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Energy

10

PART 500 TO END
Revised as of January 1, 1991

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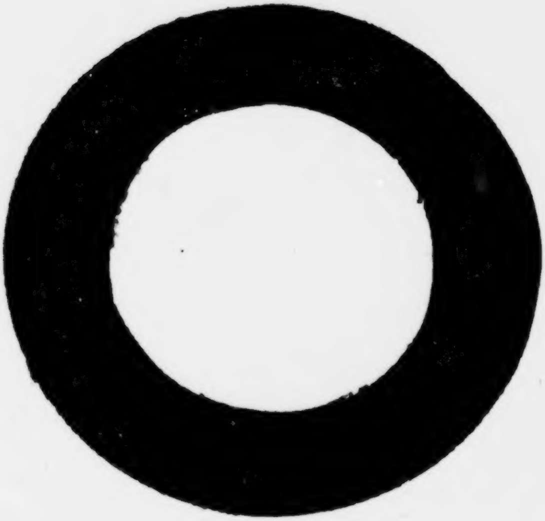

code of federal regulations

Energy

10

PART 500 TO END

Revised as of January 1, 1991

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OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JANUARY 1, 1991

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Cite this Code: **CFR**

To cite the regulations in this volume use title, part and section number. Thus, 10 CFR 500.1 *refers to Title 10, part 500, section 1.*

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16	as of January 1
Title 17 through Title 27	as of April 1
Title 28 through Title 41	as of July 1
Title 42 through Title 50	as of October 1

The appropriate revision date is printed on the cover of each volume.

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The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

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MARTHA L. GIRARD,
Director,
Office of the Federal Register.

January 1, 1991.

THIS TITLE

Title 10—Energy is composed of five volumes. The parts in these volumes are arranged in the following order: Parts 0-50, 51-199, 200-399, 400-499 and Part 500-End. The first and second volumes containing Parts 0-199 are comprised of Chapter I— Nuclear Regulatory Commission. The third, fourth, and fifth volumes containing Part 200-End are comprised of Chapters II, III and X—Department of Energy and Chapter XV—Office of the Federal Inspector for the Alaska Natural Gas Transportation System. The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 1991.

For this volume Kevin A. Green was Chief Editor. The Code of Federal Regulations publication program is under the direction of Richard L. Claypoole, assisted by Alomha S. Morris.

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SUBCHAPTER E—ALTERNATE FUELS

PART 500—DEFINITIONS

Sec.

500.1 Purpose and scope.
500.2 General definitions.
500.3 Electric regions—electric region groupings for reliability measurements under the Powerplant and Industrial Fuel Use Act of 1978.

AUTHORITY: Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. § 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (42 U.S.C. 8301 et seq.); Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (42 U.S.C. 8701 et seq.); E.O. 1209, 42 FR 46267, September 15, 1977.

SOURCE: 46 FR 59884, Dec. 7, 1981, unless otherwise noted.

OMB CONTROL NO.: 1903-0075. See 46 FR 63209, Dec. 31, 1981.

§ 500.1 Purpose and scope.

Unless otherwise expressly provided or the context clearly indicates otherwise, this section defines the terms used in these regulations. The use of the male gender is to include female; the use of singular to include plural.

§ 500.2 General definitions.

For purposes of this part and Parts 501-507 term(s):

"Act" means Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. 8301 *et seq.*

"Action" means a prohibition by rule or order, in accordance with sections 301(b) and (c) of FUA; any order granting or denying an exemption in accordance with sections 211, 212, 311 and 312 of FUA; a modification or rescission of any such order, or rule; an interpretation; a notice of violation; a remedial order; an interpretive ruling; or a rulemaking undertaken by DOE.

"Affiliate", when used in relation to person, means another person who controls, is controlled by, or is under common control, with such person.

"Aggrieved", for purposes of administrative proceedings, describes and means a person (with an interest sought to be protected under FUA) who is adversely affected by an action proposed or undertaken by DOE.

"Air pollution control agency" means any of the following:

(1) A single State agency designated as the official State air pollution control agency;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority or, in the case of any city, county, or other local unit of government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency or two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

"Alternate fuel" means electricity or any fuel, other than natural gas or petroleum. The term includes, but is not limited to :

(1) Coal;

(2) Solar energy;

(3) Petroleum coke; shale oil; uranium; biomass, tar sands, oil-impregnated diatomaceous earth; municipal, industrial, or agricultural wastes; wood; and renewable and geothermal energy sources (For purposes of this paragraph (3), the term "industrial" does not include refineries.);

(4) Liquid, solid or gaseous waste byproducts of refinery or industrial operations which are commercially unmarketable, either by reason of quality or quantity. (For purposes of this paragraph (4), the term "waste by-product" is defined as an unavoidable byproduct of the industrial or refinery operation.) A waste by-product of a refinery or industrial operation is commercially unmarketable if it meets the criteria listed in the definition of "commercial unmarketability," set forth below;

(5) Any fuel derived from an alternate fuel; and

(6) Waste gases from industrial operations. (For purposes of this subsec-

tion, the term "industrial" does not include refineries.)

"Applicable environmental requirements" includes:

(1) Any standard, limitation, or other requirement established by or pursuant to Federal or State law (including any final order of any Federal or State Court) applicable to emissions of environmental pollutants (including air and water pollutants) or disposal of solid waste residues resulting from the use of coal or other alternate fuels, natural gas, or petroleum as a primary energy source or from the operation of pollution control equipment in connection with such use, taking into account any variance of law granted or issued in accordance with Federal law or in accordance with State law to the extent consistent with Federal law; and

(2) Any other standard, limitation, or other requirement established by, or pursuant to, the Clean Air Act, the Federal Water Pollution Control Act, the Solid Waste Disposal Act, the Resource Conservation and Recovery Act of 1976, or the National Environmental Policy Act of 1969.

"Base load powerplant" means a powerplant, the electrical generation of which in kilowatt hours exceeds, for any 12-calendar-month period, such powerplant's design capacity multiplied by 3,500 hours.

"Boiler" means a closed vessel in which water is heated electrically or by the combustion of a fuel to produce steam of one percent or more quality.

"Btu" means British thermal unit.

"Capability to use alternate fuel", for the purposes of Title II prohibitions relating to construction of new powerplants, means the powerplant to be constructed:

(1) Has sufficient inherent design characteristics to permit the addition of equipment (including all necessary pollution devices) necessary to render such electric powerplant capable of using coal or another alternate fuel as its primary energy source; and

(2) Is not physically, structurally, or technologically precluded from using coal or another alternate fuel as its primary energy source.

Capability to use coal or another alternate fuel shall not be interpreted to require any such powerplant to be immediately able to use coal or another alternate fuel as its primary energy source on its initial day of operation. In addition, the owner or operator of a baseload powerplant need not have adequate on-site space for either a coal gasifier or any facilities for handling coal or related fuels.

"Certification" means a document, signed by an official of the owner or operator, notarized, and submitted to OFE, which declares that a new powerplant will have the "capability to use alternate fuel" (as defined herein).

"Certifying powerplant" means an existing powerplant whose owner or operator seeks to obtain a prohibition order against the use of natural gas or petroleum either totally or in a mixture with coal or an alternate fuel by filing a certification as to both the technical capability and financial feasibility of conversion to coal or another alternate fuel pursuant to section 301 of FUA, as amended.

"Clean Air Act" means the Clean Air Act, 42 U.S.C. 7401 *et seq.* (1970), as amended by Pub. L. 93-319, 88 Stat. 246, and Pub. L. 95-91, 91 Stat. 685.

"Coal" means anthracite, bituminous and sub-bituminous coal, lignite, and any fuel derivative thereof.

"Cogeneration facility" means an electric powerplant that produces:

(1) Electric power; and

(2) Any other form of useful energy (such as steam, gas or heat) that is, or will be used, for industrial, commercial, or space heating purposes. In addition, for purposes of this definition, electricity generated by the cogeneration facility must constitute more than five (5) percent and less than ninety (90) percent of the useful energy output of the facility.

NOTE—Any cogeneration facility selling or exchanging less than fifty percent (50%) of the facility's generated electricity is considered an industrial cogenerator and is exempt from the fuel use prohibitions of FUA.

"Combined cycle unit" means an electric power generating unit that consists of a combination of one or more combustion turbine units and one or more steam turbine units with a substantial portion of the required energy input of the steam turbine unit(s) provided by the exhaust gas from the combustion turbine unit(s).

Substantial amounts of supplemental firing for a steam turbine or waste heat boiler to improve thermal efficiency will not affect a unit's classification as a combined cycle unit.

"Combustion turbine" means a unit that is a rotary engine driven by a gas under pressure that is created by the combustion of any fuel.

"Commercial unmarketability" as used in the definitions of "alternate fuel," "natural gas" and "petroleum" shall be determined as follows:

(1) A waste by-product of industrial or refinery operations is commercially unmarketable by reason of:

(i) Quality, where the cost of processing (limited to upgrading the waste by-product to commercial quality), storing, and distributing the waste by-product would not be covered by reasonably expected revenues from its sale;

(ii) Quantity, where the cost of aggregating the waste by-product into commercial quantities through storing and distributing the waste by-product would not be covered by reasonably expected revenues from its sale.

(2) A fuel will not be classified as "natural gas" when it is commercially unmarketable by reason of:

(i) Quality, where the cost of producing, upgrading to commercial quality, storing, and distributing the fuel would not be covered by reasonably expected revenues from its sale; or

(ii) Quantity, where the quantities of the fuel are so small that the revenues to be reasonably expected from its sale would not cover the cost of its production, distribution or storage.

(3) Costs associated with upgrading, storing, distributing, and aggregating a by-product or other fuel (to determine if such fuel is natural gas) may properly include a reasonable rate of return on any capital investment required to overcome the problems posed by the quality or quantity of a fuel because the return on investment is a normal aspect of any investment decision. A firm may account for this reasonable rate of return by using its customary discount rate for an investment of similar risk.

(4) As part of any consideration of the rate of return on investment, the cost of replacing the Btu's lost if the by-product or other fuel were upgraded and sold instead of used as a fuel may be taken into consideration. The actual expense that would result from burning a replacement fuel in lieu of the by-product or other fuel in question may therefore be considered. The costs associated with using a replacement fuel are indirect costs that result from upgrading and selling the fuel, instead of burning it. These indirect costs as well as the direct costs associated with the upgrading, storing, distributing, and aggregating of by-products or other fuel may be considered in any assessment of commercial unmarketability.

"Conference" means an informal meeting incident to any proceeding, between DOE and any interested person.

"Construction" means substantial physical activity at the unit site and includes more than clearance of a site or installation of foundation pilings.

"Costs" means total costs, both operating and capital, incurred over the estimated remaining useful life of an electric powerplant, discounted to the present, pursuant to rules established in Parts 503 and 504 of these regulations.

"DEOA" means the Department of Energy Organization Act (Pub. L. 95-91) (42 U.S.C. 7101 *et seq.*) as implemented by Executive Order 12009 (42 FR 46267, September 15, 1977).

"Design capability" defined in section 103(a)(7) of FUA, shall be determined as follows:

(1) *Boiler and associated generator turbines.* The design fuel heat input rate of a steam-electric generating unit (Btu/hr) shall be the product of the generator's nameplate rating, measured in kilowatts, and 3412 (Btu/kWh), divided by the overall boiler-turbine-generator unit design efficiency (decimal); or if the generator's nameplate does not have a rating measured in kilowatts, the product of the generator's kilovolt-amperes nameplate rating, and the power factor nameplate rating; and 3412 (Btu/kWh), divided by the boiler turbine-generator unit's design efficiency

(decimal). (The number 3412 converts kilowatt-hours (absolute) into Btu's (mean).)

(2) *Combustion turbine and associated generator.* The design fuel heat input rate of a combustion turbine (Btu/hr) shall be the product of its nameplate rating, measured in kilowatts, and 3412 (Btu/kWh), divided by the combustion turbine-generator unit's design efficiency (decimal), adjusted for peaking service at an ambient temperature of 59 degrees Fahrenheit (15 degrees Celsius) at the unit's elevation. (The number 3412 converts kilowatt-hours (absolute) into Btu's (mean).)

(3) *Combined cycle unit.* The design fuel heat input rate of a combined cycle unit (Btu/hr) shall be the summation of the product of its generator's nameplate rating, measured in kilowatts, and 3412 (Btu/kWh), divided by the overall combustion turbine-generator unit's efficiency (decimal), adjusted for peaking service at an ambient temperature of 59 degrees Fahrenheit (15 degrees Celsius) and at the unit's evaluation, plus the product of the maximum fuel heat input to any supplemental heat recovery steam generator/boiler in gallons or pounds per hour and the fuel's heat content. If the generator's nameplate does not have a rating measured in kilowatts, the product of the generator's kilowatt-amperes nameplate rating and power factor nameplate rating must be substituted for kilowatts. (The number 3412 converts kilowatt-hours (absolute) into Btu's (mean).)

"Design capacity" of a powerplant pursuant to Section 103(a)(18) of FUA, is determined according to 18 CFR 287.101.

"DOE" or "the Department" means the United States Department of Energy, as defined in sections 201 and 301(a) of the DEOA, including the Secretary of Energy or his designee.

"Duly authorized representative" means a person who is authorized to appear before DOE in connection with a proceeding on behalf of a person interested in or aggrieved by that proceeding. Such appearance may include the submission of applications, petitions, requests, statements, memoranda of law, other documents, or of a personal appearance, oral communication, or any other participation in a proceeding.

"Electing powerplant" means an existing powerplant, which (1) has been issued a proposed prohibition order under former section 301 (b) or (c) of FUA prior to August 13, 1981, the date of enactment of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35 (OBRA); and (2) files an election to continue the current prohibition order proceeding under provisions of the former section 301 of FUA, rather than under amended section 301 of FUA.[1] Under the election provisions, an existing powerplant which has an order pending against it under section 2 of the Energy Supply and Environmental Coordination Act of 1974, as amended, 15 U.S.C. 791 *et seq.* (ESECA), as of August 13, 1981, may also elect to continue the current proceeding under section 2 of ESECA. Electing powerplants under ESECA are not included in the FUA definition of "electing powerplant". Relevant regulations governing ESECA proceedings are found at 10 CFR Part 303 and 305. These elections must have been filed with DOE by November 30, 1981 in the case of FUA orders and by January 14, 1982 in the case of ESECA orders.

"Electric generating unit" does not include:

(1) Any electric generating unit subject to the licensing jurisdiction of the Nuclear Regulatory Commission (NRC); and

(2) Any cogeneration facility from which less than 50 percent of the net annual electric power generation is sold or exchanged for resale. Excluded from 'sold or exchanged for resale' are sales or exchanges to or with an electric utility for resale by the utility to the cogenerating supplier, and sales or exchanges among owners of the cogeneration facility.

NOTE: For purposes of subparagraph (1) of this definition, OFE will not consider any unit located at a site subject to NRC's licensing authority to be jurisdictional for purposes of FUA.

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[1] The election provisions are published at 46 FR 48118 (October 1, 1981) and will not be codified in the Code of Federal Regulations.

"Electric powerplant" means any stationary electric generating unit consisting of (a) a boiler, (b) a gas turbine, or (c) a combined cycle unit which employs a generator to produce electric power for purposes of sale or exchange and has the design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 100 million Btu's per hour or greater. In accordance with section 103(a)(7)(C) of FUA, the Secretary has determined that it is appropriate to exclude from this definition any unit which has a design capability to consume any fuel (including any mixture thereof) that does not equal or exceed 100 million Btu's per hour.

"Electric Region" is as defined in § 500.3 of this part.

"Electric utility" means any person, including any affiliate, or Federal agency, which sells electric power.

"Emission offset" means emission reductions as defined by EPA's regulations set forth at 40 CFR Part 51, Appendix S.

"EPA" means the United States Environmental Protection Agency.

"ESECA" means the Energy Supply and Environmental Coordination Act of 1974, as amended, 15 U.S.C. 791 *et seq.*

"Existing powerplant" means any powerplant other than a new powerplant.

"Federal Water Pollution Control Act" means the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, as amended.

"FERC" means the Federal Energy Regulatory Commission.

"Firm" means a parent company and the consolidated or unconsolidated entities (if any) that it directly or indirectly controls.

"Fluidized bed combustion" means combustion of fuel in connection with a bed of inert material, such as limestone or dolomite, that is held in a fluid-like state by the means of air or other gases being passed through such materials.

"FTC" means the Federal Trade Commission.

"FUA" means the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. 8301 *et seq.*

"Fuel Use Act" means "FUA".

"Fuel use order" means a directive issued by OFE pursuant to § 501.167 of these regulations.

"Gas turbine" means "combustion turbine".

"High-priority user," for purposes of Subsection 312(j) of FUA, means any residential user of natural gas, or any commercial user whose consumption of natural gas on peak day is less than 50 MCF.

"Internal combustion engine" means a heat engine in which the combustion that generates the heat takes place inside the engine proper.

"Interpretation" means a written statement issued by the DOE General Counsel or his delegate, in response to a written request, that applies the regulations, rulings, and other precedents previously issued by the DOE to the particular facts of a prospective or completed act or transaction.

"Mcf" means 1,000 cubic feet of natural gas.

"Mixture," when used in relation to fuels used in a unit, means a mixture of petroleum or natural gas and an alternate fuel, or a combination of such fuels, used simultaneously or alternately in such unit.

"Natural gas" means any fuel consisting in whole or in part of natural gas, including components of natural gas such as methane and ethane; liquid petroleum gas; synthetic gas derived from petroleum or natural gas liquids; or any mixture of natural gas and synthetic gas. Natural gas does not include:

(1) Gaseous waste by-products or waste gas specifically designated as an alternate fuel in § 500.2 of these regulations;

(2) Natural gas which is commercially unmarketable, as defined in these rules;

(3) Natural gas produced by the user from a well, the maximum efficient production rate of which is less than 250 million Btu's per day. For purposes of paragraph (3) of this definition:

(i) "Produced by the user" means:

(A) All gas produced by the well, when such gas is delivered for use in the user's facility through a gas delivery, gathering, or transportation system which could not deliver such gas to any other user; or

(B) Only that amount which represents the user's net working (mineral) interest in the gas produced from such well, where such gas is delivered for use in the user's facility through a gas delivery, gathering, or transportation system which could deliver such gas to any other user.

(ii) "Maximum efficient production rate" (MEPR) means that rate at which production of natural gas may be sustained without damage to the reservoir or the rate which may be sustained without damage to the ultimate recovery of oil or gas through the well.

(4) Occluded methane in coal seams within the meaning of Section 107(c)(3) of the Natural Gas Policy Act of 1978 (NGPA);

(5) The following gas from wells spudded prior to January 1, 1990:

(i) Gas produced from geopressurized brine, within the meaning of Section 107(c)(2) of the NGPA;

(ii) Gas produced from Devonian shale, within the meaning of Section 107(c)(4) of the NGPA;

(iii) Gas produced from tight sands, as designated by the FERC in accordance with Section 107(c)(5) of the NGPA; and

(iv) Other gases designated by FERC as "high-cost natural gas" in accordance with Section 107(c)(5) of the NGPA, except as specifically designated as "natural gas" by OFE;

(6)(i) Synthetic gas derived from coal or other alternate fuel, the heat content of which is less than 600 Btu's per cubic foot at 14.73 pounds per square inch (absolute) and 60° F; and

(ii) Commingled natural gas and synthetic gas derived from coal consumed as part of the necessary process of a major fuel burning installation used in the iron and steel industry, so long as the average annual Btu heat content of the commingled stream as consumed within a major fuel burning installation does not exceed 600 Btu's per cubic foot at 14.73 pounds per square inch (absolute) and 60° F;

(7) Mixtures of natural gas and synthetic gas derived from alternate fuels for which the person proposing to use the gas certifies to OFE that:

(i) He owns, or is entitled to receive at the point of manufacture, synthetic gas derived from alternate fuels;

(ii) He delivers, or arranges for the delivery of such synthetic gas to a pipeline which by transport or displacement is capable of delivering such synthetic gas, mixed with natural gas, to facilities owned by the user;

(iii) The total annual Btu content of the synthetic gas delivered to a pipeline is equal to or greater than the total annual Btu content of the natural gas delivered to the facilities owned by the user, plus the approximate total annual Btu content of any natural gas consumed or lost in transportation; and

(iv) All necessary permits, licenses, or approvals from appropriate Federal, State, and local agencies (including Indian tribes) have been obtained for construction and operation of the facilities for the manufacture of the synthetic gas involved, except that for purposes of the prohibition under Section 201(2) of FUA against powerplants being constructed without the capability of using coal or another alternate fuel, only permits, licenses, and approvals for the construction of such synthetic gas facilities shall be required under this subparagraph, to be certified and documented; and

(8) A mixture of natural gas and an alternate fuel when such mixture is deliberately created for purposes of (i) Complying with a prohibition order issued pursuant to Section 301(c) of the Act, or (ii) Qualifying for a fuel mixtures exemption under the Act, provided such exemption is granted.

"NEPA" means the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 *et seq.*

"New electric powerplant" means any electric powerplant: (1) That was not classified as existing under Part 515 of this subchapter; (2) That was reconstructed, as defined in these rules under the definition of "reconstruction"; or (3) For which construction was begun after November 9, 1978.

"NGPA" means the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*

"Nonboiler" means any powerplant which is not a boiler and consists of either a combustion turbine unit or combined cycle unit.

"Notice of violation" means a written statement issued to a person by DOE that states one or more alleged violations of the provisions of these regulations, any order issued pursuant thereto, or the Act.

"OBRA" means the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35.

"OFE" means the Office of Fossil Energy of OFE.

"Offset" means "emission offset".

"Order" means a final disposition, other than the issuance of a rule, issued by DOE pursuant to these regulations or the Act.

"Person" means any:

(1) Individual, corporation, company, partnership, association, firm, institution, society, trust, joint venture, or joint stock company;

(2) Any State; or

(3) Any Federal, State, or local agency or instrumentality (including any municipality) thereof.

"Petroleum" means crude oil and products derived from crude oil, other than:

(1) Petroleum products specifically designated as alternate fuels pursuant to these regulations;

(2) Synthetic gas derived from crude oil;

(3) Liquid petroleum gas;

(4) Petroleum coke or waste gases from industrial operations; and

(5) A liquid, solid, or gaseous waste by-product of refinery operations which is commercially unmarketable under the definition of "commercial unmarketability" in these rules.

Note: For the purposes of this subparagraph, waste by-proucts do not include components (such as butane and propane) that can be extracted from the waste by-product by reasonable further processing of the waste by-product at the refinery, nor do they include final products that use the waste by-product as a blend stock at the refinery.

"Petition" means a formal request for any action including an exemption submitted to DOE under these regulations.

"Powerplant" means "electric powerplant."

"Product or process requirements" means that product or process for which the use of an alternate fuel is not technically feasible due to the necessity to maintain satisfactory control of product quality and for which the substitution of steam is not technically feasible due to process requirements.

"Primary energy source" means the fuel or fuels used by any existing or new electric powerplant except:

(1) Minimum amounts of fuel required for unit ignition, startup, testing, flame stabilization, and control uses. OFE has determined that, unless need for a greater amount is demonstrated, twenty-five (25) percent of the total annual Btu heat input of a unit shall be automatically excluded under this paragraph.

(2) Minimum amounts of fuel required to alleviate or prevent:

(i) Unanticipated equipment outages as defined in § 501.191 of these regulations; and

(ii) Emergencies directly affecting the public health, safety, or welfare that would result from electric power outages as defined in § 501.191 of these regulations.

Note: (1) Any fuel excluded under the provisions of paragraph (1) of this definition is in addition to any fuel authorized to be used in any order granting a fuel mixtures exemption under Parts 503 and 504 of these rules. The exclusion of fuel under paragraph (1), together with the authority for such additive treatment, shall apply to any jurisdictional facility, regardless of whether or not it had received an order granting an exemption as of the date these rules are promulgated.

(2) If an auxiliary unit to an electric powerplant consumes fuel only for the auxiliary functions of unit ignition, startup, testing, flame stabilization, and other control uses, its use of minimum amounts of natural gas or petroleum is not prohibited by FUA. The measurement of such minimum amounts of fuel is discussed in *Associated Electric Cooperative*, et al., Interpretation 1980-42 [45 FR 82572, Dec. 15, 1980].

"Prohibition order" means:

(1) An order issued pursuant to Section 301(b) of the Act that prohibits a powerplant from burning natural gas or petroleum as its primary energy source; or

(2) An order issued pursuant to section 301(c) of the Act that prohibits excessive use of natural gas or petroleum in mixtures burned by a powerplant as its primary energy source.

"Rated capacity" for the purpose of determining reduction in the rated capacity of an existing powerplant, means design capacity, or, at the election of the facility owner or operator, the actual maximum sustained energy output per unit of time that could be produced, measured in power output, expressed in kilowatts, per unit of time.

"Reconstruction" means the following:

(1) Except as provided in paragraph (2) of this definition, reconstruction shall be found to have taken place whenever the capital expenditures for refurbishment or modification of an electric powerplant on a cumulative basis for the current calendar year and preceding calendar year, are equal to or greater than fifty (50) percent of the capital costs of an equivalent replacement unit of the same capacity, capable of burning the same fuels.

(2) Notwithstanding paragraph (1) of this definition, reconstruction shall not be found to have taken place whenever:

(i) The capital expenditures for refurbishment or modification of an electric powerplant, on a cumulative basis for the current calendar year and preceding calendar year, are not greater than eighty (80) percent of the capital costs of an equivalent replacement unit of the same capacity, capable of burning the same fuels and the unit, as refurbished or modified, will not have a greater fuel consumption capability than the unit it replaces;

(ii) The unit being refurbished or modified was destroyed, in whole or substantial part, in a plant accident and the unit, as refurbished or modified, will not have a greater fuel consumption capability than the unit it replaces; or

(iii) Refurbishment or modification of the unit is undertaken primarily for the purpose of increasing fuel burning efficiency of the unit, and will not result in:

(A) Increased remaining useful plant life, or

(B) Increased total annual fuel consumption.

"Resource Conservation and Recovery Act of 1976" means the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*

"SIP" means State Implementation Plan pursuant to Section 10 of the Clean Air Act.

"Site limitation" means a specific physical limitation associated with a particular site that relates to the use of an alternate fuel as a primary energy source for the powerplant such as:

(1) Inaccessibility to alternate fuels;

(2) Lack of transportation facilities for alternate fuels;

(3) Lack of adequate land for facilities for the handling, use and storage of alternate fuels;

(4) Lack of adequate land or facilities for the control or disposal of wastes from such powerplant, including lack of land for pollution control equipment or devices necessary to assure compliance with applicable environmental requirements; and

(5) Lack of an adequate and reliable supply of water, including water for use in compliance with applicable environmental requirements.

"Solid Waste Disposal Act" means the Solid Waste Disposal Act, 42 U.S.C. 6901 *et seq.*, as amended.

"State regulatory authority" means any State agency that acts as ratemaking or power supply authority with respect to the sale of electricity by any State regulated electric utility.

"Synthetic fuel" means any fuel derived from an alternate fuel and does not include any fuels derived from petroleum or natural gas.

"Wetlands areas" means, for purposes of Section 103(a)(12) of the Act, those geographical areas designated as wetlands areas by State or local environmental regulatory authorities, or in the absence of any such geographic designation, those areas that are inundated by surface or ground water with frequency sufficient to support, and under normal circumstances does or would support, a prevalence of vegetation or aquatic life that requires saturated, seasonably saturated, or tidally saturated soil conditions for growth or reproduction.

(Department of Energy Organization Act, Pub. L. 95-91, 42 U.S.C. 7101 et seq.; Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, as amended by Pub. L. 94-163, Pub. L. 95-70, and Pub. L. 95-620, (15 U.S.C. 719 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, as amended by Pub. L. 97-35 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35)

[46 FR 59884, Dec. 7, 1981, as amended at 47 FR 15313, 15314, Apr. 9, 1982; 47 FR 17041, Apr. 21, 1982; 47 FR 29210, July 6, 1982; 47 FR 34972, Aug. 12, 1982; 54 FR 52889, Dec. 22, 1989]

§ 500.3 Electric regions—electric region groupings for reliability measurements under the Powerplant and Industrial Fuel Use Act of 1978.

(a) The following is a list of electric regions for use with regard to the Act. The regions are identified by FERC Power Supply Areas (PSA's) as authorized by section 202(a) of the Federal Power Act except where noted. They will be reviewed annually by ERA. Each grouping meets one or more of the following criteria:

(1) Existing centrally dispatched pools and hourly power brokers;

(2) Systems with joint planning and construction agreements;

(3) Systems with coordination agreements in the areas of:

(i) Generation reserve and system reliability criteria;

(ii) Capacity and energy exchange policies;

(iii) Maintenance scheduling; and

(iv) Emergency procedures for dealing with capacity or fuel shortages; or

(4) Systems within the same National Electric Reliability Council (NERC) region with historical coordination policies.

(b) The PSA's referred to in the definition of electric regions in paragraph (a) of this section were first defined by the Federal Power Commission in 1936. The most recent reference to them is given in the *1970 National Power Survey*, Vol. 1, Pg. 1-3-16. In cases where a petitioner finds an ambiguity in a regional assignment, he shall consult with DOE for an official determination.

Electric Region Groupings and FERC PSA's:

1. Allegheny Power System (APS)—7, except Duquesne Light Company.
2. American Electric Power System (AEP)—entire AEP System.
3. New England Planning Pool (NEPOOL)—1, 2.
4. New York Planning Pool (NYPP)—3, 4.
5. Pennsylvania—New Jersey—Maryland interconnection (PJM)—5, 6.
6. Commonwealth Edison Company—14.
7. Florida Coordination Group (FCG)—24.
8. Middle South Utilities—25.
9. Southern Company—22, 23.
10. Gulf States Group—35.
11. Tennessee Valley Authority (TVA)—20.
12. Virginia—Carolina Group (VACAR)—18, 21.
13. Central Area Power Coordination Group (CAPCO)—Cleveland Electric Illuminating Company, Toledo Edison Company, Ohio Edison Company, Duquesne Light Company.
14. Cincinnati, Columbus, Dayton Group (CCD)—Cincinnati Gas and Electric Company, Columbus and Southern Ohio Electric Company, Dayton Power and Light Company.
15. Kentucky Group—19.
16. Indiana Group—Indiana Utilities except AEP.
17. Illinois—Missouri Group (ILLMO)—15, 40.
18. Michigan Electric Coordinated Systems (MECS)—11.
19. Wisconsin—Upper Michigan Group (WUMS)—13.
20. Mid-Continent Area Power Pool (MAAP)—16, 17, 26, 27, 28.
21. Missouri—Kansas Group (MOKAN)—24, 29.
22. Oklahoma Group—33, 36.
23. Texas Interconnected Systems (TIS)—37, 38.
24. Rocky Mountain Power Pool (RMPP)—31, 32.
25. Northwest Power Pool (NWPP)—30, 42, 43, 44, 45.
26. Arizona—New Mexico Group—39, 48 within Arizona, in Nevada and California.
27. Southern California—Nevada—47, 48.
28. Northern California—Nevada—46.
29. Alaska (non-interconnected systems to be considered separately)—49.
30. Idaho—Utah Group—41.

PART 501—ADMINISTRATIVE PROCEDURES AND SANCTIONS

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501.192 [Reserved]

AUTHORITY: Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. § 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (42 U.S.C. 8301 et seq.); Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (42 U.S.C. 8701 et seq.); E.O. 1209, 42 FR 46267, September 15, 1977.

SOURCE: 46 FR 59889, Dec. 7, 1981, unless otherwise noted.

OMB CONTROL NO.: 1903-0075. See 46 FR 63209, Dec. 31, 1981.

EDITORIAL NOTE: Nomenclature changes to this part appear at 54 FR 52891, Dec. 22, 1989.

Subpart A—General Provisions

§ 501.1 Purpose and scope.

Part 501 establishes the procedures to be used in proceedings before DOE under Parts 500–508 of this chapter except as otherwise provided.

§ 501.2 Prepetition conference.

(a) Owners and operators of powerplants may request a prepetition conference with OFE for the purpose of discussing the applicability of 10 CFR Parts 503 and 504 to their situations and the scope of any exemption or other petition that OFE would accept as adequate for filing purposes.

(b) The owner or operator who requests a prepetition conference may personally represent himself or may designate a representative to appear on his behalf. A prepetition conference or a request for a prepetition conference does not commence a proceeding before OFE.

(c) If OFE agrees to waive any filing requirements under § 501.3(d), a memorandum of record stating this fact will be furnished to the potential petitioner within thirty (30) days after the conference. Copies of all applicable memoranda of record must be attached to any subsequently-filed petition.

(d) A record of all prepetition conferences will be included in the public file. OFE may provide for the taking of a formal transcript of the conference and the transcript will be included in the public file.

[46 FR 59889, Dec. 7, 1981, as amended at 54 FR 52891, Dec. 22, 1989]

§ 501.3 Petitions.

(a) *Filing of petitions.* Petitions for exemptions are to be filed with OFE at the address given in § 501.11.

(b) *Acceptance of petition.* (1) Upon acceptance (as distinguished from filing) of the petition, OFE shall publish in the FEDERAL REGISTER a Notice of Acceptance of Petition or, in the case of an exemption by certification, a Notice of Acceptance and Availability of Certification, signifying that an exemption proceeding has commenced.

(2) OFE will notify each petitioner in writing within thirty (30) days of receipt of the petition that it has been accepted or rejected and, if rejected, the reasons therefor.

(3) A petition, including supporting documents, will be accepted if the information contained appears to be sufficient to support an OFE determination. Additional information may be requested during the course of the proceeding, and failure to respond to such a request may ultimately result in denial of the requested exemption.

(4) Acceptance of petition does not constitute a determination that the requested exemption will be granted.

(c) *Rejection of petition.* (1) OFE will reject a petition if it does not meet the information of certification requirements established for the relevant exemptions under Parts 503 and 504 of this chapter. A written explanation of the reasons for rejection will be furnished with notification of the rejection.

(2) A timely-filed petition rejected as inadequate will not be rendered untimely if resubmitted in amended form within ninety (90) days of the date of rejection.

(3) OFE will, within thirty (30) days of receipt of a petition that is found to be incomplete due to minor deficiencies, notify the petitioner of the deficiencies and allow ninety (90) days from the date of notification to cure the specified deficiencies. The failure to cure the deficiencies during this

time may result in denial of the requested exemption.

(d) *Waiver of filing requirements.* Upon its own motion or at the request of a petitioner, OFE may waive some or all of the regulatory requirements if the purposes of FUA would be best achieved by doing so.

§§ 501.4—501.5 [Reserved]

§ 501.6 Service.

(a) DOE will serve all orders, notices interpretations or other documents that it is required to serve, personally or by mail, unless otherwise provided in these regulations.

(b) DOE will consider service upon a petitioner's duly authorized representative to be service upon the petitioner.

(c) Service by mail is effective upon mailing.

[54 FR 52891, Dec. 22, 1989]

§ 501.7 General filing requirements.

Except as indicated otherwise, all documents required or permitted to be filed with OFE or DOE in connection with a proceeding under Parts 503 and 504 shall be filed in accordance with the following provisions:

(a) *Filing of documents.* (1) Documents including, but not limited to, applications, requests, complaints, petitions (including petitions for exemption), and other documents submitted in connection therewith, filed with OFE are considered to be filed upon receipt.

(2) Notwithstanding the provisions of paragraph (a)(1) of this section, an application for modification or rescission in accordance with Subpart G of this part, a reply to a notice of violation, a response to a denial of a claim of confidentiality, or a comment submitted in connection with any proceeding transmitted by registered or certified mail and addressed to the appropriate office is considered to be filed upon mailing.

(3) *Timeliness.* Documents are to be filed with the appropriate DOE or OFE office listed in § 501.11. Documents that are to be considered filed upon receipt under paragraph (a)(1) of this section and that are received after regular business hours are deemed filed on the next regular business day. Regular business hours are 8 a.m. to 4:30 p.m.

(4) *Computation of time.* In computing any period of time prescribed or allowed by FUA, these regulations or by an order, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or Federal legal holiday in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a Federal legal holiday.

(5) *Additional time after service by mail.* Whenever a person is required to perform an act, to cease and desist therefrom, or to initiate a proceeding under this Part within a prescribed period of time and the order, notice, interpretation or other document is served by mail, three (3) days shall be added to the prescribed period.

(6) *Extension of time.* When a document is required to be filed within a prescribed time, an extension of time to file may be granted upon good cause shown.

(7) *Signing.* All applications, petitions, requests, comments, and other documents that are required to be signed, shall be signed by the person filing the document or a duly authorized representative. Any application, petition, request, complaint, or other document filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative, unless an OFE form otherwise requires. (A false certification is unlawful under the provisions of 18 U.S.C. 1001 (1970).)

(8) *Labeling.* An application, petition, or other request for action by DOE or OFE should be clearly labeled according to the nature of the action involved, e.g., "Petition for Temporary Exemption;" "Petition for Extension (or Renewal) of Temporary Exemption," both on the document and on the outside of the envelope in which the document is transmitted.

(9) *Obligation to supply information.* A person who files an application, petition, complaint, or other request for action is under a continuing obligation during the proceeding to

provide DOE or OFE with any new or newly discovered information that is relevant to that proceeding. Such information includes, but is not limited to, information regarding any other application, petition, complaint, or request for action that is subsequently filed by that person with any DOE office or OFE office.

(10) *The same or related matters.* In filing a petition or other document requesting OFE action, the person must state whether, to the best of his knowledge, the same or a related issue, act or transaction has been or presently is being considered or investigated by a DOE office, other Federal agency, department or instrumentality, or a State or municipal agency.

(11) *Request for confidential treatment.* (i) If any person filing a document with DOE or OFE claims that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552); is information referred to in 18 U.S.C. 1905; or is otherwise exempt by law from public disclosure, and if such person requests DOE or OFE not to disclose such information, such person shall make a filing in accordance with paragraph (b)(2) of this section. The person shall indicate in the original document that it is confidential or contains confidential information and may file a statement specifying the justification for non-disclosure of the information for which confidential treatment is claimed. If the person states that the information comes within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, such person shall include a statement specifying why such information is privileged or confidential. If a document is not so filed, OFE may assume that there is no objection to public disclosure of the document in its entirety, unless the person subsequently files a claim of confidentiality prior to public disclosure of the document.

(ii) DOE or OFE retains the right to make its own determination with regard to any claim of confidentiality. Notice of the decision by DOE or OFE to deny such claim, in whole or in part, and an opportunity to respond or take other appropriate action to avoid release shall be given to a person claiming confidentiality of information no less than seven (7) days prior to its public disclosure.

(iii) The above provisions in paragraphs (a)(11) (i) and (ii) of this section do not apply to information submitted on OFE forms that contain their own instructions concerning the treatment of confidential information.

(12) *Separate applications, petitions or requests.* Each application, petition, or request for DOE or OFE action shall be submitted as a separate document, even if the applications, petitions, or requests deal with the same or a related issue, act, or transaction, or are submitted in connection with the same proceeding.

(b) *Number of documents to be filed.* (1) A petitioner must file an executed original and fourteen (14) copies of all exemption requests submitted to DOE. For certification requests, an original and three (3) copies shall be submitted.

(2) Where the petitioner requests confidential treatment of some or all of the information submitted, an original and eleven (11) copies of the confidential document and three (3) copies of the document with confidential material deleted must be filed.

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 15314, Apr. 9, 1982; 54 FR 52891, Dec. 22, 1989]

§ 501.8 [Reserved]

§ 501.9 Effective date of orders or rules.

(a) When OFE issues a rule or order imposing a prohibition or granting an exemption (or permit) under FUA, the rule or order will be effective sixty (60) days after publication in the FEDERAL REGISTER, unless it is stayed, modified, suspended or rescinded.

(b) If the appropriate State regulatory authority has not approved a powerplant for which a petition has been filed, such exemption, to the extent it applies to the prohibition under section 201 of FUA against construction without the capability of using coal or another alternate fuel, shall not take effect until all approvals required by such State regulatory authority which relate to construction have been obtained.

[54 FR 52891, Dec. 22, 1989]

§ 501.10 Order of precedence.

If there is any conflict or inconsistency between the provisions of this Part and any other provisions or parts of this chapter, except for general procedures which are unique to Part 515 of this chapter, the provisions of this part will control respect to procedure.

[54 FR 52891, Dec. 22, 1989]

§ 501.11 Address for filing documents.

Send all petitions, self-certifications and written communications to the following address: Office of Fossil Energy, Office of Fuels Programs, Coal and Electricity Division, Mail Code FE-52, 1000 Independence Avenue, SW., Washington, DC 20585.

[54 FR 52891, Dec. 22, 1989]

§ 501.12 Public files.

DOE will make available at the Freedom of Information reading room, Room 1E190, 1000 Independence Avenue SW., Washington, DC for public inspection and copying any information required by statute and any information that OFE determines should be made available to the public.

[54 FR 52891, Dec. 22, 1989]

§ 501.13 Appeal.

There is no administrative appeal of any final administrative action to which this part applies.

§ 501.14 Notice to Environmental Protection Agency.

A copy of any proposed rule or order that imposes a prohibition, order that imposes a prohibition, or a petition for an exemption or permit, shall be transmitted for comments, if any, to the Administrator and the appropriate Regional Administrator of the Environmental Protection Agency (EPA). The Administrator of EPA shall be given the same opportunity to comment and question as is given other interested persons.

[54 FR 52891, Dec. 22, 1989]

Subpart B—[Reserved]

Subpart C—Written Comments, Public Hearings and Conferences During Administrative Proceedings

§ 501.30 Purpose and scope.

This subpart establishes the procedures for requests for and the conduct of public hearings; for submission of written comments; and for requests for and conduct of conferences pursuant to an administrative proceeding before OFE. Hearings shall be convened at the request of any interested person, in accordance with Section 701(d) of FUA, and shall be held at a time and place to be decided by the Presiding Officer.

§ 501.31 Written comments.

(a) *New facilities.* Except as may be provided elsewhere in these regulations, OFE shall provide a period of at least forty-five (45) days, commencing with publication of the Notice of Acceptance of Petition, of in the case of certification exemptions, Notice of Acceptance and availability of Certification, in the FEDERAL REGISTER in accordance with § 501.63(a), for submission of written comments concerning a petition for an exemption. Written comments shall be made in accordance with § 501.7.

(b) *Existing facilities.* Except as may be provided elsewhere in these regulations, OFE shall provide a period of at least 45 days for submission of written comments concerning a proposed prohibition rule or order or a petition for a permit. In the case of a proposed prohibition rule or order issued to an existing electing powerplant, OFE shall also provide for a period of at least 45 days for submission of written comments concerning a Tentative Staff Analysis. This period shall commence on the day after publication of the Notice of Availability of the Tentative Staff Analysis in the FEDERAL REGISTER. In the case of prohibition order proceedings for certifying powerplants under Section 301 of FUA, as amended, OFE shall provide a period of at least 45 days, beginning the day after the Notice of Acceptance of certification is published, for submission of written comments concerning the certification and OFE's proposed prohibition order, and requests for public hearings. Prohibition order proceedings under section 301, as amended by OBRA, will have only one period of 45 days, since no Tentative Staff Analysis will be prepared. The comment period may be extended by OFE in accordance with § 501.7. See § 501.52(b) of this part for further information with respect to the comment period. Written comments shall be filed in accordance with § 501.7.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97-35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 50848, Nov. 10, 1982; 54 FR 52892, Dec. 22, 1989]

§ 501.32 Conferences (other than prepetition conferences).

(a) At any time following commencement of a proceeding before OFE, an interested person may request a conference with the staff of OFE to discuss a petition, permit or any other issue pending before OFE. The request for a conference should generally be in writing and should indicate the subjects to be covered and should describe the requester's interest in the proceeding. Conferences held after the commencement of an administrative proceeding before OFE shall be convened at the discretion of OFE or the Presiding Officer.

(b) When OFE convenes a conference in accordance with this section, any person invited may present views as to the issue or issues involved. Documentary evidence may be submitted at the conference and such evidence, to the extent that it is not deemed to be confidential, will be included in the administrative record. OFE will not normally have a transcript of the conference prepared but may do so at its discretion.

(c) Because a conference is solely for the exchange of views incident to a proceeding, there will be no formal report or findings by OFE unless OFE in its discretion determines that the preparation of a report or findings would be advisable. OFE will, however, place in the public file a record of any conference.

§ 501.33 Request for a public hearing.

(a) *New facilities.* In the case of a petition for an exemption under Title II of FUA, any interested person may submit a written request that OFE convene a public hearing in accordance with section 701 of FUA no later than forty-five (45) days after publication of either the Notice of Acceptance of a petition, or in the case of a certification exemption, the publication of the Notice of Acceptance of Certification. This time period may be extended at the discretion of OFE.

(b) *Existing powerplants.* In the case of a petition for an exemption from a prohibition imposed by a final rule or order issued by OFE to an electing powerplant under former sections of Title III of FUA or a petition for a permit under § 504.1, any interested person may submit a written request that OFE convene a public hearing in accordance with section 701 of FUA within 45 days after the notice of the filing of a petition is published in the FEDERAL REGISTER. In the case of a proposed prohibition rule or order issued to an electing powerplant under former section 301, the 45 day period in which to request a public hearing shall commence upon the publication of the Notice of Availability of the Tentative Staff Analysis. In the case of a proposed prohibition order to be issued to certifying powerplants under section 301 of FUA, as amended, the 45 day period in which to request a public hearing commences upon publication of the Notice of Acceptance of Certification. This time limit may be extended at the discretion of OFE in accordance with § 501.7.

(c) *Contents of request.* A request for a public hearing must be in writing and must include a description of the requesting party's interest in the proceeding and a statement of the issues involved. The request should, to the extent possible, identify any witnesses that are to be called, summarize the anticipated testimony to be given at the hearing, and outline questions that are to be posed.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3269 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97-35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 50848, Nov. 10, 1982; 54 FR 52892, Dec. 22, 1989]

§ 501.34 Public hearing.

(a) A public hearing under this subsection is for the purpose of insuring that all issues are fully and properly developed, but is not a formal adjudicatory hearing subject to the provisions of 5 U.S.C. 554 and 556.

(b) *Opportunity to be heard at a public hearing.* (1) Any interested person, may request, and OFE will provide, an opportunity to present oral or written data, views and arguments at a public hearing on any proposed prohibition rule or order, or on any petition for an exemption or permit. An interested person may file a request to be listed as a party to a hearing on the service list prepared by the Presiding Officer pursuant to § 501.34(d) of this part.

(2) Participants at the public hearing will have an opportunity to present oral or written data, views and arguments.

(3) A request for a public hearing may be withdrawn by the requestor at any time. If other persons have requested to participate as parties in the public hearing, OFE may cancel the hearing only if all parties agree to cancellation. OFE will give notice, whenever possible, in the FEDERAL REGISTER of the cancellation of any hearings for which there has been prior notice.

(c) *Presiding Officer.* OFE will appoint a Presiding Officer to conduct the public hearing.

(d) *Powers of the Presiding Officer.* The Presiding Officer is responsible for orderly conduct of the hearing and for certification of the record of the public hearing. The Presiding Officer will not prepare any recommended findings, conclusions, or any other recommendations for disposition of a particular case, except those of a procedural nature. The Presiding Officer has, but is not limited to the following powers:

(1) Administer oaths, affirmations and protective orders;

(2) Issue administrative subpoenas and rule on motions to modify or withdraw subpoenas that he has issued;

(3) Rule on questions as to relevance and materiality of evidence;

(4) Regulate the course of the public hearing;

(5) Hold conferences for the simplification of issues by consent of the parties;

(6) Require submission of evidence in writing where appropriate;

(7) Establish service lists;

(8) Dispose of procedural requests and similar matters; and

(9) Take other actions authorized by these rules.

The Presiding Officer may also limit the number of witnesses to be presented by any party and may impose reasonable time limits for testimony. The Presiding Officer shall establish and maintain a service list that contains the names and addresses of all parties to the OFE proceeding. At the time the Presiding Officer certifies the record, he will provide the staff of OFE with an index of the issues addressed in the record.

(e) *Notice.* OFE will convene a public hearing only after publishing a notice in the FEDERAL REGISTER that states the time, place and nature of the public hearing.

(f) *Opportunity to question at the public hearing.* At any public hearing requested pursuant to paragraph (b) of this section, with respect to disputed issues of material fact, OFE will provide any interested person an opportunity to question:

(1) Other interested persons who make oral presentations;

(2) Employees and contractors of the United States who have made written or oral presentations or who have participated in the development of the proposed rule or order or in the consideration of the petition for an exemption or permit; and

(3) Experts and consultants who have provided information to any person who makes an oral presentation and which is contained in or referred to in such presentation.

(g) OFE encourages persons who wish to question Government witnesses to submit their questions at least ten (10) days in advance of the hearing.

(h) The Presiding Officer will allow questions by any interested person to be asked of those making presentations or submitting information, data, analyses or views at the hearing. The Presiding Officer may restrict questioning if he determines that such questioning is duplicative or is not likely to result in a timely and effective resolution of issues pending in the administrative proceeding for which the hearing is being conducted.

(i) The Presiding Officer or OFE may exercise discretion to control a hearing by denying, temporarily or permanently, the privilege of participating in a particular OFE hearing if OFE finds, for example, that a person:

(1) Has knowingly made false or misleading statements, either orally or in writing;

(2) Has knowingly filed false affidavits or other writings;

(3) Lacks the specific authority to represent the person seeking an OFE action; or

(4) Has disrupted or is disrupting a hearing.

(j) *Evidence.* (1) The Presiding Officer is responsible for orderly submission of information, data, materials, views or other evidence into the record of the public hearing. The Presiding Officer may exclude any evidence that is irrelevant, immaterial or unduly repetitious. Judicial rules of evidence do not apply.

(2) Documentary material must be of a size consistent with ease of handling, transportation and filing, and a reasonable number of copies should be made available at the public hearing for the use of interested persons. An original and fourteen (14) copies shall be furnished to the Presiding Officer and one copy to each party listed on the service list. Large exhibits that are used during the hearing must be provided on no larger than 11½"x14" legal size paper if they are to be submitted into the hearing record.

(k) *Hearing record.* OFE will have a verbatim transcript made of the public hearing. The hearing record shall remain open for a period of fourteen (14) days following the public hearing, unless extended by OFE, during which time the participants at the hearing may submit additional written statements which will be made part of the administrative record and will be served by the Presiding Officer upon those parties listed on the service list. OFE may also request additional information, data or analysis following the hearing in order to resolve disputed issues in the record. If OFE receives or obtains any relevant information or evidence that is placed in the record after the close of the public hearing or comment period, it will so notify all participants, and allow an additional fourteen (14) days for submission of evidence in rebuttal. In addition, OFE may, in its discretion, re-open the hearing at the request of a party or participant, to permit further rebuttal of evidence or statements submitted to OFE and made part of the hearing record after the close of the hearing. The transcript, together with any written comments submitted in the course of the proceeding, will be made part of the record available for public inspection and copying at the OFE Public Information Office, as provided in § 501.12.

§ 501.35 Public file.

(a) *Contents.* The public file shall consist of the rule, order, or petition, with supporting data and supplemental information, and all data and information submitted by interested persons. Materials which are claimed by any party to be exempt from public disclosure under the Freedom of Information Act (5 U.S.C. 552) shall be excised from the public file provided OFE has made a determination that the material is confidential in accordance with § 501.7(a)(11) of this part.

(b) *Availability.* The public file shall be available for inspection at Room 1E190, 1000 Independence Avenue SW., Washington, DC. Photocopies may be made available, on request.

The charge for such copies shall be made in accordance with a written schedule.

[46 FR 59889, Dec. 7, 1981, as amended at 54 FR 52892, Dec. 22, 1989]

Subpart D—Subpoenas, Special Report Orders, Oaths and Witnesses

§ 501.40 Issuance.

(a) *Authority.* As authorized by section 711 of FUA and section 645 of the DEOA, the Administrator, his duly authorized agent or a Presiding Officer may, in accordance with 10 CFR 205.8, sign, issue, and serve subpoenas; issue special report orders (SRO); administer oaths and affirmations; take sworn testimony, compel attendace of and sequester witnesses; control the dissemination of any record of testimony taken pursuant to this section; and subpoena and reproduce books, papers, correspondence, memoranda, contracts, agreements, or other relevant records of tangible evidence including, but not limited to, information retained in computerized or other automated systems in the possession of the subpoenaed person.

(b) *Petition to withdraw or modify.* Prior to the time specified for compliance in the subpoena or SRO, the person to whom the subpoena or SRO is directed may apply for its withdrawal or modification as provided in 10 CFR 205.8, except that if the subpoena or SRO is issued by a duly appointed Presiding Officer, the request to withdraw or modify must be addressed to that Presiding Officer, and its grant or denial will be decided by him.

Subpart E—Prohibition Rules and Orders

§ 501.50 Policy.

Except in conjunction with a prohibition order requested by the intended recipient, OFE shall not propose to prohibit or prohibit by rule or order the use of petroleum or natural gas either as a primary energy source or in amounts in excess of the minimum amount necessary to maintain reliability of operation consistent with reasonable fuel efficiency in an existing installation unless and until OFE adopts rules establishing regulatory requirements governing the issuance of such orders and rules in accordance with the applicable procedural and substantive requirements of law.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3269 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97-35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[47 FR 50848, Nov. 10, 1982]

§ 501.51 Prohibitions by order—electing powerplants.

(a) OFE may prohibit by order the use of petroleum or natural gas as a primary energy source or in amounts in excess of the minimum amount necessary to maintain reliability of operation consistent with reasonable fuel efficiency in an electing powerplant, if:

(1) That facility has not been identified as a member of a category subject to a final rule at the time of the issuance of such order; and

(2) The requirements of § 504.6 have been met.

(b) *Notice of order and public participation.* (1) OFE may hold a conference with the proposed order recipient prior to issuing the proposed order.

(2) Pursuant to section 701 of FUA, prior to the issuance of a final order to an electing powerplant, OFE shall publish a proposed order in the FEDERAL REGISTER together with a statement of the reasons for the order. In the case of a proposed order that would prohibit the use of petroleum or natural gas as a primary energy source, the finding required by former section 301(b)(1) of the Act shall be published with such proposed order.

(3) OFE shall provide a period for the submission of written comments of at least three months after the date of the proposed order. During this period, the recipient of the proposed order and any other interested person must submit any evidence that they have determined at that time to support their respective positions as to each of the findings that OFE is required to make under section 301(b) of the Act. A proposed order recipient

may submit additional new evidence at any time prior to the close of the public comment period which follows publication of the Tentative Staff Analysis or prior to the close of the record of any public hearing, whichever occurs later. A request by the proposed order recipient for an extension of the three-month period may be granted at OFE's discretion.

(4) Subsequent to the end of the comment period, OFE will issue a notice of whether OFE intends to proceed with the prohibition order proceeding.

(5) An owner or operator of a facility that may be subject to an order may demonstrate prior to issuance of a final prohibition order that the facility would qualify for an exemption if the prohibition had been established by rule. OFE will not delay the issuance of a final prohibition order or stay the effective date of such an order for the purpose of determining whether a proposed order recipient qualifies for a particular exemption unless the demonstration or qualification is submitted prior to or during the second three-month comment period, commencing after issuance of a notice of intention to proceed, or unless materials submitted after the period (i) could not have been submitted during the period through the exercise of due diligence, (ii) address material changes in fact or law occurring after the close of the period, or (iii) consist of amplification or rebuttal occasioned by the subsequent course of the proceeding. A request by the proposed order recipient for an extension of this time period may be granted at OFE's discretion.

(6) Subsequent to the end of the second three (3) month period, OFE will, if it intends to issue a final prohibition order, prepare and issue a Notice of Availability of a Tentative Staff Analysis. Interested persons wishing a hearing must request a hearing within forty-five (45) day after issuance of the Notice of Availability of the Tentative Staff Analysis. During this forty-five (45) days period, interested persons may also submit written comments on the Tentative Staff Analysis.

(7) If a hearing has been requested OFE shall provide interested person with an opportunity to present ora data, views and arguments at a public hearing held in accordance with Subpart C of this part. The hearing wil consider the findings which OFE must make in order to issue a final prohibition order and any exemption for which the proposed order recipient submitted its demonstration in accordance with paragraph (b)(5) of this section.

(8) Upon request by the receipient of the proposed prohibition order, the combined public comment periods provided for in this section may be reduced to a minimum of forty-five (45) days from the time of publication of the proposed order.

(9) OFE may terminate a prohibition order proceeding at any time prior to the date upon which a final order shall become effective. Should OFE terminate the proceeding, it will notify the proposed order recipient, and publish a notice in the FEDERAL REGISTER.

(c) *Decision to issue a final order.* (1) OFE will base its determination to issue an order on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative and substantial evidence.

(2) OFE shall include in the final order a written statement of the pertinent facts, a statement of the basis upon which the final order is issued, a recitation of the conclusions regarding the required findings and qualifications for exemptions. The final order shall state the effective date of the prohibition contained therein. If it is demonstrated that the facility would have been granted a temporary exemption, the effective date of the prohibition contained in the final order shall be delayed until such time as the temporary exemption would have terminated. If it is demonstrated that a facility will need a period of time to comply with the final order, the effective date of the prohibition contained in the final order may be delayed, in OFE's discretion, so as to allow an order recipient to comply with the final order.

(3) OFE will enclose with a copy of the final order, where appropriate, a

schedule of steps that should be taken by a stated date (a compliance schedule) to ensure that the affected facility will be able to comply with the prohibitions stated in the order by the effective date of the prohibition contained in the final order. The compliance schedule may require the affected person to take steps with regard to a unit 60 days after service of the final order.

(4) A copy of the final order and a summary of the basis therefore will be published in the FEDERAL REGISTER. The order will become effective 60 days after publication in the FEDERAL REGISTER.

(d) *Request for order.* (1) A proceeding for issuance of a prohibition order to a specific unit may be commenced by OFE, in its sole discretion, in response to a request for an order filed by the owner or operator of a facility.

(2) A petition requesting OFE to commence a prohibition order proceeding should include the following information for all units to be covered by the prohibition order:

(i) A statement of the reasons the owner or operator is seeking the issuance of a prohibition order; and

(ii) Sufficient information for OFE to make the findings required by section 301(b) of FUA.

(3) If OFE determines to accept the request, OFE shall publish a proposed order in the FEDERAL REGISTER together with a statement of the reasons for the order.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Energy Supply and Environmental Coordination Act of 1974; Pub. L. 93-319, as amended by Pub. L. 94-163, Pub. L. 95-70, (15 U.S.C. 719 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3269 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981, (Pub. L. 97-35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 17042, Apr. 21, 1982; 47 FR 50848, Nov. 10, 1982; 54 FR 52892, Dec. 22, 1989]

§ 501.52 Prohibitions by order—certifying powerplants.

(a) OFE may prohibit by order the use of petroleum or natural gas as a primary energy source or in amounts in excess of the minimum amount necessary to maintain reliability of operation consistent with maintaining reasonable fuel efficiency in an existing powerplant if the owner or operator of the powerplant certifies, and OFE concurs in such certification in accordance with the requirements of §§ 504.5, 504.6 and 504.8.

(b) *Notice of order and participation.* (1) OFE may hold a conference with the proposed order recipient, at the recipient's election, prior to issuing the proposed order. The conference may resolve any questions regarding the certification required by section 301 of the Act, as amended, and §§ 504.5, 504.6, and 504.8, and OFE's review and concurrence therein.

(2) Pursuant to section 701(b) of FUA, prior to the issuance of a final order to a certifying powerplant owner or operator, OFE must publish in the FEDERAL REGISTER, a proposed prohibition order stating the reasons for such order. OFE will review all of the information submitted by a proposed order recipient within 60 days after receipt by OFE. If the certification is complete, OFE will, within 30 days after the end of the 60 day review period, publish in the FEDERAL REGISTER a Notice of Acceptance of certification together with a proposed prohibition order stating therein the reasons for such order. This commences the prohibition order proceeding. If OFE does not believe it is able to concur in the certification, OFE shall notify the proposed order recipient and shall publish a Notice of Proposed Non-Concurrence in the FEDERAL REGISTER within 30 days after the end of the 60 day review period. If OFE finds that the certification with compliance schedule is incomplete, OFE will notify the proposed prohibition order recipient as to the deficiencies, and provide an additional period of 30 days for the certification to be amended and resubmitted. If a complete certification is not submitted within this period, the proceeding shall be terminated in accordance with § 501.52(b)(5). OFE will notify the proposed order recipient and other parties to the proceeding of the termination and publish a notice in the FEDERAL REGISTER. OFE, on its own motion, may extend any period of time

by publishing a notice to that effect in the FEDERAL REGISTER.

(3) The publication of the Notice of Acceptance or Notice of Proposed Non-Concurrence commences a period of 45 days during which interested persons may submit written comments or request a public hearing. During this period, the recipient of the proposed order and any other interested person may submit any evidence that they have available relating to the proposed order, the certification or the concurrence that OFE must make. A proposed order recipient may submit additional new evidence at any time prior to the close of the public comment period which follows the commencement of the proceeding or prior to the close of the record of any public hearing, whichever occurs later. A request for an extension of the 45 day period may be granted at OFE's discretion. In the case of a Notice of Acceptance, as set forth in § 504.9, no final prohibition order can be issued until any necessary environmental review pursuant to the National Environmental Policy Act of 1969, 42 U.S.C 4321 *et seq.* (NEPA) has been completed. Upon completion of the NEPA review and unless OFE determines on the basis of the record of the proceeding that the certification fails to meet the requirements of §§ 504.5, 504.6, and 504.8, OFE shall publish a final prohibition order, together with the information required by paragraph (c) of this section. In the case of a Notice of Proposed Non-Concurrence, at the end of the 45 day comment period, OFE will notify the proposed order recipient and parties to the proceeding and publish a final Notice of Non-Concurrence in the FEDERAL REGISTER, if OFE determines it cannot concur in the certification based upon additional information submitted during the proceeding. If, at the end of the 45 day period, OFE believes it can concur in the certification, OFE will notify the proposed order recipient and parties to the proceeding and publish a Notice of Acceptance followed by a new 45 day comment period.

(4) If a hearing has been requested, OFE shall provide interested persons with an opportunity to present oral data, views and agruments at a public hearing held in accordance with Subpart C of this part. The hearing may consider, among other matters, the sufficiency of the certification of the owner or operator of the powerplant required by section 301 of FUA, as amended, and §§ 504.5, 504.6, and 504.8 of these regulations.

(5) OFE may terminate a prohibition order proceeding at any time prior to the date upon which a final prohibition order is issued whenever OFE believes, from any information contained in the record of the proceeding, that the certification does not meet the requirements of section 301 of the Act, as amended, or §§ 504.5, 504.6, and 504.8 of these regulations. If OFE terminates the proceeding or publishes a final Notice of Non-Concurrence, or the proposed order recipient fails to submit a complete certification, OFE will notify the proposed order recipient and other parties to the proceeding and publish a notice in the FEDERAL REGISTER. In such event, the proposed order recipient may submit a new certification under any provision of section 301 of the Act, as amended, at a later date. Specifically, a Notice of Non-Concurrence under either section 301(b) or 301(c) shall not affect a proposed order recipient's ability to make a certification under the other subsection.

(c) *Record and decision to issue a final order.* (1) OFE will base its determination to issue an order on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative and substantial evidence.

(2) OFE shall include in the final order a written statement of the basis upon which the final order is issued, and its concurrence in the required certification. A copy of the final order and a summary of the basis therefor will be published in the FEDERAL REGISTER. While the prohibition order is final for purposes of judicial review under section 702 of FUA, the prohibitions contained in the final order shall not become effective for purposes of amendment under section 301(d) of FUA, as amended, and § 501.52(d) of these regulations until the effective date of the prohibitions stated in the

order, or, where the order is subject to one or more conditions subsequent listed in the prohibition order compliance schedule, until all its conditions are met.

(d) *Amendment to certifications under §§ 504.5 and 504.6.* The proposed prohibition order recipient may amend its compliance schedule under § 504.5(d), or its certification under section 301 of FUA, as amended, and §§ 504.5, 504.6 and 504.8 of these regulations in order to take into account changes in relevant facts and circumstances at any time prior to the effective date of the prohibitions contained in the final prohibition order.

(e) *Rescission of prohibition orders.* The rescission or modification of final prohibition orders issued to existing electric powerplants will be governed by the procedure in § 501.101 of these regulations.

(Approved by the Office of Management and Budget under control number 1903-0077)

(Department of Energy Organization Act, Pub. L. 95-91, 42 U.S.C. 7101 et seq.; Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, as amended by Pub. L. 94-163, Pub. L. 95-70, and Pub. L. 95-620, 15 U.S.C. 719 et seq.; Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, as amended by Pub. L. 97-35, 42 U.S.C. 8301 et seq.; Omnibus Budget Reconciliation Act of 1981, (Pub. L. 97-35))

[47 FR 17042, Apr. 21, 1982]

§ 501.53–56 [Reserved]

Subpart F—Exemptions and Certifications

§ 501.60 Purpose and scope.

(a) (1) If the owner or operator plans to construct a new baseload powerplant and the unit will not be in compliance with the prohibition contained in section 201(a) of FUA, this subpart establishes the procedures for filing a petition requesting a temporary or permanent exemption under, respectively, sections 211 and 212 of FUA.

(2) Self-certification alternative. If the owner or operator plans to construct a new baseload powerplant not in compliance with the prohibitions contained in section 201(a) of FUA, this subpart establishes the procedures for the filing of a self-certification under section 201(d) of FUA.

(3) If the petitioner owns, operates or controls a new powerplant, this subpart provides the procedures for filing a petition requesting extension of a temporary exemption granted under sections 211 or 311 of FUA.

(4) If the petitioner owns, operates or controls a new or existing powerplant or MFBI, this subpart provides the procedures for filing a petition requesting extension of a temporary exemption granted under section 211 or section 311 of FUA.

(b) If the petition is for an extension of a temporary exemption, the petitioner must apply for this extension at least (90) days prior to the expiration of the temporary exemption.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3269 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35; E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 50849, Nov. 10, 1982; 54 FR 52892, Dec. 22, 1989]

§ 501.61 Certification Contents.

(a) A self-certification filed under section 201(d) of FUA should include the following information:

(1) Owner's name and address.

(2) Operator's name and address.

(3) Plant location and address.

(4) Plant configuration (combined cycle, simple cycle, topping cycle, etc.)

(5) Design capacity in megawatts (MW).

(6) Fuel(s) to be used by the new facility.

(7) Name of utility purchasing electricity from the proposed facility and percent of total output to be sold.

(8) Date unit is expected to be placed in service.

(9) Certification by an officer of the company or his designated representative certifying that the proposed facility:

(i) Has sufficient inherent design characteristics to permit the addition of equipment (including all necessary pollution devices) necessary to render such electric powerplant capable of using coal or another alternate fuel as its primary energy source; and

(ii) Is not physically, structurally, or technologically precluded from using coal or another alternate fuel as its primary energy source.

(b) A self-certification filed pursuant to § 501.61(a) shall be effective to establish compliance with the requirement of section 201(a) of FUA as of the date filed.

(c) OFE will publish a notice in the FEDERAL REGISTER within fifteen days reciting that the certification has been filed. Publication of this notice does not serve to commence a public comment period.

(d) OFE will notify the owner or operator within 60 days if supporting documentation is needed to verify the certification.

[54 FR 52892, Dec. 22, 1989]

§ 501.62 Petition contents.

(a) A petition for exemption should include the following information:

(1) The name of the petitioner;

(2) The name and location of the unit for which an exemption is being requested;

(3) The specific exemption(s) being requested; and

(4) The name, address, and telephone number of the person who can supply further information.

(b) *Table of contents.* Include only those sections contained in the petition.

(c) *Introduction.* Include the following:

(1) Description of the facility under consideration;

(2) Description of the unit and fuel the petitioner proposes to burn in that unit, including the purpose of and need for the unit; and

(3) Description of the operational requirements for the unit, including size (capacity, input and output in millions of Btu's per hour), output in terms of product or service to be supplied, fuel capability, and operating mode, including capacity factor, utilization factor, and fluctuations in the load.

(d) *General requirements.* The evidence required under Part 503 Subpart B for each exemption(s) for which the petitioner is applying:

(1) No alternate power supply (§ 503.8);

(2) Use of mixtures (§503.9);

(3) Alternative site (§ 503.11);

(4) Compliance Plan (§ 503.12);

(5) Environmental impact analysis (§ 503.13);

(6) Fuels search (§ 503.14).

(e) *Specific evidence.* Evidence required for each exemption, segregated by exemption (Part 503 Subparts C and D).

(f) *References.* (1) Specify the reports, documents, experts, and other sources consulted in compiling the petition. Cite these sources in accordance with acceptable documentation standards, and indicate the part of the petition to which they apply. If the source is unusual or little known, briefly describe its contents.

(2) Identify at the end of each section of the petition any information or any statement based, in whole or in part, on information or principles which, to petitioner's knowledge, represent significant innovations to or departures from generally accepted facts or principles.

(g) *Appendices.* Include in the appendices material which the petitioner believes substantiates any analyses fundamental to the petition, materials prepared in connection with it, and any other documents, studies, or analyses which are believed to be relevant to the decision to be made. Also, include in the appendices copies of any forms submitted as part of the petition.

(h) *List of Preparers.* List the names with the qualifications and professional credentials of the principal contributors to the preparation of the petition. Indicate the sections or subject matters for which each principal contributor was responsible.

(i) *Incorporation by reference.* Pertinent information may be incorporated into the petition by reference when this can be done without impeding agency and public review. Referenced materials must be specifically identified and their contents briefly described in the petition. To incorporate by reference, the material must be submitted with the petition, or if previously submitted, the office to which it was submitted must be identified in the petition. The petitioner cannot incorporate by reference material based on proprietary data not available to OFE for review.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3269 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35; E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 50849, Nov. 10, 1982]

§ 501.63 Notice of the commencement of an administrative proceeding on an exemption petition.

(a)(1) When a petition is accepted, OFE will publish in the FEDERAL REGISTER a Notice of Acceptance, or, in the case of a certification exemption, a Notice of Acceptance and Availability of Certification, signifying that an exemption proceeding has commenced. The notice will include a summary of the exemption petition, and publication will commence a public comment period of no less than forty-five (45) days during which interested parties may file written comments concerning the petition. In the case of a certification exemption, interested persons may request a public hearing during this period, pursuant to § 501.33.

(2) OFE will notify the appropriate State agency having apparent primary authority to permit or regulate the construction or operation of a powerplant that an exemption proceeding has commenced and will consult with this agency to the maximum extent practicable. Copies of all accepted petitions also will be forwarded to EPA, as provided in § 501.14(a).

(b) In processing an exemption petition, OFE shall comply with the requirements of the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality's implementing regulations, and the DOE guidelines implementing those regulations (45 FR 20694, Mar. 28, 1980). Compliance with NEPA may involve the preparation of (1) an environmental impact statement (EIS) evaluating the grant or denial of an exemption petition, (2) an environmental assessment (EA), or (3) a memorandum to the file finding that the grant of the requested petition would not be considered a major federal action significantly affecting the quality of the human environment. If an EIS is required, OFE will publish in the FEDERAL REGISTER a Notice of Intent (NOI) to prepare an EIS as soon as practicable after commencement of the proceeding. A public meeting may be held pursuant to 40 CFR 1501.7 to solicit comments or suggestions on the structure and content of the EIS.

[46 FR 59889, Dec. 7, 1981, as amended at 54 FR 52893, Dec. 22, 1989]

§ 501.64 Publication of notice of availability of tentative staff analysis.

OFE will publish in the FEDERAL REGISTER a Notice of the Availability of Tentative Staff Analysis for the noncertification temporary public interest exemption, for noncertification environmental exemptions, and for a cogeneration exemption based on the public interest. OFE will provide a public comment period of at least fourteen (14) days from the date of publication during which interested persons may make written comments and request a public hearing.

§ 501.65 Publication of notice of availability of draft EIS.

A Notice of Availability of any draft EIS will be published in the FEDERAL REGISTER and comments thereon will also be solicited. Interested persons may request a hearing on any draft EIS. Such hearing must be requested within thirty (30) days of publication of the Notice of Availability of the draft EIS.

[54 FR 52893, Dec. 22, 1989]

§ 501.66 OFE evaluation of the record, decision and order.

(a) The administrative record in a proceeding under this Part will consist of the proposed prohibition order and/or petition and related documents, all relevant evidence presented at the public hearing, all written comments, and any other information in the possession of OFE and made a part of the public record of the proceeding. OFE will base its determination to issue a rule or order on consideration of the whole record, or those parts thereof cited by a party and supported by reliable, probative, and substantial evidence.

(b) OFE may investigate and corroborate any statement in any petition, document, or public comments submitted to it. OFE also may use any relevant facts it possesses in its evaluation and may request submissions from third persons relevant to the petition or other documents. OFE also may request additional information, data, or analyses following a public hearing, if any, if this information is necessary to resolve disputed issues in the record. Any relevant information received by OFE following the hearing that is not declared to be confidential under § 501.7(a)(11) shall be made part of the public record with opportunity provided for rebuttal.

(c) OFE will notify all participants if, after the close of any public hearing or comment period, it receives or obtains any relevant information or evidence. Participants may respond to such information or evidence in writing within fourteen (14) days of such notification. If OFE finds that the additional information or evidence relates to material issues of disputed fact and may significantly influence the outcome of the proceeding, OFE shall reopen the hearing on the issue or issues to which the additional information or evidence relates.

§ 501.67 Petition redesignations.

OFE, with the petitioner's approval, will redesignate an exemption petition if the petitioner qualifies for an exemption other than the one originally requested, even though he may not qualify for the specific exemption originally requested, or be entitled to the full exemption period provided by requested exemption. OFE shall give public notice of any redesignation of an exemption petition, and where a public hearing has been requested notice shall be given at least thirty (30) days prior to such hearing.

§ 501.68 Decision and order.

(a)(1) OFE shall issue an order either granting or denying the petition for an exemption or permit within six (6) months after the end of the period for public comment and hearing applicable to any petition.

(2) OFE may extend the six (6) month period for decision to a date certain by publishing notice in the Federal Register, and stating the reasons for such extension.

(3) OFE will publish a final EIS at least thirty (30) days prior to take issuance of the final order in all cases where an EIS is required.

(b)(1) OFE shall serve a copy of the order granting or denying a petition for exemption to the petitioner and all persons on the service list in cases involving a public hearing.

(2) OFE shall publish any order granting or denying a petition under this subpart in the Federal Register together with a statement of the reasons for the grant or denial.

(c)(1) Any order granting or denying a petition for exemption shall be based upon consideration of the whole record or those parts thereof cited by a party and supported by, and in accordance with, reliable, probative and substantive evidence.

(2) The denial of a petition for exemption shall be without prejudice to the petitioner's right to submit an amended petition. OFE may, however, reject the amended petition if it is not materially different from the denied petition.

(d) OFE may design any terms and conditions included in any temporary exemption issued or extended under Section 211 of FUA, to ensure, among other things, that upon expiration of the exemption the persons and powerplant covered by the exemption will comply with the applicable prohibitions under FUA. For purposes of the provision, the subsequent grant of a permanent exemption to the subject unit shall be deemed compliance with applicable prohibitions.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3269 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35; E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[46 FR 59889, Dec. 7, 1981, as amended at 47 FR 50849, Nov. 10, 1982; 54 FR 52893, Dec. 22, 1989]

§ 501.69 Judicial review.

Any person aggrieved by any order issued by OFE under this subpart, must file, within sixty (60) days of publication of the final order in the FEDERAL REGISTER, a petition for judicial review in the United States Court of Appeals for the Circuit wherein he resides, or has his principal place of business. Exhaustion of administrative remedies for purposes of judicial review does not require filing a petition pursuant to Subpart G for modification or rescission of the order to be reviewed.

Subpart G—Requests for Modification or Rescission of a Rule or Order

§ 501.100 Purpose and scope.

(a) Anyone may request that OFE commence a rulemaking proceeding pursuant to 5 U.S.C. 553(e); however, this subpart provides the procedures to be followed by—

(1) An interested person seeking the modification or rescission of a prohibition by rule applicable to a new facility;

(2) An owner or operator of a facility named in a prohibition by rule requesting the modification or rescission of that rule; or

(3) An owner or operator subject to an exemption order or a specific prohibition imposed by order requesting the modification or a rescission of that order.

(b) OFE also may commence a modification or rescission proceeding on its own initiative.

§ 501.101 Proceedings to modify or rescind a rule or order.

(a) In response to a request duly filed by an interested person, OFE may commence a proceeding to modify or rescind a rule or order. If OFE determines that a request to modify or rescind a rule or order does not warrant commencement of a proceeding, it will deny the request and issue a brief statement of the reason(s) for the denial.

(b) A request for modification or rescission of a rule or order must comply with the requirements of § 501.7 and must be filed at the address set forth in § 501.11.

(c) Notice of the request for modification or rescission of an order must be given by the requester to each party to the original proceeding that resulted in the issuance of the original order for which modification or rescission is sought. If the number of parties to the original proceeding is too large to allow actual notice at a reasonable cost or within a reasonable time, a requester may ask that OFE give notice to the parties by publication in the FEDERAL REGISTER; however, this alternate notice does not bind OFE to commence a proceeding, if it subsequently determines that the request is not warranted.

(d) If OFE determines to grant a request to commence a proceeding to rescind or modify a rule or order, or OFE on its own initiative, commences a proceeding for the modification or rescission of a rule or order, it will give notice, either by service of a written notice or by oral communication (which communication must be promptly confirmed in writing) to each person upon whom the order was served that OFE proposes to modify or rescind, or, alternatively, by publication of notice in the FEDERAL REGISTER. OFE will give a reasonable period of time for each person notified to file a written response.

(e)(1) A copy of any written comments submitted to OFE under this subpart by a party to the original proceeding must also be sent to the requester. The party submitting such comments must certify to OFE that he has sent a copy of such comments to the requester.

(2) OFE may notify other persons participating in the proceeding of the comments and provide an opportunity for those notified to respond.

(f) A request for modification or rescission of a rule or order must contain a complete statement of all facts relevant to the action sought. The request must also include the names and addresses of all reasonably ascertainable persons who will be affected. Pertinent provisions contained in any documents believed to support a request may be briefly described, however, OFE reserves the right to obtain copies of any significant documents that will assist in making a determination on the merits of a request. The request must identify the specific order or rule for which modification or rescission is sought. A request should also indicate whether an informal conference will facilitate OFE's determination to commence, or not to commence a proceeding, or will assist OFE in making any determinations on material issues raised by the request.

(g) A decision by OFE to commence a proceeding under this subpart does not entitle the requester to a public hearing on the request for modification or rescission. A public hearing may be held, however, if, in its discretion, OFE considers that a public hearing will advance its evaluation of the request.

§ 501.102 OFE evaluation of the record, decision and order for modification or rescission of a rule or order.

(a) OFE will consider the entire administrative record in its evaluation of the decision and order for modification or rescission of a rule or order. OFE may investigate and corroborate any statement in the petition or related documents and may utilize in its evaluation any relevant facts obtained by its investigations. OFE may solicit or accept submissions from third persons relevant to any request under this subpart and all interested persons will be afforded an opportunity to respond to these submissions. OFE may, in its discretion and on its own initiative, convene a conference, if it considers that a conference will advance its evaluation of the request.

(b) *Criteria.* Except where modification or rescission of a rule or order is initiated by OFE, OFE's decision to rescind or modify a rule or order will be based on a determination that there are significantly changed circumstances with respect to the applicability of a particular prohibition or exemption to the requester. OFE believes that there may be "significantly changed circumstances", if:

(1) Significant material facts are subsequently discovered which were not known and could not have been known to the petitioner or to OFE at the time of the original proceeding;

(2) A law, regulation, interpretation, ruling, order or decision on appeal that was in effect at the time of the proceeding upon which the rule or order is based and which, if it had been made known to OFE, would have been relevant to the proceeding and would have substantially altered the outcome is subsequently discovered; or

(3) There has been a substantial change in the facts or circumstances upon which an outstanding and continuing order was based, which change occurred during the interval between issuance of the order and the date of filing of the request under this subpart, and was caused by force or circumstances beyond the requester's control.

§ 501.103 OFE decision.

(a) OFE shall issue an appropriate rule or order after considering the request for modification or rescission of a rule or order and other relevant information received during the proceeding.

(b) OFE will either grant or deny the request for modification or rescission and will briefly state the pertinent facts and legal basis for the decision.

(c) OFE will serve the rule or order granting or denying the request for modification or rescission upon the requester, or, if the action was initiated by OFE, upon the owner or operator of the affected powerplant or installation. OFE will publish a notice of the issuance of a rule or order modifying or rescinding a rule or order in the FEDERAL REGISTER.

Subpart H—Requests for Stay

§ 501.120 Purpose and scope.

(a) This subpart sets forth the procedures for the request and issuance of a stay of a rule or order or other requirement issued or imposed by OFE or these regulations but does not apply to the mandatory stays provided for in Sections 202(b) and 301(a) of FUA. The application for a stay under this subpart will only be considered incidental to a proceeding on a request for modification or rescission of a final prohibition rule or order.

(b) The petitioner must comply with all final and effective OFE orders, regulations, rulings, and generally applicable requirements unless a petition for a stay is granted or is applicable under FUA.

§ 501.121 Filing and notice of petitions for stays.

(a)(1) The petition for a stay must be in writing and comply with the general filing requirements stated in § 501.7, in addition to any other requirements set forth in this subpart, and must be filed at the address provided in § 501.11.

(2) A claim for confidential treatment of any information contained in the petition for stay and supporting documents must be in accordance with § 501.7(a)(11), and filed at the address provided in § 501.11.

(b) OFE will publish notice of receipt of a petition for a stay under this subpart in the FEDERAL REGISTER.

§ 501.122 Contents.

(a) A petition for a stay shall contain a full and complete statement of all facts believed to be pertinent to the act or transaction for which a stay is sought. The facts shall include, but not be limited to, the criteria listed below in § 501.123(b).

(b) The petitioner may request a conference regarding the application. If the request is not made at the time the application is filed, it must be made as soon thereafter as possible. The request and OFE's determination regarding it will be made in accordance with Subpart C of this part.

§ 501.123 Evaluation of the record.

(a) The record in a proceeding on a petition for stay shall consist of the petition and any related documents, evidence submitted at any public proceedings and any other information in the possession of OFE and made part of the record. OFE may investigate and corroborate any statement in the petition or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by its investigations. OFE may solicit or accept submissions from third persons relevant to the petition for stay or other document and any interested person will be afforded an opportunity to respond to these submissions. OFE, on its initiative, may convene a conference, if, in its discretion, it considers that the conference will advance its evaluation of the petition.

(b) *Criteria.* (1) OFE may grant a stay incident to a proceeding on a petition for modification of a rule or order if the petitioner shows:

(i) Irreparable injury will result if the stay is denied;

(ii) There is a strong likelihood of success on the merits;

(iii) The denial of a stay will result in a more immediate hardship or inequity to the petitioner than to other persons affected by the proceeding; and

(iv) It would be desirable for reasons of public policy to grant the stay.

§ 501.124 Decision and order.

(a) OFE will issue an order granting or denying the petition for a stay upon consideration of the request and other relevant information received or obtained during the proceeding.

(b) OFE will include in the order a brief written statement setting forth the relevant facts and the basis of the decision, including any appropriate terms and conditions of the stay.

Subpart I—Requests for Interpretation

§ 501.130 Purpose and scope.

This subpart establishes procedures for filing a formal request for and the issuance of an interpretation of a rule, order or other action by DOE. Any response, whether oral or written, to a general inquiry, or to other than a formal written request for interpretation filed with DOE, is not an interpretation and merely provides general information that may not be relied upon in any proceeding to determine compliance with the applicable requirements of FUA.

§ 501.131 Filing a request for interpretation.

A proceeding to request an interpretation is commenced by the filing of a "Request for Interpretation (FUA)." The request must be in writing and must also comply with the general filing requirements stated in § 501.7. Any claims for confidential treatment for any information contained in the request or other related documents must be made pursuant to § 501.7(a)(11). A request for interpretation should be filed with the Assistant General Counsel for Interpretations and Rulings at the address provided in § 501.11.

§ 501.132 Contents of a request for interpretation.

(a) A request for an interpretation must contain a complete statement of all the facts believed to be relevant to the circumstances, acts or transactions that are the subject of the request. The facts must include the names and addresses of all potentially affected persons (if reasonably ascertainable) and a full discussion of the pertinent provisions and relevant facts contained in any documents submitted with the request. Copies of relevant contracts, agreements, leases, instruments, and other documents relating to the request must be submitted if DOE believes they are necessary for determination of any issue pending in the proceeding under this subpart. When the request pertains to only one step in a larger integrated transaction, the requesting party must also submit the facts, circumstances, and other relevant information pertaining to the entire transaction.

(b) The requesting party must include in the request a discussion of all relevant legal authorities, rulings, regulations, interpretations and decisions on appeal relied upon to support the particular interpretation sought.

(c) DOE may refuse to issue an interpretation if it determines that there is insufficient information upon which to base an interpretation.

§ 501.133 DOE evaluaton.

(a)(1) The record shall consist of the request for an interpretation and any supporting documents, all relevant evidence presented at any public proceedings, written comments and any information in the possession of DOE that has been made part of the record.

(2) DOE may investigate and corroborate any statement in a request or related documents and may utilize in its evaluation any relevant facts obtained by the investigation. DOE may solicit or accept submissions from third persons relevant to the request for interpretation, or any other document submitted under this subpart, and the person requesting the interpretation will be afforded an opportunity to respond to these submissions.

(3) The General Counsel or his delegate will issue an interpretation on the basis of the information provided in the request, unless that information is supplemented by other information brought to the attention of DOE during the proceeding. DOE's interpretation will, therefore, depend on the accuracy of the factual statements, and the requesting party may rely upon it only to the extent that the facts of the actual situation correspond to those upon which the interpretation is based.

(b) *Criteria.* (1) DOE will base its FUA interpretations on the DEOA and FUA, as applicable, and the regulations and published rulings of DOE as applied to the specific factual situation presented.

(2) DOE will take into consideration previously issued interpretations dealing with the same or a related issue.

§ 501.134 Issuance and effect of interpretations.

(a) DOE may issue an interpretation after consideration of the request for interpretation and other relevant information received or obtained during the proceeding.

(b) The interpretation will contain a written statement of the information upon which it is based and a legal analysis of and conclusions regarding the application of rulings, regulations and other precedent to the situation presented in the request.

(c) Only those persons to whom an interpretation is specifically addressed, and other persons upon whom the DOE serves the interpretation and who are directly involved in the same transaction or act, are entitled to rely upon it. No person entitled to rely upon an interpretation shall be subject to civil or criminal penalties stated in Title VII of FUA for any act aken in reliance upon the interpreta ion, notwithstanding that the interretation shall thereafter be declared y judicial or other competent authorty to be invalid.

(d) DOE may at any time rescind or nodify an interpretation on its own nitiative. Rescission or modification hall be made by notifying persons enitled to rely on the interpretation hat it is rescinded or modified. This otification will include a statement of he reasons for the rescission or modiication and, in the case of a modificaion, a restatement of the interpretaion as modified.

(e) An interpretation is modified by subsequent amendment to the reguations or ruling to the extent that it s inconsistent with the amended reguation or ruling.

(f) Any person who believes he is diectly affected by an interpretation ssued by DOE, and who believes that e will be aggrieved by its implemenation, may submit a petition for reonsideration of that interpretation to he General Counsel. DOE will acnowledge receipt of all requests for reconsideration; however, this acnowledgement in no way binds DOE o commence any proceeding on the request. If within sixty (60) days of DOE's acknowledgement of the receipt of a request for reconsideration, DOE has not issued either a notice of intent to commence a proceeding to reconsider the interpretation or a modification, revision or rescission of the original interpretation, the request for reconsideration will be deemed denied. DOE may, in its discretion, issue a formal denial of a request for reconsideration if:

(1) The request has not been filed in a timely manner, and good cause therefor has not been shown;

(2) The person requesting reconsideration is not aggrieved or otherwise injured substantially by the interpretation; or

(3) The request is defective because it fails to state and to present facts and legal argument that the interpretation was erroneous in fact or in law, or that it was arbitrary or capricious.

Subpart J—Rulings

§ 501.140 Purpose and scope.

DOE may issue rulings in accordance with the provisions of this subpart. DOE will publish each ruling in the Federal Register and in 10 CFR Part 518. A person is entitled to rely upon a ruling to the extent provided in this subpart.

§ 501.141 Criteria for issuance.

(a) The General Counsel may issue a ruling whenever:

(1) There has been a substantial number of inquiries with regard to similar factual situations or a particular section of the regulations; or

(2) It is determined that a ruling will be of assistance to the public in applying the regulations to a specific situation.

§ 501.142 Modification or rescission.

(a) A ruling may be modified or rescinded by—

(1) Publication of the modification or rescission by DOE in the Federal Register and in 10 CFR Part 518; or

(2) Adoption of a rule that supersedes or modifies a prior ruling.

(b) A person shall not be subject to the sanctions or penalties stated in these regulations for actions taken in reliance upon a ruling, notwithstanding that the ruling is subsequently declared to be invalid or no longer applicable. A person affected by a ruling may not rely upon it for more than 30 days after it has been rendered invalid pursuant to issuance of a superseding rule by OFE, or after it has been rescinded or modified by DOE.

§ 501.143 Comments.

Any interested person may file a written comment on or objection to a published ruling at any time with the Assistant General Counsel for Interpretations and Rulings at the address provided in § 501.11.

Subpart K—Enforcement

§ 501.160 Purpose and scope.

This subpart provides the procedures by which OFE may initiate enforcement proceedings on its own behalf and by which complaints concerning a violation of the Act or any rule or order thereunder may be filed.

§ 501.161 Filing a complaint.

(a) A complaint under this subpart must be submitted in writing over the signature of the person making the complaint in accordance with the general filing requirements stated in § 501.7. OFE will accept oral complaints that otherwise satisfy the requirements of this subpart, but OFE may request written verification.

(b) A complaint shall be filed at the address provided in § 501.11.

§ 501.162 Contents of a complaint.

A complaint must contain a complete statement of all relevant facts pertaining to the act or transaction that is the subject of the complaint. It must also include the names and addresses of all persons involved (if reasonably ascertainable), a description of the events that led to the complaint, and a statement describing the statutory provision, regulation, ruling, order, rule, or interpretation that allegedly has been violated.

§ 501.163 OFE evaluation.

(a) The record shall consist of the complaint and any supporting documents and all other relevant information developed in the course of any investigations or proceedings related to that complaint. OFE may investigate and corroborate any statement in the complaint or related documents submitted, and may utilize in its evaluation any relevant facts obtained by such investigation or from any other source of information. OFE may solicit or accept submissions from third persons relevant to the complaint or other related documents.

(b) *Confidentiality of information.* OFE will treat as confidential information received in any investigation of a complaint, including the identity of the complainant and the identity of any other persons who provide information to the extent such information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. OFE reserves the right to make disclosures that would be in the public interest.

§ 501.164 Decision to initiate enforcement proceedings.

After investigation of a specific complaint or based on any relevant information received or obtained during an investigation, OFE may issue a notice of violation, determine that no violation has occurred, or take such other actions as it deems appropriate. Prior to issuance of a notice of violation, and before commencement of an enforcement proceeding, OFE may transmit a draft of the notice of violation to the potentially affected person in order to promote an informal resolution of the violation.

§ 501.165 Commencement of enforcement proceedings.

(a) Whenever, on the basis of any information available, OFE determines that a person is in violation or about to be in violation of any provision of these regulations, OFE may issue a notice of violation stating, in writing and with reasonable specificity, the nature of the violation. An enforcement proceeding commences with the issuance of a notice of violation.

(b) *Contents of the notice of violation.* OFE will set forth in the notice of violation the nature of the violation, the relevant facts that OFE believes establish the violation and the legal basis for the conclusions reached therein. OFE may also include with the notice of violation a copy of a proposed order. The notice of violation will also state whether or not OFE proposes to assess civil penalties.

(1) If OFE proposes to assess a civil penalty, a notice of violation will be issued to the violator with an opportunity for a hearing before an Administrative Law Judge, as set forth in § 501.166(a)(1) of this part, before any final determination on the violation and penalty are made by OFE. The recipient of the notice will also be informed of his right to elect to have the procedures of § 501.166(a)(2) apply, in lieu of the hearing, with respect to a final determination on the assessment of any civil penalty.

(2) If OFE does not propose to assess a civil penalty, the violator will be provided the opportunity for a conference, as set forth in § 501.166(b),

before a final determination on the violation is made by OFE. OFE may, in its discretion, also provide the violator an opportunity for a hearing pursuant to § 501.166(a)(1).

(c) *Service.* OFE will serve the notice of violation in accordance with provisions set forth in § 501.6.

(d) *Rescission.* If, after issuance of a notice of violation and any related investigation, OFE finds no basis for the belief that a violation has occurred, is continuing to occur, or is about to occur, OFE may rescind the notice of violation by giving written notice to that effect to the recipient.

§ 501.166 Hearings and conferences.

(a) *When a civil penalty is proposed.* (1) *Hearing alternative in civil penalty assessment proceedings.* Unless the recipient of a notice of violation elects in writing to have the provisions of paragraph (a)(2) of this section apply, OFE will commence a proceeding to assess a penalty and, prior to a final determination on the violation and assessment of a penalty, provide an opportunity for a hearing pursuant to 5 U.S.C. 554 before an Administrative Law Judge.

(2) *Election alternative in civil penalty assessment proceedings.* The recipient of a notice of violation in which a civil penalty assessment has been proposed may elect, in writing, within thirty (30) days of receipt of the notice, to waive the administrative proceedings described in paragraph (a)(1) of this section. OFE will make a determination on the proposed civil penalty assessment and issue a final order to that effect within forty-five (45) days after receiving notice of the exercise of this election.

(b) *When a civil penalty is not proposed—opportunity to request a conference.* If a person has received a notice of violation in which a civil penalty has not been proposed, he may, within thirty (30) days after receipt of the notice, request a conference with OFE to discuss the notice. In order to request a conference he must comply with the instructions set forth in the notice.

§ 501.167 Fuel use order.

(a) *General.* OFE will issue a Fuel Use Order if, after considering all the information received during the proceeding, OFE determines that a person has committed, is committing, or is about to commit a violation of FUA or of an order or rule thereunder.

(b) *Contents.* Any Fuel Use Order issued under this section shall set forth the relevant facts and legal basis for the order and where appropriate, the final penalty assessment and the basis therefor. When an administrative hearing is requested under § 501.166(a) of this part, the Fuel Use Order will include the recommended findings and conclusions of the Administrative Law Judge (ALJ) and the basis for the penalty assessment. OFE will make a final determination as to any penalty assessment or other appropriate remedy based upon the recommended findings and conclusions of the ALJ and other information in the record of the enforcement proceeding. The order will be effective upon service, unless otherwise provided therein, or stayed pursuant to § 501.120.

(c) *Service.* OFE will serve a copy of the Fuel Use Order upon any person who was served a copy of the notice of violation and upon all parties to any public proceeding on the notice of violation. OFE will place a copy of each final order on file in the Public Information Office described in § 501.12.

(d) *Judicial review.* Any person against whom a penalty is assessed pursuant to § 501.167(b) after a hearing before an ALJ may, within sixty (60) calendar days after the date of issuance of the order assessing such penalty, institute an action in the United States Court of Appeals for the appropriate judicial circuit for judicial review of such order in accordance with the provisions of Section 723 of FUA.

Subpart L—Investigations, Violations, Sanctions and Judicial Actions

§ 501.180 Investigations.

(a) *General.* Pursuant to Section 711 of FUA, the DEOA, and in accordance with the provisions of 10 CFR 205.201, OFE may initiate and conduct investigations relating to the scope, nature, and extent of compliance by any person with the rules, regulations, and orders issued by OFE under the authority of the Act, or any order or decree of court relating thereto, or any other agency action. When the circumstances warrant, OFE may issue subpoenas as provided in Subpart D of this part. OFE may also conduct investigative conferences in conjunction with any investigation.

(b) Any duly authorized representative of OFE has the authority to conduct an investigation and to take such action as he deems necessary and appropriate to the conduct of the investigation.

(c) *Notification.* If any person is required to furnish information or documentary evidence pursuant to a subpoena or special report order, OFE will, upon written request, inform that person as to the general purposes of the investigation.

(d) *Confidentiality.* OFE shall not disclose any information received during an investigation under this section, including the identities of the person investigated and any other person who provides information, to the extent it is exempt from public disclosure pursuant to 5 U.S.C. 552 and 10 CFR Part 1004.

§ 501.181 Sanctions.

(a) *General.* (1) A violation of any provision of the Act (other than section 402 of FUA), or any rule or order thereunder shall be subject to the penalties and sanctions provided in Subtitle C of Title VII of FUA.

(2) Each day that any provision of the Act (other than section 402), or any rule or order thereunder is violated constitutes a separate violation within the meaning of the provisions of this section relating to civil penalties.

(b) *Criminal penalties.* Any person who willfully violates any provision of the Act (other than section 402), or any rule or order thereunder will be subject to a fine of not more than $50,000, or to imprisonment for not more than 1 year, or both, for each violation.

(c) *Civil penalties.* (1) Any person who violates any provisions of the Act (other than section 402) or any rule or order thereunder will be subject to the following civil penalty, which may not exceed $25,000 for each violation: Any person who operates a powerplant or major fuel burning installation under an exemption, during any 12-calendar-month period, in excess of that authorized in such exemption will be assessed a civil penalty of up to $3 for each MCF of natural gas or up to $10 for each barrel of oil used in excess of that authorized in the exemption.

(2) OFE may compromise and settle, and collect civil penalties whenever it considers it to be appropriate or advisable.

(d) *Corporate personnel.* (1) If a director, officer, or agent of a corporation willfully authorizes, orders, or performs any act or practice constituting in whole or in part a violation of the Act, or any rule or order thereunder, he will be subject to the penalties specified in paragraphs (b) and (c) of this section without regard to any penalties to which the corporation may be subject. He will not, however, be subject to imprisonment under paragraph (b) of this section unless he knew of noncompliance by the corporation, or had received from OFE notice of noncompliance by the corporation.

(2) Purposes of this paragraph:

(i) "Agent" includes any employee or other person acting on behalf of the corporation on either a temporary or permanent basis; and

(ii) "Notice of noncompliance" is a final Fuel Use Order issued under § 501.167 of this part.

§ 501.182 Injunctions.

Whenever it appears to OFE that any person has committed, is committing, or is about to commit a violation of any provision of the Act, or any rule or order thereunder, OFE may, in accordance with section 724 of FUA, bring a civil action in the appropriate United States District Court to enjoin such acts or practices. The relief sought may include a mandatory injunction commanding any person to comply with any provision of such provision, order or rule, the violation of which is prohibited by section 724 of

FUA and may also include interim equitable relief.

§ 501.183 Citizen suits.

(a) *General.* A person who believes he is aggrieved by the failure of OFE to perform any nondiscretionary act of duty under the Act may file a Petition for Action for OFE to take such action as he may feel to be proper. This petition must be filed at the address provided in § 501.11. The petition must specify the action requested and set forth the facts and legal arguments that constitute the basis for the request. The filing of a Petition for Action will serve as notice to OFE under FUA section 725(b) for purposes of any citizens suit that may be subsequently filed.

(b) *OFE decision.* Within sixty (60) days of receiving the Petition for Action, OFE will notify the person giving notice under this section that it has instituted the action requested or that other described action is being taken, or that other described action is being taken, or that no action is being taken and the reasons therefor.

Subpart M—Use of Natural Gas or Petroleum for Emergency and Unanticipated Equipment Outage Purposes

§ 501.190 Purpose and scope.

(a) If a person operates a powerplant covered by any of the prohibitions of Titles II, III, or IV of FUA, § 501.191 of this subpart establishes procedures to be followed for the use of minimum amounts of natural gas or petroleum under FUA section 103(a)(15)(B) in order to alleviate or prevent unanticipated equipment outages and emergencies directly affecting the public health, safety, or welfare that would result from electric power outages.

(b) *Explanatory note:* If a person operates a rental boiler as a powerplant covered by any of the prohibitions of Titles II, III, or IV of FUA, he may be able to use the provisions of this subpart for the emergency use of natural gas or petroleum.

[54 FR 52893, Dec. 22, 1989]

§ 501.191 Use of natural gas or petroleum for certain unanticipated equipment outages and emergencies defined in section 103(a)(15)(B) of the act.

(a) In the event of the occurrence or imminent occurrence of an emergency, or of the occurrence or imminent occurrence of an unanticipated equipment outage in the unit, an owner or operator of a powerplant is automatically permitted to use minimum amounts of natural gas or petroleum in the unit or in a substitute unit to prevent or alleviate the outage or to prevent or alleviate the emergency if he complies with procedures contained in paragraph (b) of this section.

(b) If the use of minimum amounts of petroleum or natural gas is required for purposes specified in this section, the owner or operator must notify OFE of such use by telegram or telephone within 24 hours after the commencement of such use. Immediately thereafter a written confirmation must be submitted to OFE, describing, to the best estimate of the owner or operator, (1) the nature of the emergency and (2) how long petroleum or natural gas use is likely to be required.

(c) For purposes of this section only:

(1) An "emergency" is the occurrence or threat of imminent occurrence of a condition which results or would result from an electric power outage and directly effects or would directly effect the public health, safety or welfare;

(2) "Unanticipated equipment outage" shall mean an unexpected outage due to equipment failure.

(3) "Minimum amounts required to alleviate or prevent" shall mean:

(i) For powerplants, the amounts of natural gas or petroleum required to prevent curtailment of electric supply where the operating utility has, to the maximum extent possible, utilized alternate fuel-fired capacity to prevent such curtailment. Note—A utility operating hydroelectric facilities may take into account seasonal fluctuations in storage capacity and shall be permitted to prevent depletion of stored power-producing capacity as deemed necessary by the utility; and

(ii) For installations, the amounts of natural gas or petroleum required to meet plant protection or human health and safety needs, including services to hospitals, public transportation facilities, sanitation, or water supply and pumping.

[46 FR 59889, Dec. 7, 1981, as amended at 54 FR 52893, Dec. 22, 1989]

§ 501.192 [Reserved]

PART 503—NEW FACILITIES

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503.39-44 [Reserved]

AUTHORITY: Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. § 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (42 U.S.C. 8301 et seq.); Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (42 U.S.C. 8701 et seq.); E.O. 1209, 42 FR 46267, September 15, 1977.

SOURCE: 46 FR 59903, Dec. 7, 1981, unless otherwise noted.

OMB CONTROL NO.: 1903-0075. See 46 FR 63209, Dec. 31, 1981.

EDITORIAL NOTE: Nomenclature changes to this part appear at 54 FR 52893, Dec. 22, 1989.

Subpart A—General Prohibition

§ 503.1 Purpose and scope.

This subpart sets forth the statutory prohibition imposed by the Act upon new powerplants. The prohibition in the subpart applies to all new baseload electric powerplants unless an exemption has been granted by OFE under subparts C and D of this part. Any person who owns, controls, rents, leases or operates a new powerplant that is subject to the prohibition may be subject to sanctions provided by the Act or these regulations.

[54 FR 52893, Dec. 22, 1989]

§ 503.2 Prohibition.

Section 201 of the Act prohibits, unless an exemption has been granted under subpart C or D of this part, any new electric powerplant from being constructed or operated as a baseload powerplant without the capability to use coal or another alternate fuel as a primary energy source.

[54 FR 52893, Dec. 22, 1989]

§ 503.3 [Reserved]

Subpart B—General Requirements for Exemptions

§ 503.4 Purpose and scope.

This subpart establishes the general requirements necessary to qualify for either a temporary or permanent exemption under this part and sets out the methodology for calculating the cost of using an alternate fuel and the cost of using imported petroleum.

§ 503.5 Contents of petition.

Before OFE will accept a petition for either a temporary or permanent exemption under this part, the petition must include all of the evidence and information required in this part and Part 501 of this chapter.

§ 503.6 Cost calculations for new powerplants and installations.

(a) *General.* (1) This calculation compares the cost of using alternate fuel to the cost of using imported petroleum. It must be performed for each alternate fuel and/or alternate site that the petitioner is required to examine.

(2) The cost of using an alternate fuel as a primary energy source will be deemed to substantially exceed the cost of using imported petroleum if the difference between the cost of using alternate fuel and the cost of using imported oil is greater than zero.

(3) There are two comparative cost calculations—a general cost test and a special cost test. Both take into consideration cash outlays for capital investments, annual expenses, and the effect of depreciation and taxes on cash flow. To demonstrate eligibility for a permanent exemption, a petitioner must use the procedures specified in the general cost test (paragraph (b) of this section). To demonstrate eligibility for a temporary exemption, the petitioner may apply the procedures specified in either the general cost test or the special cost test (paragraph (c) of this section).

(b) *Cost calculation—general cost test.* (1) A petitioner may be eligible for a permanent exemption if he can demonstrate that the cost of using an alternate fuel from the first year of operation substantially exceeds the cost of using imported petroleum. Unless the best practicable cost estimates as prescribed below will not materially change during the first ten years of operation of the unit (given the best information available at the time the petition is filed), the petitioner must also demonstrate that the cost of using an alternate fuel beginning at any time within the first ten years of operation and using imported petroleum or natural gas until such time (*i.e.*, delayed use of alternate fuel) would substantially exceed the cost of using only imported petroleum.

(2) The petitioner would only be eligible for a temporary exemption if the computed costs of delayed alternate fuel use, commencing at the start of the second through eleventh years of operation, do not always substantially exceed the cost of using only imported petroleum. The length of the temporary exemption would be the minimum period from the start of operation in which the cost of using alternate fuel substantially exceeds the cost of using imported petroleum.

(3) To conduct the general cost test, calculate the difference (DELTA) between the cost of using an alternate fuel (COST(ALTERNATE)) and the cost of using imported petroleum (COST(OIL)) using Equations 1 through 3 below and the comparison procedures in paragraph (b)(5) of this section.

EQ 1 $$\text{DELTA} = \text{COST (ALTERNATE)} - \text{COST (OIL)}$$

where COST(ALTERNATE) and COST(OIL) are determined by:

EQ 2 $$\text{COST} = I + \sum_{i=1}^{N} \frac{(OM_i+FL_i)(1-t_i)}{(1+k)^i}$$

and I (capital investment) is:

EQ 3 $$I = \sum_{i=-g}^{N} \frac{I_i-ITC_i-S_i-t_i(DPR_i)\left(\frac{IX_e}{IX_i}\right)}{(1+k)^i}$$

(4) The terms in Equations 2 and 3 are defined as follows:

i = Year. i is a specified year either before year 0 or after year 0. Year 0 is the year before the unit becomes operational. For example, in the third year before the unit becomes operational, i would equal -2, and in the third year following commencement of operations of the unit, i would equal $+3$. Years are represented by 52 week periods prior to or following the date on which the unit becomes operational. Outlays before the unit becomes operational are future valued to the year before the unit becomes operational (year 0), and outlays after the unit becomes operational are present valued to the year before the unit becomes operational. Year 0 must be the same for the units being compared.

g = The number of years prior to the year before the unit becomes operational (year 0) that (1) a cash outlay is first made for capital investments, or (2) an investment tax credit is first used—whichever occurs first.

N = The useful life of the unit (see paragraph (d)(5) of this section).

I_i = Yearly cash outlay (in dollars) from the year outlays first occur to the last year of the unit's useful life for capital investments. (See paragraph (d)(2) of this section for the items that must be included.)

OM_i = Annual cash outlay in year i (in dollars) for all operations and maintenance expenses except fuel (*i.e.*, all non-capital and non-fuel cash outlays caused by putting the capital investments (I) into service). This may include labor, materials, insurance, taxes (except income taxes), etc. (See paragraph (d)(3) of this section.)

S_i = Salvage value of capital investment (in dollars) in year i.

FL_i = Annual cash outlay for delivered fuel expenses (in dollars) in year i. (See paragraph (d)(3) of this section for FL_i calculation instructions and Appendix II of these regulations for the procedures to determine fuel price.)

k = The discount rate expressed as a fraction (see paragraph (d)(4) of this section).

ITC_i = Federal investment tax credit used in year i resulting from capital investments (see paragraph (d)(6) of this section).

DPR_i = Depreciation in year i resulting from capital investments (see paragraph (d)(6) of this section).

t_i = Marginal income tax rate in year i (see paragraph (d)(6) of this section).

IX_i = Inflation index value for year i (see Appendix II to Part 504 for method of computation).

IX_e = Inflation index value for the year e, the year before the asset is placed in service.

(5) The step-by-step procedure that follows shows the comparison that the petitioner must make.

(i) Compute the cost of using an alternate fuel (COST(ALTERNATE)) unit throughout the useful life of the unit using Equations 2 and 3.

(ii) Compute the cost of using oil or natural gas (COST(OIL)) throughout the useful life of the unit using Equations 2 and 3.

(iii) Using Equation 1, compute the difference (DELTA) between COST (ALTERNATE) and COST (OIL). If the difference (DELTA) is less than or equal to zero, a petitioner is not eligible for a permanent or temporary exemption using the general cost test and need not complete the remainder of the general cost test calculation. However, he still may be eligible for a temporary exemption using the special cost test (paragraph (c) of this section). If the difference (DELTA) is greater than zero and if the best practicable cost estimates will not materially change during the first ten years of operation (given the best information available at the time the petition is filed), the petitioner has completed the test and is eligible for a permanent exemption. However, if the best practicable cost estimate will materially change during the first ten years, the petitioner must complete the remainder of the general cost test—the delayed use calculations which follow.

(iv) Recompute COST (ALTERNATE) with Equations 2 and 3, assuming that an alternate fuel is not used as the primary energy source until the start of the second year of operation and that imported petroleum or natural gas is used for the first year of operation. All cash outlays should reflect postponed use of alternate fuel.

(v) Successively recompute COST (ALTERNATE) with Equations 2 and 3, assuming that the alternate fuel use is postponed until the start of the third year, fourth year, and so on, through the beginning of the eleventh year of operation (with imported petroleum or natural gas used in the years preceding alternate fuel use).

(vi) Compute the difference (DELTA) between each of the ten COST(ALTERNATE)s calculated in paragraph (b)(5) (iv) and (v) of this section and the COST(OIL) calculated in paragraph (b)(5)(ii) of this section.

(vii) If *all* the DELTAs computed in paragraph (b)(5) (iii) and (vi) of this section are greater than zero, the petitioner is eligible for a permanent exemption. If one or more of the DELTAs is less than or equal to zero, he is eligible for a temporary exemption for the period beginning at the start of the first year of operation and terminating at the beginning of the first year in which a DELTA is zero or less.

(c) *Cost calculations—special cost test.* (1) A petitioner may be eligible for a temporary exemption if he demonstrates that the cost of using an alternate fuel will substantially exceed the cost of using imported petroleum or (natural gas) over the period of the proposed exemption. The period of the proposed temporary exemption may not exceed ten years.

The petitioner must demonstrate that the cost of using an alternate fuel substantially exceeds the cost of using imported petroleum for the first year of operation, the first two years of operation, and so forth, through the period of the proposed exemption. OFE will limit the duration of a temporary exemption to the shortest time possible.

(2) To conduct the test, calculate the difference (DELTA) between the cost of using an alternate fuel (COST (ALTERNATE)) and the cost of using imported petroleum (COST (OIL)) using Equations 4 and 5 below, Equation 3 (paragraph (b)(3) of this section), and the comparison procedures in paragraph (c)(4) of this section.

EQ 4 $$\text{DELTA} = \text{COST (ALTERNATE)} - \text{COST (OIL)}$$

where COST(ALTERNATE) and COST(OIL) are determined by:

EQ 5 $$\text{COST} = I \times \frac{\sum_{i=1}^{P} (1+k)^{-i}}{\sum_{i=1}^{N} (1+k)^{-i}} + \sum_{i=1}^{P} \frac{(OM_i+FL_i)(1-t_i)}{(1+k)^{i}}$$

Capital investment (I) is calculated with Equation 3 (paragraph (b)(3) of this section).

(3) The terms in Equation 5 are the same as those in Equation 2 with the addition of P, the length of the proposed temporary exemption in years. (See paragraph (b)(4) of this section for other terms.)

(4) The step-by-step procedure that follows shows the comparisons which must be made.

(i) Using Equation 5, compute the cost of using an alternate fuel (COST(ALTERNATE)) assuming the length of the proposed exemption is one year.

(ii) Likewise, compute the cost of using imported petroleum or natural gas (COST(OIL)) assuming the length of the proposed exemption is one year.

(iii) Compute the difference (DELTA) between COST (ALTERNATE) and COST (OIL) using Equation 4.

(iv) Repeat the calculations made in (i), (ii), and (iii) above, assuming the length of the proposed exemption is two years, three years, four years, and so on, up through the period of the proposed exemption.

(v) A petitioner is eligible for a temporary exemption for the period beginning at the start of the first year of operation and terminating at the beginning of the first year in which a DELTA is zero or less.

(d) *Information on parameters used in the calculations.* (1) All estimated expenditures, except fuel, shall be expressed in real terms (unadjusted for inflation) by using the prices in effect at the time the petition is submitted. Instructions for fuel price calculations are contained in Appendix II.

(2) Capital investment yearly cash outlays (I_i) must include all items that are capital investments for Federal income tax purposes. All purchased equipment that has a useful life greater than one year, capitalized engineering costs, land, construction, environmental offsets, fuel inventory, transmission facilities, piping, etc., that are necessary for the operation of the unit must be included. However, an item must only be included if a cash outlay is required after the decision has been made to build the unit; sunk costs must not be included (*e.g.*, if the firm owns the land, its purchase price may not be included).

NOTE: The guidelines for the fuel inventory for powerplants not using natural gas shall be: (a) All powerplants with only steam driven turbines—78 days, (b) all powerplants with only combustion turbines—142 days, (c) all powerplants with combined cycles—both steam driven turbines and combustion turbines—142 days. The guidelines for the fuel inventory for installations not using natural gas shall be the greater of: (1) 21 days fuel supply, or (2) sufficient fuel to fill sixty (60) percent of the storage volume. The guidelines for the fuel inventory for all facilities using natural gas shall be zero unless the gas supply is interruptible in which case an appropriate inventory of back-up fuel must be included. Other inventory levels may be used if they are more appropriate than these guidelines; however, the source or derivation of these levels must be discussed in the evidential summary.

(3)(i) The annual cash outlays for operations and maintenance expense (OM_i) and fuel expense (FL_i) for a powerplant may be computed by one of the following three methods; however, the one chosen must be consistently applied throughout the analysis.

(A) Assume the energy produced by the powerplant equals seventy (70) percent of design capacity times 8760 hours for each year during the life of the powerplant, and compute cash outlays for operations, maintenance, and fuel expenses for the powerplant.

(B) Economically dispatch the new powerplant. The cash outlays for operations, maintenance, and fuel expenses of all powerplants being dispatched (where oil and natural gas are priced according to the procedures of Appendix II[1]) are the corresponding expenses for the purpose of the cost calculation. The dispatch analysis area must be that area with which the firm currently dispatches, anticipates dispatching, and will be interconnected. It must also include all anticipated exchanges of energy with other utilities or powerpools. The outlays for operations, maintenance, and fuel may also be estimated using a methodology that incorporates the benefits of economically dispatching units and provides consistent treatment in the alternate fuel and oil or natural gas cases being compared.

(C) Use a dispatch analysis to project the energy produced by the powerplant for a representative (not atypical) year of operation when consuming an alternate fuel. Compute the cash outlays for operations, maintenance, and fuel expenses for the powerplant based upon the level of energy production estimated for the representative year. The dispatch analysis and fuel expenses for the cost calculation must include oil and natural gas priced according to the procedures of Appendix II.[1]

(ii) When computing the annual cash outlays for operations and maintenance expense (OM_i) and fuel expense (FL_i) for an installation, specify the firing rates and the length of time each firing rate will be maintained.

(4) The discount rate (k) for analyses is 2.9 percent or that which is computed as specified in Appendix I. The method of computing the inflation index (IX) is shown in Appendix II to Part 504. OFE will modify these specified rates from time to time as required by changed conditions after public notice and an opportunity to comment. However, the relevant set of specified rates for a specific petition for exemption will be the set in effect at the time the petition is submitted or the set in effect at the time a decision is rendered, whichever set is more favorable to the petitioner.

(5)(i) The guidelines for the useful life (N) of all powerplants except nuclear will be thirty-five (35) years. The guidelines for the useful life of a nuclear powerplant will be forty (40) years. The guidelines for the useful life of major fuel burning installations will be forty (40) years. Other useful life projections may be used if they are more appropriate than these guidelines; however, the source or derivation of these projections must be contained in the evidential summary. The summary should include a discussion of engineering, economic historical or other evidence.

(ii) If the units being compared have different useful lives, the petitioner will have to modify his calculation so that the two cash flows being compared have the length of the shorter useful life. To do this, (A) use the shorter of the two useful lives in Equations 2 and 5 for both units, and (B) multiply capital investment (I) of the unit with the longer life (computed with Equation 3) by the following adjustment factor (A):

$$\text{EQ 6} \qquad A = \frac{\sum_{i=1}^{Q} (1+k)^{-i}}{\sum_{i=1}^{R} (1+k)^{-i}}$$

where:

R = The useful life of the facility with the longer life.

Q = The useful life of the facility with the shorter life.

k = The discount rate (see paragraph (d)(4) above).

(6) All Federal investment tax credits (ITC_i) and depreciation (PR_i) values are those used for Federal

income tax purposes and must be applied consistently throughout the analysis and in a manner consistent with the Federal tax laws. All investment tax credits allowed under Federal tax law must be reflected in the computations. The petitioner must use the method of depreciation which results in the greatest present value of the cash flow due to the tax and depreciation effect. The marginal income tax rate (t_i) is the firm's anticipated marginal Federal income tax rate in year i. The relevant investment tax credits, depreciation methodology, and marginal Federal income tax rates for a specific exemption petition will be those prescribed by Federal law in effect (or those tax parameters which are known with certainty will be in effect) at the time a decision is rendered. (However, if an investment tax credit expires in a certain year under the law which is in effect at the time the petition is submitted, the petitioner must assume that it will in fact expire in that year.)

(7) If powerplants are being compared, the design capacities or the maximum sustained energy per unit of time that could be produced must be the same. If installations are being compared, the maximum sustained energy per unit of time that could be produced must be the same.

(8) All estimated cash outlays must be computed in accordance with generally accepted accounting principles consistently applied.

(9) The scope of the estimates of relevant costs (as discussed above) of units being compared must be the same.

(10) All allowances for uncertainty and risk in the cost estimates must be explicit.

(11) All cash outlays must be net of any government subsidies or grants.

(e) *Evidence in support of the cost calculation.* Petitioners for an exemption which requires the use of the cost calculation shall certify that the cost of using alternate fuel substantially exceeds the cost of using oil as primary energy source as calculated in this section. A brief summary of the petitioner's supporting calculations and estimates shall be submitted with the certification. The summary should include the following:

(1) Cash outlays, Investment tax credits, depreciation methodologies, and anticipated salvage for capital investments including a description of all major construction and equipment;

(2) Annual cash outlays for operations and maintenance expenses including the formulas used to compute them; and

(3) Annual cash outlays for delivered fuel expenses including the formulas used to compute them.

[46 FR 59903, Dec. 7, 1981; 46 FR 63033, Dec. 30, 1981; 47 FR 15314, Apr. 9, 1982; 54 FR 52893, Dec. 22, 1989]

§ 503.7 State approval—general requirement for new powerplants.

(a) Where approvals by the appropriate State regulatory authority are required prior to the construction or use of a new powerplant, a petition for an exemption for consideration by OFE may be submitted to OFE prior to obtaining such approvals from the State regulatory authority.

(b) An exemption granted for a powerplant shall not become effective until an adequate demonstration has been made to OFE that all applicable approvals required by the State regulatory authorities have been obtained.

§ 503.8 No alternate power supply—general requirement for certain exemptions for new powerplants.

(a) *Application.* To qualify for an exemption, except in the case of an exemption for cogeneration units, section 213(c) of the Act requires a demonstration that, despite reasonable good faith efforts, there is no alternative supply of electric power available within a reasonable distance at a reasonable cost without impairing short-run or long-run reliability of service. If a petitioner is unable to demonstrate that there is no alternate supply during the first year of operation, OFE will conclude that the absence of the proposed powerplant will not impair short-term reliability of service, and as a result will not grant the exemption. Such action would not impair long-term reliability of service, since a petition may be submitted for a powerplant that would begin operation in a subsequent year.

(b) *Criteria.* To meet the demonstration required under paragraph (a) of this section, a petitioner must certify that:

(1) A diligent effort has been made to purchase firm power for the first year of operation to cover all or part of the projected shortfall at a cost that is less than ten (10) percent above the annualized cost of generating power from the proposed plant (including the capital, operation and maintenance expenses, and fuel prices); and

(2)(i) Despite these efforts, the reserve margin in the petitioner's electric region, normal dispatch area, or service area, in the absence of the proposed plant, would fall below twenty (20) percent during the first year of proposed operation; or

(ii) Despite these efforts, the reserve margin will be greater than twenty (20) percent but reliability of service would be impaired. In such case, the certification must be related to factors not included in the calculation of reserve margin, such as transmission constraints.

(c) *Evidence.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certification required under paragraph (b) of this section; and

(2) Exhibits containing the basis for the certification submitted under this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support its certification to this general requirement).

(d) *FERC consultation.* OFE will forward a copy of any petition for which a showing is required under this section to FERC promptly after it is filed with OFE, and OFE will consult with FERC before making the no alternate supply of power finding.

[46 FR 59903, Dec. 7, 1981, as amended at 47 FR 15314, Apr. 9, 1982; 54 FR 52894, Dec. 22, 1989]

§ 503.9 Use of mixtures—general requirement for certain permanent exemptions.

(a) *Criteria.* To qualify for a permanent exemption, except in the case of an exemption for fuel mixtures, section 213(a)(1) of the Act requires a demonstration that the use of a mixture of natural gas and petroleum and an alternate fuel for which an exemption under 10 CFR 503.38 (Fuel mixtures) would be available, would not be economically or technically feasible.

(b) *Evidence.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications to the criteria set forth in paragraph (a) of this section; and

(2) Exhibits containing the basis for the certifications submitted under this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support its certifications to this general requirement.)

NOTE: In meeting this general requirement, OFE will require a petitioner to examine only mixtures of oil and coal and natural gas and coal, or, where petitioner wishes to examine an additional or substitute mixture, such other alternate fuels as OFE and the petitioner agree are reasonable to petitioner's circumstances.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

§ 503.10 Use of fluidized bed combustion not feasible—general requirement for permanent exemptions.

(a) *OFE finding.* Except in the case of an exemption for fuel mixtures, OFE may deny permanent exemptions authorized under section 212 of the Act if OFE finds on a site-specific or generic basis that use of a method of fluidized bed combustion of an alternate fuel is economically and technically feasible.

(b) *Demonstration.* If OFE has made such a finding, OFE will deny a petitioner's request for exemption unless the petitioner demonstrated that the use of a method of fluidized bed combustion is not economically or technically feasible. The petition or any supplement thereto required by OFE must include the following evidence:

(1) If use of a method of fluidized bed combustion were to be required, evidence that the petitioner would be eligible for a permanent exemption for lack of alternate fuel supply, site limitations, environmental requirements, lack of adequate capital, or state or local requirements; or

(2) Use of a method of fluidized bed combustion is not technically or economically feasible due to design or special circumstances.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

§ 503.11 Alternative sites—general requirement for permanent exemptions for new powerplants.

(a) *Criteria.* To qualify for permanent exemption due to lack of alternate fuel supply, site limitations, environmental requirements, or inadequate capital, section 212(a) of the Act requires a demonstration that one of these exemptions would be available for any reasonable alternative site for the facility.

(b) *Evidence.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications to the criteria set forth in paragraph (a) of this section; and

(2) Exhibits containing the basis for the certifications submitted under this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support its certifications to this general requirement).

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

§ 503.12 Terms and conditions; compliance plans.

(a) *Terms and conditions generally.* A petitioner must comply with any terms and conditions imposed upon the grant of an exemption petition. OFE will limit any such terms and conditions to the unit(s) which is the subject of the petition.

(b) *Compliance plans for temporary exemptions.* (1) Any compliance plan required to accompany a petition for a temporary exemption shall include the following:

(i) A detailed schedule of progressive events and the dates upon which the events are to take place, indicating how compliance with the applicable prohibitions of the Act will occur;

(ii) Evidence of binding contracts for fuel, or for facilities for the production of fuel, which are required for compliance with the applicable prohibitions of the Act;

(iii) A schedule indicating how any necessary permits and approvals required to burn an alternate fuel will be obtained; and

(iv) Any other documentary evidence which indicates an ability to comply with the applicable prohibitions of the Act.

(2) Any exemption for which a compliance plan is required shall not be effective until the compliance plan is approved by DOE.

(3) If the petition is granted, an updated, duly executed plan must be submitted to OFE within one (1) month of an alteration of any milestone in the compliance plan, together with the reasons for the alteration and its impact upon the scheduling of all other milestones in the plan.

§ 503.13 Environmental impact analysis.

In order to enable OFE to comply with NEPA, a petitioner must include the information indicated in this section if a permanent exemption is requested. Material which has been prepared pursuant to any Federal, State or local requirement for environmental information for this unit or site may be incorporated by reference and appended to the petition. Guidelines issued by OFE for environmental reports should be used in preparing this analysis (44 FR 63740, November 5, 1979). These guidelines, which are also available in the OFE public document room, have been designed to insure that environmental reports follow the format prescribed by Council on Environmental Quality final regulations implementing NEPA. The guidelines are subject to discussion at a prepetition conference and to modification according to the facts of a particular case.

(a) All petitions for permanent exemptions must contain the following information:

(1) A description of the facility, including site location, and surroundings, alternative site(s), the facility's current proposed operations, its fuel capability, and its pollution abatement systems and equipment (including those systems and equipment necessary for all fuel scenarios considered);

(2) A description of the existing environment, including air, water, and land resources;

(3) Direct and indirect environmental impacts of the proposed action including impacts of alternative fuel scenarios, and no build alternatives.

(4) Regulatory requirements governing the facility, including a description of Federal, State and local requirements for air, water, noise and solid waste disposal which must be met for each fuel considered.

(b) For exemptions for cogeneration, the information enumerated below is to be submitted in lieu of the information required by paragraph (a) of this section. However, submission of the following information merely establishes a rebuttable presumption that the grant or denial of the exemption would have no significant environmental impact. OFE may, in individual cases, during the course of the administrative proceeding, determine that additional environmental information is required. In such cases, the petitioner will be required to submit the information described in paragraph (a) of this section.

(1) A certification that the petitioner will, prior to operating the unit under the exemption, secure all applicable environmental permits and approvals pursuant to, but not limited to, the following: Clean Air Act, Rivers and Harbors Act, Coastal Zone Management Act, Safe Drinking Water Act, Resource Conservation and Recovery Act; and

(2) Information required by the following environmental checklist must be provided and certified as accurate:

Environmental Checklist for FUA Certification Exemptions Instructions

All questions are to be answered by placing a check in the appropriate box. N/A represents (not applicable). Although it is not required, the petitioner may elaborate on any question in writing on a separate sheet of paper.

	Yes	No	N/A
(1) Is your facility located in, or will it affect a wetland (Protection of Wetlands Executive Order No. 11990)?			
(2) Is your facility located in, or will it affect, a 100-year floodplain (Floodplain Management Executive Order No. 11988)?			
(3) Will your facility affect a designated wild, scenic, or recreation river (Wild and Scenic Rivers Act)?			
(4)(A) Is your facility located within a county in which critical habitat for threatened or endangered species are known to exist (Endangered Species Act)?			
(4)(B) Has a qualified biologist determined that your facility will not affect any species on the Threatened and Endangered Species list?			
(5) Is your facility located on, or will it affect land that has been classified as prime or unique farmland or rangeland by the U.S. Department of Agriculture?			
(6) Is your facility located on, or will it affect, historical archaeological, or cultural resources that have been designated pursuant to the National Historic Preservation Act?			

[46 FR 59903, Dec. 7, 1981, as amended at 47 FR 15315, Apr. 9, 1982; 51 FR 18866, May 22, 1986; 52 FR 658, Jan. 7, 1987; 54 FR 52894, Dec. 22, 1989]

§ 503.14 Fuels search.

Prior to submitting a petition for a permanent exemption for lack of alternate fuel supply, site limitations, inadequate capital, or state or local requirements, a petitioner must examine the use of conventional solid coal as a primary energy source at the site under consideration, and at reasonable alternative sites. Where a petitioner believes that its use of such coal would be infeasible, however, and where OFE and the petitioner can reach accord, it may evaluate use of a different alternate fuel in lieu of solid coal. A petitioner of these exemptions must demonstrate for any fuel examined that he would qualify for an exemption.

[54 FR 52894, Dec. 22, 1989]

Subpart C—Temporary Exemptions for New Facilities

§ 503.20 Purpose and scope.

(a) This subpart implements the provisions contained in Section 211 of the Act with regard to temporary exemptions for new facilities.

(b) This subpart establishes the criteria and standards which owners or operators of new powerplants who petition for a temporary exemption must meet to sustain their burden of proof under the Act.

(c) All petitions for temporary exemptions shall be submitted in accordance with the procedures set out in Part 501 of this chapter and the applicable requirements of Part 503 of these regulations.

(d) The duration of any temporary exemption granted under this subpart shall be measured from the date that the facility is placed in service using petroleum or natural gas.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

§ 503.21 Lack of alternate fuel supply.

(a) *Eligibility.* Section 211(a)(1) of the Act provides for a temporary exemption due to the unavailability of an adequate and reliable supply of an alternate fuel at a cost which does not substantially exceed the cost of using imported petroleum. To qualify, a petitioner must certify that:

(1) A good faith effort has been to obtain an adequate and reliable supply of an alternate fuel of the quality necessary to conform to the design and operational requirements of the unit;

(2) For the period of the proposed exemption, the cost of using such alternate fuel would substantially exceed the cost of using imported petroleum as a primary energy source as defined in § 503.6 (Cost calculation) of these regulations;

(3) The petitioner will be able to comply with the applicable prohibitions of the Act at the end of the proposed exemption period; and

(4) No alternate power supply exists, as required under § 503.8 of these regulations.

(b) *Evidence required in support of a petition.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) All data required by § 503.6 (cost calculation) of these regulations necessary for computing the cost calculation formula; and

(4) The anticipated duration of the lack of alternate fuel supply which constitutes the basis for the exemption.

(c) *Duration.* This temporary exemption, taking into account any extensions or renewals, may not exceed 10 years.

[46 FR 59903, Dec. 7, 1981, as amended at 47 FR 15315, Apr. 9, 1982; 54 FR 52894, Dec. 22, 1989]

§ 503.22 Site limitations.

(a) *Eligibility.* Section 211(a)(2) of the Act provides for a temporary exemption due to a site limitation. To qualify for such an exemption, a petitioner must certify that:

(1) One or more specific physical limitations relevant to the location or operation of the proposed facility exist which, despite diligent good faith efforts, cannot be overcome before the end of the proposed exemption period;

(2) The petitioner will be able to comply with the applicable prohibitions of the Act at the end of the proposed exemption period; and

(3) No alternate power supply exists, as required under § 503.8 of these regulations.

NOTE: Examples of the types of site limitations to which a petitioner may certify in order to qualify for this exemption include:

(i) Inaccessability of alternate fuels as a result of a specific physical limitation;

(ii) Unavailability of transportation facilities for alternate fuels;

(iii) Unavailability of adequate land or facilities for handling, using, or storing an alternate fuel;

(iv) Unavailability of adequate land or facilities for controlling and disposing of wastes, including pollution control equipment or devices necessary to assure compliance with applicable environmental requirements;

(v) Unavailability of adequate and reliable supply of water, including water for use in compliance with applicable environmental requirements; or

(vi) Other site limitations exist which will not permit the location or operation of the proposed unit using an alternate fuel.

(b) *Evidence required in support of a petition.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption); and

(3) The anticipated duration of the site limitation which constitutes the basis for the exemption.

(c) *Duration.* This temporary exemption, taking into account any extensions and renewals, may not exceed five years.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

§ 503.23 Inability to comply with applicable environmental requirements.

(a) *Eligibility.* Section 211(a)(3) of the Act provides for a temporary exemption due to an inability to comply with applicable environmental requirements. To qualify a petitioner must demonstrate that despite diligent good faith efforts:

(1) The petitioner will be unable, as of the projected date of commencement of operation, to comply with the applicable prohibitions of the Act without violating applicable Federal or State environmental requirements; and

(2) The petitioner will be able to comply with the applicable prohibitions of the Act and with applicable environmental requirements by the end of the temporary exemption period.

NOTE: (1) For purposes of considering an exemption under this section, OFE's decision will be based solely on an analysis of the petitioner's capacity to physically achieve applicable environmental requirements. The petition should be directed toward those conditions or circumstances which make it physically impossible to comply during the temporary exemption period. The cost of compliance is not relevant, but cost-related considerations may be presented as part of a demonstration submitted under § 503.21.

(2) Prior to submitting an exemption petition, it is recommended that a meeting be requested with OFE and EPA or the appropriate State or local regulatory agency to discuss options for operating an alternate fuel fired facility in compliance with applicable environmental requirements.

(b) *Evidence required in support of a petition.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Where the petitioner has applied for a construction permit from EPA or an appropriate State agency prior to petitioning for an exemption under this section, a copy of that application and synopsis of supporting documents filed with or subsequent to that application must be submitted to OFE with the petition or at the time filed with the permitting agency;

(2) To the extent applicable, a copy of the EPA or State denial of the construction permit application;

(3) To the extent applicable, a synopsis of the administrative record of the EPA or State or local permit proceedings;

(4) To the extent applicable, a summary of the technology upon which the denial was based, including a performance comparison between the proposed technology and that technology which would provide the maximum possible reduction of pollution;

(5) An examination of the environmental compliance of the facility, including an analysis of its ability to meet applicable standards and criteria when using both the proposed fuel

and the alternate fuel(s) which would provide the basis for exemption. All such analysis must be based on accepted analytical techniques, such as air quality modeling, and reflect current conditions of the area which would be affected by the facility. The petitioner is responsible for obtaining the necessary data to accurately characterize these conditions. Environmental compliance must be examined in the context of available pollution control equipment which would provide the maximum possible reduction of pollution. The analysis must contain: (i) Requests for bids and other inquiries made and responses received by the petitioner concerning the availability and performance of pollution control equipment; (ii) contracts signed, if any, for an alternate fuel supply and for the purchase and installation of pollution control equipment; or (iii) other comparable evidence such as technical studies documenting the efficacy of equipment to meet applicable requirements;

(6) An examination of any regulatory options available to the petitioner in seeking to achieve environmental compliance (such as offsets, variances, and State Implementation Plan revisions);

(7) Any other documentation which demonstrates an inability to comply with applicable environmental requirements;

(8) No alternate power supply exists, as required under § 503.8 of these regulations.

(c) *Duration.* This temporary exemption, taking into account any extension and renewals, may not exceed 5 years.

(d) *Certification alternative.* (1) To qualify for this exemption, in lieu of meeting the evidentiary requirements of paragraph (b) of this chapter, a petitioner may certify that, for the period of the exemption:

(i) The site for the facility is or will be located in a Class I area or Class II area in which the allowable increment established by law has been consumed, as defined in Part C of the Clean Air Act; the use of an alternate fuel will cause or contribute to concentrations of pollutants which would exceed the maximum allowable increases in a Class I or Class II area even with the application of best available control technology; the site for the facility is or will be located in a non-attainment area as defined in Part D of the Clean Air Act for any pollutant which would be emitted by the facility; or, even with the application of the lowest achievable emission rate, the use of an alternate fuel will cause or contribute to concentrations in an air quality control region, of a pollutant for which any national ambient air quality standard is or would be exceeded; and

(ii) No alternate power supply exists, as required under § 503.8 of these regulations.

(2) A petition by certification under this paragraph must include:

(i) Duly executed certifications required under paragraph (d)(1) of this section;

(ii) Exhibits containing the basis for the certifications required under paragraph (d)(1) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption); and

(iii) The anticipated duration of the circumstances which constitute the basis for the exemption.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

§ 503.24 Future use of synthetic fuels.

(a) *Eligibility.* Section 211(b) of the Act provides for a temporary exemption based upon the future use of synthetic fuels. To qualify, a petitioner must certify that:

(1) The petitioner will be able to comply with the applicable prohibitions imposed by the Act by the use of a synthetic fuel derived from coal or another alternate fuel as a primary energy source in the proposed facility by the end of the proposed exemption period;

(2) The petitioner will not be able to comply with the applicable prohibitions imposed by the Act by use of a synthetic fuel until the end of the proposed exemption period; and

(3) No alternate power supply exists, as required under § 503.8 of these regulations.

(b) *Evidence required in support of a petition.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption); and

(3) A preliminary compliance plan, including to the extent available, the information required under § 503.12.

(c) *Final Compliance Plan.* Before an exemption may become effective, the petitioner must submit and OFE must approve a final compliance plan as required by § 503.12.

(d) *Duration.* This temporary exemption may be granted for a period of up to ten (10) years. Unless the petitioner requests otherwise, any temporary exemption from the fuel use prohibitions of the Act for the future use of synthetic fuels will commence on the date of commercial operation of the facility.

NOTE: Contracts based on the anticipated successful demonstration of a development program and/or the anticipated economic feasibility of a synthetic fuels facility, will generally be sufficient to meet the "binding contract" requirements for this exemption.

[46 FR 59903, Dec. 7, 1981; 47 FR 15315, Apr. 9, 1982; 54 FR 52894, Dec. 22, 1989]

§ 503.25 Public interest.

(a) *Eligibility.* Section 211(c) of the Act provides for a temporary public interest exemption. To qualify, a petitioner must demonstrate that:

(1) The unit will be capable of complying with the applicable prohibitions at the end of the proposed exemption period;

(2) The granting of the exemption would be in accord with the purposes of the Act and would be in the public interest; and

(3) No alternate power supply exists, as required under § 503.8 of these regulations.

(b) *Evidence required in support of a petition.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Substantial evidence to corroborate the eligibility requirements identified above; and

(2) The anticipated duration of the circumstances which constitute the basis for the exemption.

(c) *Certification alternative.* If the petitioner requires use of oil or natural gas in a unit, during the construction of an alternate-fuel fired unit, the petitioner may substitute, in lieu of the evidentiary requirements of paragraphs (b)(1) and (2) of this section:

(1) A duly executed certification, including the requested duration of the exemption, that the unit will be operated on oil or natural gas only during the construction of an alternate fuel fired unit to be owned or operated by the petitioner; and

(2) Exhibits containing the basis for the certifications required under paragraph (c)(1) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption).

(d) *Duration.* This temporary exemption, taking into account extension and renewals, may not exceed 5 years.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52894, Dec. 22, 1989]

Subpart D—Permanent Exemptions for New Facilities

§ 503.30 Purpose and scope.

(a) This subpart implements the provisions contained in Section 212 of the Act with regard to permanent exemptions for new facilities.

(b) This subpart establishes the criteria and standards which owners or operators of new powerplants and installations who petition for a permanent exemption must meet to sustain their burden of proof under the Act.

(c) All petitions for permanent exemptions for new facilities shall be submitted in accordance with the procedures set out in Part 501 of this chapter and the applicable requirements of Part 503 of these regulations.

§ 503.31 Lack of alternate fuel supply for the first 10 years of useful life.

(a) *Eligibility.* Section 212(a)(1)(A)(i) of the Act provides for a permanent exemption due to lack of an adequate and reliable supply of alternate fuel within the first 10 years of useful life of the proposed unit. To qualify, a petitioner must certify that:

(1) A good faith effort has been made to obtain an adequate and reliable supply of an alternate fuel for use as a primary energy source of the quality and quantity necessary to conform with the design and operational requirements of the unit;

(2) Such a supply is not likely to be available within the first 10 years of useful life of the proposed unit;

(3) No alternate power supply exists, as required under § 503.8 of these regulations;

(4) Use of mixtures is not feasible, as required under § 503.9 of these regulations; and

(5) Alternative sites are not available, as required under § 503.11 of these regulations.

(b) *Evidence required in support of a petition.* A petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of these regulations; and

(4) Fuels search, as required under § 503.14 of these regulations.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52895, Dec. 22, 1989]

§ 503.32 Lack of alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum.

(a) *Eligibility.* Section 212(a)(1)(A)(ii) of the Act provides for a permanent exemption due to lack of an alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum. To qualify a petitioner must certify that:

(1) A good faith effort has been made to obtain an adequate and reliable supply of an alternate fuel for use as a primary energy source of the quality and quantity necessary to conform with the design and operational requirements of the proposed unit;

(2) The cost of using such a supply would substantially exceed the cost of using imported petroleum as a primary energy source during the useful life of the proposed unit as defined in § 503.6 (cost calculation) of these regulations;

(3) No alternate power supply exists, as required under § 503.8 of these regulations.

(4) Use of mixtures is not feasible, as required under § 503.9 of these regulations; and

(5) Alternative sites are not available, as required under § 503.11 of these regulations.

(b) *Evidence required in support of a petition.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of these regulations;

(4) Fuels search, as required under § 503.14 of these regulations; and

(5) All data required by § 503.6 (cost calculation) of these regulations necessary for computing the cost calculation formula.

[46 FR 59903, Dec. 7, 1981, as amended at 47 FR 15315, Apr. 9, 1982; 54 FR 52895, Dec. 22, 1989]

§ 503.33 Site limitations.

(a) *Eligibility.* Section 212(a)(1)(B) of the Act provides for a permanent exemption due to site limitations. To qualify for such an exemption, a petitioner must certify that:

(1) One or more specific physical limitations relevant to the location or operation of the proposed facility exist which, despite good faith efforts, cannot reasonably be expected to be overcome within five years after commencement of operations;

(2) No alternate power supply exists, as required under § 503.8 of these regulations;

(3) Use of mixtures is not feasible, as required under § 503.9 of these regulations; and

(4) Alternative sites are not available, as required under § 503.11 of these regulations.

NOTE: Examples of the types of site limitations to which a petitioner may certify in order to qualify for this exemption include:

(i) Inaccessibility of alternate fuels as a result of a specific physical limitation;

(ii) Unavailability of transportation facilities for alternate fuels;

(iii) Unavailability of adequate land or facilities for handling, using or storing an alternate fuel;

(iv) Unavailability of adequate land or facilities for controlling and disposing of wastes, including pollution control equipment or devices necessary to assure compliance with applicable environmental requirements;

(v) Unavailability of adequate and reliable supply of water, including water for use in compliance with applicable environmental requirements; or

(vi) Other site limitations exist which will not permit the location or operation of the proposed unit using an alternate fuel.

(b) *Evidence required in support of the petition.* A petitioner must include in the petition the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of these regulations; and

(4) Fuels search, as required under § 503.14 of these regulations.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52895, Dec. 22, 1989]

§ 503.34 Inability to comply with applicable environmental requirements.

(a) *Eligibility.* Section 212(a)(1)(C) of the Act provides for a permanent exemption due to the inability to comply with applicable environmental requirements. To qualify, a petitioner must demonstrate that despite good faith efforts:

(1) The petitioner will be unable within 5 years after beginning operation, to comply with the applicable prohibitions imposed by the Act without violating applicable Federal or state environmental requirements; and

(2) Reasonable alternative sites, which would permit the use of alternate fuels in compliance with applicable Federal or state environmental requirements, are not available.

NOTE: (1) For purposes of considering an exemption under this section, OFE's decision will be based solely on an analysis of the petitioner's capacity to physically achieve applicable environmental requirements. The cost of compliance is not relevant, but cost-related considerations may be presented as part of a demonstration submitted under § 503.32 (Lack of alternate fuel supply).

(2) Prior to deciding to submit an exemption petition, it is recommended that a petitioner request a meeting with OFE and EPA or the appropriate state or local regulatory agency to discuss options for operating an alternate fuel-fired facility in compliance with the applicable environmental requirements.

(b) [Reserved]

(c) *Evidence required in support of a petition.* The petitioner must include in the petition the following evidence in order to make the demonstration required by this section:

(1) Where the petitioner has applied for a construction permit from EPA or an appropriate state agency prior to petitioning for an exemption from OFE under this section, a copy of such application and a synopsis of all supporting documents filed with or subsequent to the application must be submitted to OFE with the petition or at the time filed with the permitting agency;

(2) To the extent applicable, a copy of the EPA or state denial of the construction permit application;

(3) To the extent applicable, a synopsis of the administrative record of the EPA or state or local permit proceedings;

(4) To the extent applicable, a summary of the technology upon which the denial was based, including a performance comparison between the proposed technology and that technology which provides the maximum possible reduction of pollution;

(5) An examination of the environmental compliance of the facility, including an analysis of its ability to meet applicable standards and criteria when using both the proposed fuel and the alternate fuel(s) which would provide the basis for the exemption. All such analysis must be based on accepted analytical techniques, such as air quality modeling, and reflect current conditions of the area which would be affected by the facility. The petitioner is responsible for obtaining the necessary data to accurately characterize these conditions. Environmental compliance must be examined in the context of available pollution control equipment which would provide the maximum possible reduction of pollution. The analysis must contain: (i) Requests for bids and other inquiries made and responses received by the petitioner concerning the availability and performance of pollution control equipment; or (ii) other comparable evidence such as technical studies documenting the efficacy of equipment to meet applicable requirements;

(6) An examination of any regulatory options available to the petitioner in seeking to achieve environmental compliance (such as offsets, variances and State Implementation Plan (SIP) revisions); and

(7) Any other documentation which demonstrates an inability to comply with applicable environmental requirements;

(8) No alternate power supply exists as required under § 503.8 of these regulations;

(9) Use of mixtures is not feasible, as required under § 503.9 of these regulations;

(10) Alternative sites are not available, as required under § 503.11 of these regulations;

(11) Environmental impact analysis, as required under § 503.13 of these regulations; and

(12) Fuels search, as required under § 503.14 of these regulations.

(d) *Certification alternative.* (1) To qualify for this exemption, in lieu of meeting the evidentiary requirements of paragraph (c) of this section, a petitioner may certify that:

(i) The site for the facility is or will be located in a Class I area or Class II area in which the allowable increment established by law has been consumed, as defined in Part C of the Clean Air Act; the use of an alternate fuel will cause or contribute to concentrations of pollutants which would exceed the maximum allowable increases in a Class I or Class II area even with the application of best available control technology; the site for the facility is or will be located in a non-attainment area as defined in Part D of the Clean Air Act for any pollutant which would be emitted by the facility; or, even with the application of the lowest achievable emission rate, the use of an alternate fuel will cause or contribute to concentrations in an air quality control region of a pollutant for which any national ambient air quality standard is or would be exceeded;

(ii) No alternate power supply exists, as required under § 503.8 of these regulations;

(iii) Alternative sites are not available, as required under § 503.11 of these regulations; and

(iv) Use of mixtures is not feasible, as required under § 503.19 of these regulations.

(2) A petition by certification under this paragraph must include:

(i) Duly executed certifications required under paragraph (d)(1) of this section;

(ii) Exhibits containing the basis for the certifications required under paragraph (d)(1) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(iii) Environmental impact analysis, as required under § 503.13 of these regulations; and

(iv) Fuels search, as required under § 503.14 of these regulations.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52895, Dec. 22, 1989]

§ 503.35 Inability to obtain adequate capital.

(a) *Eligibility.* Section 212(a)(1)(D) of the Act provides for a permanent exemption due to inability to obtain adequate capital. To qualify, a petitioner must certify that:

(1) Despite good faith efforts the petitioner will be unable to comply with the applicable prohibitions imposed by the Act because the additional capital required for an alternate fuel-capable unit beyond that required for the proposed unit cannot be raised;

(2) The additional capital cannot be raised:

(i) Due to specific restrictions (e.g., convenants on existing bonds) which constrain management's ability to raise debt or equity captial;

(ii) Without a substantial dilution of shareholder equity;

(iii) Without an unreasonably adverse affect on the utility's credit rating; or

(iv) In the case of non-investor-owned public utilities, without jeopardizing the utility's ability to recover its capital investment, through tariffs, without unreasonably adverse economic effect on its service area (such as adverse impacts on local industry or undue hardship to ratepayers).

(3) No alternative power supply exists, as required under § 503.8 of these regulations;

(4) Use of mixtures is not feasible, as required under § 503.9 of these regulations; and

(5) Alternative sites are not available, as required under § 503.11 of these regulations.

(b) *Evidence required in support of a petition.* A petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of these regulations; and

(4) Fuels search, as required under § 503.14 of these regulations.

[46 FR 59903, Dec. 7, 1981, as amended at 47 FR 15315, Apr. 9, 1982; 54 FR 52895, Dec. 22, 1989]

§ 503.36 State of local requirements.

(a) *Eligibility.* Section 212(b) of the Act provides for an exemption due to certain State or local requirements. To qualify a petitioner must certify that:

(1) With respect to the proposed site of the unit, the operation or construction of the new unit using an alternate fuel is infeasible because of a State of local requirement other than a building code, nuisance, or zoning law;

(2) The petitioner has made a good faith effort to obtain a variance from the State or local requirement but has been unable to do so or has demonstrated why none is available;

(3) The granting of the exemption would be in the public interest and would be consistent with the purposes of the Act;

(4) The petitioner is not entitled to an exemption for lack of alternate fuel supply, site limitation, environmental requirements, or inability to obtain adequate capital at the site of the proposed powerplant or at any reasonable alternative site for the alternate fuel(s) considered;

(5) At the proposed site and every reasonable alternative site where the petitioner is not entitled to an exemption for lack of alternate fuel supply, site limitation, environmental requirements, or inability to obtain adequate capital, the petitioner nevertheless would be barred at each such proposed or alternate site from burning an alternate fuel by reason of a State or local requirement;

(6) No alternate power supply exists, as required under § 503.8 of these regulations; and

(7) Use of mixtures is not feasible, as required under § 503.9 of these regulations.

(b) *Evidence required in support of a petition.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) Environmental impact analysis, as required under § 503.13 of these regulations; and

(4) Fuels search, as required under § 503.14 of these regulations.

[46 FR 59903, Dec. 7, 1981; 46 FR 63033, Dec. 30, 1981, as amended at 54 FR 52895, Dec. 22, 1989]

§ 503.37 Cogeneration.

The following table may be used to determine eligibility for a permanent exemption based on oil and natural gas savings.

AVERAGE ANNUAL UTILIZATION OF OIL AND NATURAL GAS FOR ELECTRICITY GENERATION BY STATE

[BTU's per KWHR sold]

State name	Oil/gas savings Btu/kWh
Alabama	33
Arizona	802
Arkansas	1,363
California	3,502
Colorado	289
Connecticut	3,924
Delaware	3,478
Washington, DC	895
Florida	3,177
Georgia	45
Idaho	0
Illinois	250
Indiana	53
Iowa	147
Kansas	686
Kentucky	34
Louisiana	4,189
Maine	2,560
Maryland	895
Massachusetts	5,250
Michigan	256

AVERAGE ANNUAL UTILIZATION OF OIL AND NATURAL GAS FOR ELECTRICITY GENERATION BY STATE—Continued

[BTU's per KWHR sold]

State name	Oil/gas savings Btu/kWh
Minnesota	151
Mississippi	1,519
Missouri	57
Montana	60
Nebraska	130
Nevada	761
New Hampshire	2,695
New Jersey	1,894
New Mexico	1,528
New York	4,219
North Carolina	49
North Dakota	47
Ohio	36
Oklahoma	5,180
Oregon	0
Pennsylvania	771
Rhode Island	1,800
South Carolina	24
South Dakota	36
Tennessee	20
Texas	4,899
Utah	107
Vermont	105
Virginia	460
Washington	3
West Virginia	128
Wisconsin	72
Wyoming	75

Data are based upon 1987 oil, natural gas and electricity statistics published by DOE's Energy Information Administration.

EXAMPLE: The proposed cogeneration project is to be located in Massachusetts and is to use distillate oil. It will have a capacity of 50 MW, an average annual heat rate of 7600 BTU/KWHR, and be operated at a capacity factor of 90%. The annual fuel consumption is therefore calculated to be 2.996×10^9 Btu/yr. (50,000 KW × 7600 BTU/KWHR × .9 × 8760 HR/YR) The oil and gas backed off the grid would be calculated to be $.2070 \times 10^9$ BTU/YR. (50,000 KW × 5250 BTU/KWHR × .9 × 8760 HR/YR) since the proposed unit would consume more oil that would be "backed off" the grid, the unit would not be eligible for a permanent exemption based on savings of oil and natural gas.

[54 FR 52895, Dec. 22, 1989]

§ 503.38 Permanent exemption for certain fuel mixtures containing natural gas or petroleum.

(a) *Eligibility.* Section 212(d) of the Act provides for a permanent exemption for certain fuel mixtures. To qualify a petitioner must certify that:

(1) The petitioner proposes to use a mixture of natural gas or petroleum and an alternate fuel as a primary energy source;

(2) The amount of petroleum or natural gas proposed to be used in the mixture will not exceed the minimum percentage of the total annual Btu heat input of the primary energy sources needed to maintain operational reliability of the unit consistent with maintaining a reasonable level of fuel efficiency; and

(3) No alternate power supply exists, as required under § 503.8 of these regulations.

(b) *Evidence required in support of a petition.* The petition must include the following evidence in order to make the demonstration required by this section:

(1) Duly executed certifications required under paragraph (a) of this section;

(2) Exhibits containing the basis for the certifications required under paragraph (a) of this section (including those factual and analytical materials deemed by the petitioner to be sufficient to support the granting of this exemption);

(3) A description of the fuel mixture, including component fuels and the percentage of each such fuel to be used; and

(4) Environmental impact analysis as required under § 503.13 of these regulations.

(c) *Solar mixtures.* OFE will grant a permanent mixtures exemption for the use of a mixture of solar energy (including wind, tide, and other intermittent sources) and petroleum or natural gas, where:

(1) Solar energy will account for at least 20 percent of the total annual Btu heat input, of the primary energy sources of the unit; and

(2) Petitioner meets the eligibility and evidentiary requirements of paragraphs (a) and (c) of this section.

[46 FR 59903, Dec. 7, 1981, as amended at 54 FR 52896, Dec. 22, 1989]

§ 503.39–44 [Reserved]

PART 504—EXISTING POWERPLANTS

504.2 Purpose and scope.
504.3-504.4 [Reserved]
504.5 Prohibitions by order (certifying powerplants under section 301 of FUA, as amended).
504.6 Prohibitions by order (case-by-case).
504.7 Prohibition against excessive use of petroleum or natural gas in mixtures—electing powerplants.
504.8 Prohibitions against excessive use of petroleum or natural gas in mixtures—certifying powerplants.
504.9 Environmental requirements for certifying powerplants.
APPENDIX I—PROCEDURES FOR THE COMPUTATION OF THE REAL COST OF CAPITAL
APPENDIX II—FUEL PRICE COMPUTATION

AUTHORITY: Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. § 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (42 U.S.C. 8301 et seq.); Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (42 U.S.C. 8701 et seq.); E.O. 1209, 42 FR 46267, September 15, 1977.

SOURCE: 45 FR 53692, Aug. 12, 1980, unless otherwise noted.

(Approved by the Office of Management and Budget under control number 1903-0075. See 46 FR 63209, Dec. 31, 1981.)

EDITORIAL NOTE: Nomenclature changes to this part appear at 54 FR 52896, Dec. 22, 1989.

§ 504.2 Purpose and scope.

(a) Sections 504.5, 504.6, and 504.8, set forth the prohibitions that OFP, pursuant to section 301 of the Act, as amended, may impose upon existing powerplants after a review of the certification and prohibition order compliance schedule submitted by the owner or operator of a powerplant. Sections 504.5 and 504.8 are explanatory sections, and § 504.6 provides the informational requirements necessary to support the certification.

(b) Sections 504.6 and 504.7, set forth the prohibitions that OFP may impose upon certain electing powerplants, pursuant to former section 301

(b) and (c) of FUA, where OFP can make the findings as to the unit's technical capability and financial feasibility to use coal or another alternate fuel as a primary energy source. The prohibitions may be made to apply to electing powerplants unless an exemption is granted by OFP under the provisions of the Final Rule for Existing Facilities (10 CFR Parts 500, 501 and 504) published at 45 FR 53682, Aug. 12, 1980 and 46 FR 59872, Dec. 7, 1981. Any person who owns, controls, rents or leases an existing electing powerplant may be subject to the prohibitions imposed by and the sanctions provided for in the Act or these regulations, if OFP can make the findings required by former section 301 (b) and (c) of FUA.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3269 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35; E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[47 FR 50849, Nov. 10, 1982]

§§ 504.3-504.4 [Reserved]

§ 504.5 Prohibitions by order (certifying powerplants under section 301 of FUA, as amended).

(a) In the case of existing powerplants, OFP may prohibit, in accordance with section 301 of the Act, as amended, the use of petroleum or natural gas as a primary energy source where the owner or operator of the powerplant presents a complete certification concurred in by OFP. The certification, which may be presented at any time, pertains to the unit's technical capability and financial feasibility to use coal or another alternate fuel as a primary energy source in the unit. The informational requirements necessary to support a certification are contained in § 504.6 of these regulations. A prohibition compliance schedule which meets the requirements of § 504.5(d) shall also be submitted.

(b) If OFP concurs with the certification, a prohibition order on the powerplant's use of petroleum or natural gas will be issued following the procedure outlined in § 501.52 of these regulations.

(c) The petitioner may amend its certification at any time prior to the effective date of the prohibitions contained in the final prohibition order in order to take into account changes in relevant facts and circumstances by following the procedure contained in § 501.52(d).

(d) *Prohibition order compliance schedule.* The certification described above, which forms the basis for the issuance of a prohibition order to a powerplant, shall include a prohibition order compliance schedule. The compliance schedule should contain the following:

(1) A schedule of progressive events involved in the conversion project, including construction of any facilities for the production of fuel or fuel handling equipment, and contracts for the purchase of alternate fuels, and estimated date of compliance with the applicable prohibitions of the Act; and

(2) A schedule indicating estimated dates for obtaining necessary federal, state, and local permits and approvals. Any prohibition order issued under the certification provisions of §§ 504.5, 504.6, and 504.8 will be subject to appropriate conditions subsequent so as to delay the effectiveness of the prohibitions contained in the final prohibition order until the above events or permits have occurred or been obtained.

(Approved by the Office of Management and Budget under control number 1903-0077)

(Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7101 et seq.); Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, as amended by Pub. L. 94-163, Pub. L. 95-70, and Pub. L. 95-620 (15 U.S.C. 719 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, as amended by Pub. L. 97-35 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35)

[47 FR 17044, Apr. 21, 1982]

§ 504.6 Prohibitions by order (case-by-case).

(a) OFP may prohibit, by order, the use of natural gas or petroleum as a primary energy source in existing powerplants under certain circumstances. In the case of certifying powerplants under section 301 of the Act, as amended, the petitioner must present evidence to support the certification, required by § 504.6 (c), (d), (e), and (f). In the case of electing powerplants, OFP must make the following findings required by § 504.6 (c), (d), (e), and (f), in order to issue a prohibition order to the unit, pursuant to former section 301 (b) or (c):

(1) The unit currently has, or previously had, the technical capability to use an alternate fuel as a primary energy source;

(2) The unit has this technical capability now, or it could have the technical capability without:

(i) A substantial physical modification of the unit; or

(ii) A substantial reduction in the rated capacity of the unit; and

(3) It is financially feasible for the unit to use an alternate fuel as its primary energy source.

(b) In the case of electing powerplants, OFP must make a proposed finding regarding the technical capability of a unit to use alternate fuel as identified in paragraph (a) (1) of this section prior to the date of publication of the notice of the proposed prohibition. OFP will publish this finding in the FEDERAL REGISTER along with the notice of the proposed prohibition.

(c) *Technical capability.* (1) In the case of electing and certifying powerplants, OFP will consider "technical capability" on a case-by-case basis in order to make the required finding. In the case of a certifying powerplant, the powerplant should present information to support the certification relevant to the considerations set forth below. OFP will consider the ability of the unit, from the point of fuel intake to physically sustain combustion of a given fuel and to maintain heat transfer.[2]

(2) OFP considers that a unit "had" the technical capability to use an alternate fuel if the unit was once able to burn that fuel (regardless of whether the unit was expressly designed to burn that fuel or whether it ever actually did burn it), but is no longer able to do so at the present due to temporary or permanent alterations to the unit itself.[3]

(3) A unit "has" the technical capability to use an alternate fuel if it can burn an alternate fuel, notwithstanding the fact that adjustments must be made to the unit beforehand or that pollution control equipment may be required to meet air quality requirements.[4]

(d) *Substantial physical modification.* In the case of electing and certifying powerplants, OFP will make its determination on whether a physical modification to a unit is "substantial" on a case-by-case basis. In the case of certifying powerplants, OFP will consider the factors set forth below for the purpose of concurrence in the certification. OFP will consider physical modifications made to the unit as "substantial" where warranted by the magnitude and complexity of the engineering task or where the modification would impact severely upon operations at the site.[5] OFP will not, however, assess physical modification on the basis of cost.

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[2] OFP will not ordinarily consider the nature or absence of appurtenances outside the unit. For example, OFP will examine the furnace configuration and ash removal capability but will not normally consider the need to install pollution control equipment as a measure of technical capability. Furthermore, OFP will not normally conclude that the absence of fuel handling equipment, such as conveyor belts, pulverizers, or unloading facilities, bears on the issue of a unit's "technical capability" to burn an alternate fuel.

[3] For example, a unit which at one time burned solid coal but which could no longer do so because its coal firing ports and sluicing channels had been cemented over, would be classified as having "had" the technical capability to use coal. (The question of whether it again "could have" such capability without "substantial physical modification" is a separate and additional question.)

[4] A unit designed to burn natural gas shall be presumed to have the technical capability to burn a synthetic fuel such as medium Btu gas from coal (assuming such gas is available unless convincing evidence to the contrary is submitted in rebuttal). Also a unit designed to burn oil may, depending upon the chemical characteristics, be a unit that "has" the technical capability to burn liquefied coal. The fact that certain adjustments may be necessary does not render this a "hypothetical" as opposed to a "real" capability. Even an oil fired unit converting from the use of #2 distillate to #6 residual oil may be required to adjust or replace burner nozzles and add soot blowers.

(e) *Substantial reduction in rated capacity.* In the case of electing and certifying powerplants, OFP will make this determination on the basis of the following factors. A certifying powerplant should present information to support its certification regarding these factors in order for OFP to make its review for concurrence.

(1) OFP regards a unit's derating of 25 percent or more, as a result of converting a unit from oil or gas to an alternate fuel, as substantial.

(2) OFP will presume that a derating of less than 10 percent, as a result of converting a unit from oil or gas to an alternate fuel, is not substantial unless convincing evidence to the contrary is submitted in rebuttal.[6]

(3) OFP will assess units for which a derating is claimed of 10 percent or more, but less than 25 percent, on a case-by-case.

(4) In assessing whether a unit's derating is not substantial, OFP will consider the impact of a reduction in rated capacity of the unit taking into consideration all necessary appurtenances such as air pollution control equipment required to burn an alternate fuel in compliance with environmental requirements expected to be applicable at the date the prohibitions contained in the final prohibition order become effective. However, the potential order recipient may raise in rebuttal the impact of derating on the site at which the unit is located and on the system as well as on the unit itself, if under paragraph (e)(2), or case-by-case, if under paragraph (e)(3) of this section.

(f) *Financial feasibility.* In the case of certifying and electing powerplants, OFP will make this finding based on the following considerations. A certifying powerplant should present information to support its certification relevant to these considerations in order for OFP to make its review for concurrence. Conversion of a unit to burn coal or an alternate fuel shall be deemed financially feasible if the firm has the actual ability to obtain sufficient capital to finance the conversion, including all necessary land, coal and ash handling equipment, pollution control equipment, and all other necessary expenditures, without violating legal restrictions on its ability to raise debt or equity capital, unreasonably diluting shareholder equity, or unreasonably adversely affecting its credit rating. OFP will consider any economic or financial factors presented by the proposed order recipient in determining the firm's ability or inability to finance the conversion including, but not limited to, the following:

(1) The required coverage ratios on the firm's debt and preferred stock;

(2) The firm's investment program; and

(3) The financial impact of the conversion, including other conversions which are or may be undertaken voluntarily by the proposed order recipient or imposed upon the recipient's system by the Act, and including pending or planned construction or reconstruction of alternate-fuel-fired plants and plants exempt from FUA prohibitions.[7] Where helpful in clarifying the

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[5] Generally, modification of a unit to burn coal or an alternate fuel will be considered insubstantial if significant alterations to the boiler, such as a change to the furnace configuration or a complete respacing of the tubes, are not required. Minor alterations such as replacement of burners or additions of soot blowers, and additions or alterations outside the boiler, shall not cause the modification to be substantial.

[6] For example, units that are the subject of a prohibition order will not have installed any operating air pollution control equipment sufficient to burn coal in compliance with applicable environmental equipments. The installation and use of air pollution control equipment alone can, in many cases, produce a derating. Moreover, the shift to coal itself will, because of differences in energy density and fuel flow characteristics, typically involve some derating.

[7] OFP will not require the proposed order recipient to cancel or defer construction or reconstruction of any alternate-fuel-fired facility, or any facility exempt from the prohibitions of the Act, for which a decision to finance such facility has been made by the appropriate company official before the publication of the prohibition order. The proposed order recipient may choose to cancel or defer any such facility.

long-term financial feasibility of a conversion, DOE may analyze the economic benefits anticipated from operation of the converted unit or units using coal or other alternate fuel relative to those from continued operation using petroleum or natural gas.

(Approved by the Office of Management and Budget under control number 1903-0077)

(Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, as amended by Pub. L. 94-163, Pub. L. 95-70, and 15 U.S.C. 719 et seq.; Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3269 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97-35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[45 FR 53692, Aug. 12, 1980, as amended at 47 FR 17044, Apr. 21, 1982; 47 FR 50849, Nov. 10, 1982]

§ 504.7 Prohibition against excessive use of petroleum or natural gas in mixtures—electing powerplants.

(a) In the case of electing powerplants, if OFP finds that it is technically and financially feasible for a unit to use a mixture of petroleum or natural gas and an alternate fuel as its primary energy source, OFP may prohibit, by order, the use in that unit of petroleum or natural gas, or both, in amounts exceeding the minimum amount necessary to maintain reliability of operation consistent with maintaining reasonable fuel efficiency of the mixture.

(b) In making the technical feasibility finding required by former section 301 (b) and (c) of the Act and paragraph (a) of this section, OFP may weigh "physical modification" or "derating of the unit," but these considerations, by themselves, will not control the technical feasibility finding. A technical feasibility finding might be made notwithstanding the need for substantial physical modification. The economic consequences of a substantial physical modification are taken into account in determining financial feasibility.

(Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, as amended by Pub. L. 94-163, Pub. L. 95-70, and 15 U.S.C. 719 et seq.; Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3269 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97-35); E.O. 12009, 42 FR 46267, Sept. 15, 1977)

[47 FR 17045, Apr. 21, 1982, and 47 FR 50850, Nov. 10, 1982]

§ 504.8 Prohibitions against excessive use of petroleum or natural gas in mixtures—certifying powerplants.

(a) In the case of certifying powerplants, OFP may prohibit the use of petroleum or natural gas in such powerplant in amounts exceeding the minimum amount necessary to maintain reliability of operation consistent with maintaining the reasonable fuel efficiency of the mixture. This authority is contained in section 301(c) of the Act, as amended. The owner or operator of the powerplant may certify at any time to OFP that it is technically capable and financially feasible for the unit to use a mixture of petroleum or natural gas and coal or another alternate fuel as a primary energy source. In assessing whether the unit is technically capable of using a mixture of petroleum or natural gas and coal or another alternate fuel as a primary energy source, for purposes of this section, the extent of any physical modification necessary to convert the unit and any concomitant reduction in rated capacity are not relevant factors. So long as a unit as proposed to be modified would be technically capable of using the mixture as a primary energy source under § 504.6(c), this certification requirement shall be deemed met. The criteria for certification of financial feasibility are found at § 504.6(f). In addition, the powerplant's owner or operator must submit a prohibition compliance schedule, which meets the requirements of § 504.5(d).

(b) If OFP concurs with the certification, a prohibition order against the unit's excessive use of petroleum or natural gas in the mixture will be issued following the procedure outlined in § 501.52 of these regulations.

(c) The petitioner may seek to amend its certification in order to take into account changes in relevant facts and circumstances by following the procedure contained in § 501.52(d).

NOTE: The authority of OFP implemented under this section should not be confused with the other two fuel mixture provisions of these regulations. One is the general requirement that petitioners for permanent exemptions demonstrate that the use of a mixture of natural gas or petroleum and an alternate fuel is not economically or technically feasible (See § 504.15). The second is the permanent fuel mixtures exemption itself (See § 504.56).

(Approved by the Office of Management and Budget under control number 1903-0077)

(Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7101 et seq.); Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, as amended by Pub. L. 94-163, Pub. L. 95-70, and Pub. L. 95-620 (15 U.S.C. 719 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, as amended by Pub. L. 97-35 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35)

[47 FR 17045, Apr. 21, 1982]

§ 504.9 Environmental requirements for certifying powerplants.

Under §§ 501.52, 504.5 and 504.6 of these regulations, OFP may prohibit, in accordance with section 301 and section 303 (a) or (b) of FUA, as amended, the use of natural gas or petroleum, or both, as a primary energy source in any certifying powerplant. Under sections 301(c) and 303(a) of FUA, as amended, and §§ 501.52, 504.6, and 504.8 of these regulations, OFP may prohibit the excessive use of natural gas or petroleum in a mixture with an alternate fuel as a primary energy source in a certifying powerplant.

(a) *NEPA compliance.* Except as provided in paragraph (c) of this section, where the owner or operator of a powerplant seeks to obtain an OFP prohibition order through the certification procedure, and did not hold either a proposed prohibition order under former section 301 of FUA or pending order under section 2 of ESECA, it will be responsible for the costs of preparing any necessary Environmental Assessment (EA) or Environmental Impact Statement (EIS) arising from OFP's obligation to comply with NEPA. The powerplant owner or operator shall enter into a contract with an independent party selected by OFP, who is qualified to conduct an environmental review and prepare an EA or EIS, as appropriate, and who does not have a financial or other interest in the outcome of the proceedings, under the supervision of OFP. The NEPA process must be completed and approved before OFP will issue a final prohibition order based on the certification.

(b) *Environmental review procedure.* Except as provided in paragraph (c) of this section, environmental documents, including the EA and EIS, where necessary, will be prepared utilizing the process set forth above. OFP, the powerplant owner or operator and the independent third party shall enter into an agreement for the owner or operator to engage and pay directly for the services of the qualified third party to prepare the necessary documents. The third party will execute an OFP prepared disclosure document stating that he does not have any conflict of interest, financial or otherwise, in the outcome of either the environmental process or the prohibition order proceeding. The agreement shall outline the responsibilities of each party and his relationship to the other two parties regarding the work to be done or supervised. OFP shall approve the information to be developed and supervise the gathering, analysis and presentation of the information. In addition, OFP will have the authority to approve and modify any statement, analysis, and conclusion contained in the third party prepared environmental documents.

(c) *Financial hardship.* Whenever the bona fide estimate of the costs associated with NEPA compliance, if borne by the powerplant owner or operator, would make the conversion financially infeasible, OFP may waive the requirement set forth in paragraphs (a) and (b) of this section and perform the necessary environmental review.

(Approved by the Office of Management and Budget under control number 1903-0077)

(Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7101 et seq.); Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, as amended by Pub. L. 94-163, Pub. L. 95-70, and Pub. L. 95-620 (15 U.S.C. 719 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, as amended by Pub. L. 97-35 (42 U.S.C. 8301 et seq.); Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35)

[47 FR 17046, Apr. 21, 1982]

APPENDIX I—PROCEDURES FOR THE COMPUTATION OF THE REAL COST OF CAPITAL

(a) The firm's real after-tax weighted average marginal cost of capital (K) is computed with equation 1.

EQ 1

$$K = W_d \left[\frac{\hat{R}_d (1-t)}{1 - f_d} - INF \right] + W_p \left[\frac{\hat{R}_p}{1-f_p} - INF \right] + W_e \left[\frac{\hat{R}_e}{1-f_e} - INF \right]$$

The terms in equation 1 are defined as follows:

W_d = Fraction of existing capital structure which is debt.

W_p = Fraction of existing capital structure which is preferred equity.

W_e = Fraction of existing capital structure which is common equity and retained earnings.

$\hat{R}_d$ = Predicted nominal cost of long term debt expressed as a fraction.

$\hat{R}_p$ = Predicted nominal cost of preferred stock expressed as a fraction.

$\hat{R}_e$ = Predicted nominal cost of common stock expressed as a fraction.

INF = Percentage change in the GNP implicit price deflator over the past 12 months expressed as a fraction.

f_d = Flotation cost of debt expressed as a fraction.

f_p = Flotation cost of preferred stock expressed as a fraction.

f_e = Flotation cost of common stock expressed as a fraction.

t = Marginal federal income tax rate for the current year.

(b) *Information on parameters used in Equation 1.* (1) The parameters used in equation 1 will be the best practicable estimates. They will be obtained from the firm, accepted rating services (e.g., Standard & Poors, Moody's), government publications, accepted financial publications, annual financial reports and statements of firms, and investment bankers.

(2) The predicted nominal cost of debt ($\hat{R}_d$) may be estimated by determining the current average yield on newly issued bonds—industrial or utility as appropriate—which have the same rating as the firm's most recent debt issue.

(3) The predicted nominal cost of preferred stock ($\hat{R}_p$) may be estimated by determining the current average yield on newly issued preferred stock—industrial or utility as appropriate—which has the same rating as the firm's most recent preferred stock issue.

(4)(A) The predicted nominal cost of common stock ($\hat{R}_e$) is computed with equation 2.

Eq 2 $\hat{R}_e = \hat{R}_f + B \times \hat{R}_m$

where:

$\hat{R}_f$ = The risk free interest rate—the average of the most recent auction rates of U.S. Government 13-week Treasury Bills,

B = The "beta" coefficient—the relationship between the excess return on common stock and the excess return on the S&P 500 composite index, and

$\hat{R}_m$ = The mean excess return on the S&P 500 composite index—the mean of the difference between the return on the S&P 500 composite index and the risk free interest rate for the years 1926-1976 as computed by Ibbotson and Sinquefield(*1*)—9.2%

(B) The "beta" coefficient is computed with regression analysis techniques. The regression equation is Equation 3.

$$(R_e^t - R_f^t) = A + B(R_m^t - R_f^t) + e^t \qquad \text{Eq. 3}$$

where

$$R_e^t = \frac{PRCC_t - PRCC_{t-1} + (DIVRATE/12)}{PRCC_{t-1}}$$

R_f^t = The risk free interest rate in month t—the average of the yields on 13-week treasury bills auctioned in month t.*(2)*

A = A constant which should not be significantly different than zero.

$$R_m^t = \frac{V_{sp,t} - V_{sp,t-1} + D_{sp,t}}{V_{sp,t-1}}, \text{ and}$$

e^t = The error in month t.

$PRCC_t$ = Closing market prices of the firm's common stock at the end of month t fully adjusted for splits and stock dividends.

$DIVRATE_t$ = The sum of the dividends paid in the fiscal year which contain month t.

$V_{sp,t}$ = The market value of "one share" of the S&P 500 composite index at the end of month t.

$D_{sp,t}$ = The estimated monthly income received from holding "one share" of the S&P 500 in month t.

The regression analysis is done with sixty months of data. The first month (t = 1) is sixty months before the month in which the firm's current fiscal year started. The last month (t = 60) is the last month of the past fiscal year.

(5) Where the parameters specified above are not obtainable, alternate parameters that closely correspond to those above may be used. This may include substituting a bond yield for nominal cost of preferred stock where the former is not available. Where the capital structure does not consist of any debt, preferred equity, or common equity, an alternate methodology to predict the firm's real after-tax marginal cost of capital may be used.

Example of using alternate parameters that closely correspond to those above are:

(A) In the case of industrials, who do not typically issue preferred stock, the predicted nominal cost of preferred stock ($\hat{R}_p$) can be estimated by determining the current average yield on newly issued industrial bonds which have the same rating as the firm's most recent debt issue.

(B) If necessary, the following assumptions can be made to determine the nominal cost of debt or preferred stock and their flotation costs.

(i) Where a company issued privately placed debt that was not rated, the rating, applied to preferred stock could be used to determine the cost of debt and its flotation cost.

(ii) Where a company issued privately placed preferred stock that was not rated, the rating applied to debt could be used to determine the cost of preferred stock and its flotation costs.

(iii) In the case where all issues were privately placed, the current average yield on all newly issued debt or preferred could be used to determine the cost of debt or preferred respectively, and an average flotation cost, for debt or preferred, could be used.

(C) *Evidence Requirements.* Copies of this calculation with notations as to the source of the data must be submitted.

FOOTNOTES

(1) Ibbotson, R.E. and R.A. Sinquefield, *Stocks, Bonds, Bills, and Inflation*, Charlottesville, Va.: The Financial Analysts Research Foundation, 1977, cited by Ernst & Whinney, *Costs of Capital and Rates of Return for Industrial Firms and Class A&B Electric Utility Firms*, June 1979, p. 3-8.

(2) As an option, R_f^t can be developed with the following equation:

$$R_f^t = \frac{365D^t}{360 - ND^t} \times \frac{1}{12}$$

where:

D^t = The average annual yield on three month U.S. Treasury bills reported in the *Survey of Current Business* auctioned in month t—which is reported using the bank discount method.

N = Number of days to maturity.

[46 FR 59920, Dec. 7, 1981]

APPENDIX II—FUEL PRICE COMPUTATION

(a) *Introduction.* This appendix provides the equations and parameters needed to specify the price of the delivered fuels to be used in the cost calculations associated with parts 503 and 504 of these regulations. The delivered price of the fuel to be used to calculate delivered fuel expenses must reflect (1) the price of each fuel at the time of the petition, and (2) the effects of future real price increases for each fuel. The delivered price of an alternate fuel used to calculate delivered fuel expenses must reflect the petitioner's delivered price of the alternate fuel and the effects of real increases in the price of that alternate fuel. Paragraphs (b), (c) and (d) below provide the procedure to: (1) Calculate fuel price and inflation indices; (2) account for projected real increases in fuel prices when planning to burn one or more than one fuel; and (3) account for projected real increases in the price of the alternate fuel. Table II-1 of this appendix (See paragraph (b)) contains example fuel price and inflation indices based on the latest data appearing in the Energy Information Administration's (EIA) *Annual Energy Outlook* (AEO).

The fuel price and inflation indices will change yearly with the publication of the *AEO*. Revisions shall become effective after final publication. However, the relevant set of parameters for a specific petition for exemption will be the set in effect at the time the petition is submitted or the set in effect at the time a decision is rendered, whichever is more favorable to the petitioner.

(b) *Computation of Fuel Price and Inflation Indices.*

(1) the Petitioner is responsible for computing the annual fuel price and inflation indices by using Equation II-1 and Equation II-2, respectively. The petitioner may compute the fuel price index specified in Equation II-1 or use his own price index. However, if he uses his own price index, the source or the derivation of the index must be fully documented and be contained in the evidential summary.

EQ II-1 is:

$$PX_i = \frac{P_i}{P_o}$$

where:

PX_i = The fuel price index for each fuel in year i. P_i = Price of fuel in year i.

P_o = Price of fuel in base year.

EQ II-2 is:

$$IX_i = \frac{GX_i}{GX_o}$$

where:

IX_i = The inflation index in year i.

GX_i = The NIPA GNP price deflator for year i.

GX_o = The NIPA GNP price deflator for the base year.

(2) The parameters to be used in EQ II-1 are the Base Case fuel price projections found in EIA's current *AEO*.

(3) When computing annual inflation indices, the petitioner is to use the Base Case National Macroeconomic Indicators (NIPA GNP Price Deflator) contained in EIA's current *AEO*. If necessary, the petitioner must rebase the projection to the same year used for the fuel price projections. For example, in 1989 *AEO* projects the price deflator in 1982 dollars; this must be rebased to the year in which the petition is filed. The methodology used to rebase the inflation indices must follow standard statistical procedures and must be fully documented within the petition. This index will remain frozen at the last year of the *AEO*'s projection for the remainder of the unit'(s) useful life.

(4) Table II-1 is provided as an example of the application of equations II-1 and II-2. This table contains annual fuel price indices for distillate oil, residual oil, natural gas, and coal. It also contains annual inflation indices. These values were computed from information contained in Table A3 and Table A11 of EIA's *AEO, 1989*.

TABLE II-1: PRICE AND INFLATION INDICES FOR USE IN THE COST CALCULATIONS

Year	Distillate (DPX)	Residual (RPX)	Natural gas (GPX)	Coal (CPX)	Inflation (IX)
1986	1.0000	1.0000	1.0000	1.0000	1.0000
1987	0.9810	1.2134	0.9508	0.9231	1.0334
1988	0.9429	0.9407	0.8934	0.8876	1.0658
1989	0.8929	0.9328	0.9057	0.8639	1.1054
1990	0.9905	1.0119	0.9221	0.9112	1.1607
1991	1.0381	1.0751	0.9344	0.9172	1.2204
1992	1.0929	1.1344	1.0205	0.9231	1.2836
1993	1.1595	1.2292	1.1148	0.9349	1.3512
1994	1.2286	1.3241	1.1844	0.9467	1.4214
1995	1.3000	1.4150	1.2705	0.9527	1.4960
1996	1.4000	1.5415	1.4016	0.9586	1.5768
1997	1.4762	1.6403	1.4918	0.9704	1.6585
1998	1.5452	1.7273	1.5615	0.9763	1.7410
1999	1.6143	1.7905	1.6475	0.9882	1.8235
2000	1.6690	1.8340	1.7049	0.9941	1.9025
2001	1.6690	1.8340	1.7049	0.9941	1.9025
2002	1.6690	1.8340	1.7049	0.9941	1.9025
2003	1.6690	1.8340	1.7049	0.9941	1.9025
2004	1.6690	1.8340	1.7049	0.9941	1.9025
2005	1.6690	1.8340	1.7049	0.9941	1.9025
2006	1.6690	1.8340	1.7049	0.9941	1.9025
2007	1.6690	1.8340	1.7049	0.9941	1.9025
2008	1.6690	1.8430	1.7049	0.9941	1.9025
2009	1.6690	1.8340	1.7049	0.9941	1.9025
2010	1.6690	1.8340	1.7049	0.9941	1.9025

(C) *Fuel Price Computation.*

(1) The delivered price of the proposed fuel to be burned (FPB_i) must reflect the real escalation rate of the proposed fuel, and must be computed with Equation EQ II-3.

EQ-II-3 is: $FPB_i = MPB\ [PX_i]$

where:

FPB_i = Price of the proposed fuel (distillate oil, residual oil, or natural gas) in year i.

MPB = The current delivered market price of the proposed fuel.

PX_i = The fuel price index value in year i, computed with Equation II-1.

or:

(2) When planning to use more than one fuel in the proposed unit(s), the petitioner must use Equation II-1 and Equation II-3 to calculate the annual fuel price of each fuel to be used. The petitioner then must estimate the proportion of each fuel to be burned annually over the useful life of the unit(s). With these proportions and the respective annual fuel prices for each fuel, the petitioner must compute an annual weighted average fuel price. The methodology used to calculate the weighted average fuel price must follow standard statistical procedures and be fully documented within the petition.

(d) *Fuel Price Computation—Alternate Fuel.* The delivered price of alternate fuel (PFA_i) must reflect the real escalation rate of alternate fuel and must be computed with Equation II-4.

Equation II-4 is:

$PFA_i = APF \times apx_i$

where:

PFA = The price of the alternate fuel in year i.

APF^{1} = The current market price of the alternate fuel f.o.b. the facility).

APX_i = The alternate fuel price index value for year i, computed with Equation II-1.

In most cases the alternate fuel will be coal. The petitioner must use Equation II-1 (paragraph (b)) to compute the escalation rate (APX_i). If an alternate fuel other than coal is proposed the souroe or the derivation of the index must be fully documented and be contained in the evidential summary.

[54 FR 52896, Dec. 22, 1989]

PART 508—[Reserved]

PART 515—TRANSITIONAL FACILITIES

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AUTHORITY: Dept. of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (42 U.S.C. 8301 et seq.); E.O. 12009, 42 FR 46267.

SOURCE: 44 FR 60692, Oct. 19, 1979, unless otherwise noted.

OMB Control No.: 1903-0075. See 46 FR 63209, Dec. 31, 1981.

Subpart A—General Provisions

§ 515.1 Policy.

(a) The Economic Regulatory Administration (ERA) intends to administer the provisions of the Powerplant and Industrial Fuel Use Act of 1978 (FUA or the Act) relating to transitional facilities in a firm but fair and practical manner. A transitional facility is one which was not operational on April 20, 1977, but for which a contract for its construction or acquisition was signed prior to November 9, 1978, the date of FUA's enactment. ERA will not classify as "existing," transitional facilities which are in the early stages of planning and construction, and which would not incur a substantial financial penalty, an adverse effect upon electric system reliability (for powerplants), or a significant operational detriment (for major fuel-burning installations). These facilities will therefore be considered to be "new." As new facilities, they will be subject to the statutory prohibitions of Title II of FUA, but will have the opportunity to petition ERA for an exemption from those prohibitions. Where a person requesting classification of a transitional facility as "existing" can demonstrate that the facility is in a more advanced stage of construction and would sustain any of the penalties, adverse effects, or detriments identified above, ERA will classify the facility as "existing" in order to avoid disruptive impacts on the facility as well as on the economy at large.

(b) You are eligible to request that ERA classify your transitional facility as "existing" if a contract for the facility's construction or acquisition was signed prior to November 9, 1978. Moreover, you are also eligible to request that ERA classify your transitional facility as "existing" if a contract was signed prior to November 9, 1978, for the reconstruction of your facility (including refurbishment of or addition to the facility) to the extent that the reconstruction equals or exceeds 50 percent of the price of a replacement unit. We base these criteria for eligibility as a transitional facility on the principle that a contract constitutes a commitment, after which time any cancellation, rescheduling, or modification may result in a substantial financial penalty, a significant operational detriment, or an adverse effect on electric system reliability. If you are otherwise eligible to request classification of a rental boiler under this part, your request must also be filed on behalf of all other persons, if any, who have an interest in (i.e., own, operate and/or control) the boiler at the time the request is filed, unless ERA has, for good cause shown, waived this requirement.

(c) We have established milestones whereby facilities will automatically be considered "new" or "existing" without contacting ERA. Where no contract for construction or acquisition of a facility was signed prior to November 9, 1978, the facility is clearly "new." Facilities which were operational, as defined in these regulations, on or before April 20, 1977, are automatically deemed "existing." Individual transitional facilities with a design capability of consuming any fuel at a heat input rate which does not equal or exceed 100 million BTU's per hour, are automatically deemed "existing."

(d) To further facilitate the processing of requests for classification of transitional facilities and to reduce the administrative burden on persons requesting classification and ERA alike, facilities which were completed and title transferred, operational or at a certain stage of construction by designated dates will be classified as "existing" upon certification to ERA and, in some cases, the submission of minimal documentation. Under this approach, powerplants and MFBIs which were completed on or before April 20, 1977 and for which title was transferred to the purchaser on or before April 20, 1977, will be classified as "existing" by ERA. In addition, units which were operational on May 8, 1979 (the effective date of FUA) will be classified as "existing" by ERA. Moreover, MFBIs which are prefabricated boilers and powerplants which are prefabricated boilers or combustion turbines which had been shipped by the manufacturer, or which had their main steam drum in place (for field-erected boilers) by November 9, 1978, will similarly be classified as "existing."

(e) ERA believes that a powerplant or MFBI will incur a "substantial financial penalty" where 25 percent or more of the total projected project cost has been expended or irrevocably committed as of November 9, 1978. In assessing the expenditures or committed costs, however, ERA will exclude outlays which can be used toward the construction of an alternate fuel-fired facility or which may be cancelled. The limitation to nonrecoverable outlays follows from the definitions of new powerplants and MFBIs in Section 103 of the Act. These definitions recognize the extra costs that are incurred in building an alternate fuel-fired plant by cancelling, rescheduling or modifying a partially completed oil or gas-fired plant.

(f) Where these nonrecoverable outlays do not reach 25 percent of the total projected project cost, ERA may consider other financially-related factors presented on a case-by-case basis. The purpose of these additional case-by-case evaluations, where facilities have not expended beyond 25 percent of their total projected project cost, in to permit persons requesting classification to present ERA with full explanations of the financial penalties they believe they may incur, but which are otherwise not properly included in computing the 25 percent test.

(g) If your transitional facility is a powerplant, one of the considerations ERA will employ in reaching a determination applicable to an adverse effect on electric system reliability is whether the cancellation, rescheduling or modification of your proposed powerplant would result in your electric region's reserve margin falling below 20 percent during the 12-month period after you expect your proposed powerplant to begin operation. You may present whatever evidence you deem appropriate to ERA's reaching a determination on your claim of an adverse effect on electric system reliability.

(h) If your transitional facility is a major fuel-burning installation, your unit will be designated "existing" if you demonstrate to ERA that you would incur a significant operational detriment as a result of cancelling, rescheduling, or modifying your facility. In light of the complexity and variety of operational requirements in the MFBI sector, ERA will review these requests for classification on a case-by-case basis.

[44 FR 60692, Oct. 19, 1979, as amended at 44 FR 69920, Dec. 5, 1979]

§ 515.2 Purpose and scope.

(a) *Purpose.* These rules govern requests for classification of transitional facilities by ERA as "existing" facilities subject to the provisions of Title III of FUA, rather than as "new" facilities subject to the provisions of Title II of FUA.

(b) *Application.* This part applies to all transitional facilities. You are eligible to submit a request to have your transitional powerplant or major fuel-burning installation classified as an "existing" facility, pursuant to this part, if a contract for the construction or acquisition of your facility was signed prior to November 9, 1978, the date of enactment of FUA.

(c) *ERA determinations.* Based upon the criteria set forth below, and after thorough consideration of the entire administrative record of your formal request, ERA will publish in the FEDERAL REGISTER a formal decision either: (1) Granting the request, having determined that your installation or powerplant is "existing," or (2) denying the request, having determined that your installation or powerplant is "new." ERA determinations on requests that are received by ERA on or before the effective date of this final rule, will be made on the basis of the provisions set forth in the revised interim rule or this final rule, whichever would result in a more favorable disposition of your request. Determinations on requests received after the effective date of this final rule, will be made on the basis of this final rule. These determinations are final Departmental actions.

Subpart B—Electric Powerplants

§ 515.3 Eligibility.

You are eligible to submit a request to ERA to have your transitional facility classified as "existing" if you can demonstrate to the satisfaction of ERA that a contract for the construction or acquisition of the powerplant was signed prior to November 9, 1978.

§ 515.4 Powerplants automatically classified as "new."

If a contract for the construction or acquisition of the powerplant was not signed prior to November 9, 1978, the powerplant is automatically classified as "new" and subject to the provisions of Title II of the Act.

§ 515.5 Powerplants automatically classified as "existing."

(a) Any powerplant which was operational on or before April 20, 1977, is automatically classified as "existing" and subject to the provisions of Title III of the Act.

(b) Any powerplant for which a contract for construction or acquisition was signed prior to November 9, 1978, and which does not have a design capability to consume any fuel at a fuel heat input of 100 million BTU's per hour or greater, is automatically classified as "existing" and subject to the provisions of Title III of the Act.

(c) Any powerplant for which a contract for construction or acquisition was signed before November 9, 1978, and which was operational on or before May 8, 1979, is automatically classified as "existing" and subject to the provisions of Title III of the Act upon filing with ERA of a certification. This certification must be made by a duly authorized officer of the electric utility which owns, operates or controls the powerplant. This filing will not be deemed by ERA to be a formal request for classification under this part.

(d) Any powerplant which was completed and for which ownership of the unit was transferred from the manufacturer to a purchaser on or before April 20, 1977 shall be automatically classified as "existing" and subject to the provisions of Title III of the Act upon the submission of the evidence required by § 515.7(a)(3).

(e) Any powerplant for which a contract for construction or acquisition was signed prior to November 9, 1978 and which is:

(1) A prefabricated packaged boiler or a combustion turbine that was shipped by the manufacturer to the user by November 9, 1978 is automatically classified as "existing" upon the submission of a certification to such effect by a duly authorized officer of the electric utility that owns, operates or controls your powerplant and the evidence required by § 515.7(a)(4).

(2) A field-erected unit, the main stream drum of which was in place by November 9, 1978, is automatically classified as existing upon the submission of a certification to such effect by a duly authorized officer of the electric utility that owns, operates or controls your powerplant and the evidence required by § 515.7(a)(5).

§ 515.6 Powerplants which ERA will classify as "existing."

ERA will classify an eligible powerplant as "existing" if you demonstrate to the satisfaction of ERA that the cancellation, rescheduling or modification of the construction or acquisition of your powerplant would result in a substantial financial penalty or an adverse effect on the electric system reliability.

(a) *Substantial financial penalty.* (1) ERA will take into consideration any financially-related factor which you consider appropriate in reaching a determination on substantial financial penalty. If you demonstrate to the satisfaction of ERA that, as of November 9, 1978, you have expended at least 25 percent of the total projected project cost, ERA will classify your facility as "existing." In computing the 25 percent expenditure, you must include only nonrecoverable outlays expended as of November 9, 1978.

EXAMPLE: You are constructing a facility which can use either petroleum or coal, and the following outlays have been made and are projected:

	Outlays	
	As of 11/9/78	Total projected project cost
Oil handling equipment, including storage	$1,000,000	$2,000,000
Boiler and other equipment	4,000,000	7,000,000

In general, ERA would define a maximum of $1,000,000 as a non-recoverable outlay (oil handling equipment, oil storage) and could probably reduce this amount since certain items would be retained in an alternate fuel-firing system which used oil for startup and ignition. Outlays for the boiler are deemed recoverable, since they could be used in a coal facility, even though you would be required to spend an additional amount for pollution control and coal handling and storage facilities. (You may indicate your assessment of the impact of this additional amount by addressing paragraph (a)(2)(iii) of this section in your request.)

(2) If you have expended at least 25 percent of the total projected project cost, ERA will classify your facility as "existing." If you have expended less than 25 percent under the test set forth above, you may still request classification from ERA. Your request for classification may address, among others, the following factors:

(i) The nonrecoverable outlays you would incur by cancelling, rescheduling, or modifying your current proposed powerplant in order to burn an alternate fuel or fuel mixture;

(ii) The total projected project cost and percentage of completion of the project at November 9, 1978;

(iii) The impact that cancelling, rescheduling, or modifying your present powerplant would have upon your rate base and your ability to continue in business as a sound and financially viable public utility;

(iv) The site at which the facility is located; and

(v) An alternate use for the facility under construction.

(b) *Adversely affecting electric system reliability.* (1) ERA will make its determination applicable to electric system reliability on a case-by-case basis, after consultation with FERC and the appropriate state authority.

(2) One of the considerations ERA will employ is whether the reserve margin of the electric region in which you propose to locate your powerplant would be reduced to less than 20 percent during the 12-month period after you expect your proposed powerplant to begin operation, assuming your proposed powerplant is not completed. Firm purchases and sales to or from the electric region will be included in ERA's evaluation. The reserve margin percentage is computed by subtracting the normal peak load expected during the 12-month period from the system's total capacity, including the additional capacity that will be available through interconnection, and dividing the result by the projected normal peak load during the delay.

(3) Notwithstanding paragraph (b)(2) of this section, if you wish to demonstrate that your own electric utility's ability to provide reliable service will be adversely affected during this period, regardless of circumstances pertaining to your electric region, you may present whatever evidence you deem appropriate.

§ 515.7 Evidence required in support of a request for classification.

(a)(1) You must submit a separate request for classification for each facility at a single site. Each request must be in writing, and must be signed by the duly authorized officer of the company that owns, operates or controls the powerplant. Your request must include:

(i) A complete description of the transitional facility;

(ii) A statement of the date on which the contract for the construction or acquisition of the powerplant was signed and a description of the components or services contracted for; and

(iii) A statement of the date on which your powerplant became or is scheduled to become operational.

(2) ERA may request that you submit copies of any contracts concerned with the construction or acquisition of the powerplant.

(3) If your request is made pursuant to § 515.5(d), to document that the unit was completed prior to April 20, 1977, you must submit a certification from a duly authorized officer of the manufacturer to that effect. To document that ownership was transferred

prior to April 20, 1977, you must submit evidence which clearly demonstrates the transfer of ownership.

(4) If your request is made pursuant to § 515.5(e)(1), to document that the unit was shipped by November 9, 1978, you must submit a statement of the date it was shipped by the manufacturer and either a copy of the bill of lading from the shipment of the prefabricated boiler or combustion turbine or a dated photograph of the prefabricated boiler or combustion turbine after it has been set in place.

(5) If your request is made pursuant to § 515.5(e)(2), to document that the main steam drum was in place by November 9, 1978, you must submit a statement of the date it was in place and either a copy of the bill of lading for the shipment of the main steam drum or a dated photograph of the main steam drum after it has been set in place.

(b)(1) If you wish to show that you will incur a substantial financial penalty, your request for classification must include the information listed below:

(i) A statement of the total projected project cost of your transitional facility projected as of November 9, 1978;

(ii) An itemized list of the project expenditures as of November 9, 1978;

(iii) An itemized list of any financial penalties you will incur by cancelling or terminating contracts signed as of November 9, 1978, for the project;

(iv) An itemized list of your recoverable expenditures for the project;

(v) An itemized list of the nonrecoverable outlays for the project; and/or

(vi) Any other relevant information you feel ERA should consider in reaching its determination, including information relating to the factors listed in § 515.6(a), above.

(2) You should provide sufficient detail to enable ERA to evaluate your claim of substantial financial penalty. When providing itemized lists, you may aggregate costs of minor items in a reasonable manner, but ERA may require you to specify these costs if the cost categories are too vague or the costs are substantial.

(3) ERA may request that you submit copies of the sections of the engineering design plan and copies of environmental analyses or their summaries which describe in detail the design specifications, the construction schedule and the estimated engineering and contingency costs of the transitional facility.

(c)(1) If you wish to show an adverse effect on electric system reliability, your request for classification must include:

(i) A description of your own service area and its interconnection with other utilities;

(ii) Projections of peakload for your service area during the period of the delay that would be caused by the cancellation or redesign of the transitional facility;

(iii) The net dependable electrical capacity and peak loads for this service area for the 12 months following the expected operational date of the facility, including interconnections (if you are claiming an adverse impact on reliability during a period after the 12 months, you must provide this data for the period commensurate with the time of your anticipated reliability difficulties);

(iv) Your service area's reserve margin during the 1-year period after you expect your proposed powerplant to begin operation; and

(v) Any other relevant information you feel ERA should consider in reaching its determination.

(2) You should provide sufficient detail to enable ERA to evaluate your claim of an adverse effect on electric system reliability.

(3) ERA will conduct the required regional reliability analysis for your electric region. You are invited to assist ERA by providing the additional projected regional load and generation data needed to evaluate the reliability of your electric region. ERA will utilize its own generation and load projection data base if you do not provide the necessary data.

Subpart C—Major Fuel-Burning Installations

§ 515.10 Eligibility.

You are eligible to submit a request to ERA to have your transitional facility classified as "existing" if you can demonstrate to the satisfaction of ERA that a contract for the construction or acquisition of the installation was signed prior to November 9, 1978.

§ 515.11 Installations automatically considered to be "new."

If a contract for the construction or acquisition of the installation was not signed prior to November 9, 1978, the installation is automatically considered to be "new" and subject to the provisions of Title II of the Act.

[44 FR 69920, Dec. 5, 1979]

§ 515.12 Installations automatically considered to be "existing."

(a) Any installation which was operational on or before April 20, 1977, is automatically classified as "existing" and subject to the provisions of Title III of the Act.

(b) Any installation for which a contract for construction or acquisition was signed prior to November 9, 1978, and which does not have a design capability to consume any fuel at a fuel heat input rate of 100 million BTU's per hour or greater, is automatically classified as "existing" and subject to the provisions of Title III of the Act.

(c) Any installation for which a contract for construction or acquisition was signed prior to November 9, 1978, and which was operational on or before May 8, 1979, is automatically classified as "existing" and subject to the provisions of Title III of the Act upon filing with ERA of a certification. This certification must be made by a duly authorized officer of the installation. This filing will not be deemed by ERA to be a formal request for classification under this part.

(d) Any installation which was completed and for which ownership was transferred from the manufacturer to a purchaser prior to April 20, 1977, shall be automatically classified as "existing" and subject to the provisions of Title III of the Act upon the submission of the evidence required by § 515.15(a)(3).

(e) Any installation for which a contract for construction or acquisition was signed prior to November 9, 1978 and which is:

(1) A prefabricated packaged boiler that was shipped by the manufacturer to the user by November 9, 1978, is automatically classified as "existing" upon the submission of a certification to such effect by a duly authorized officer of the company that owns, operates or controls your installation and the evidence required by § 515.15(a)(4).

(2) A field-erected unit, the main steam drum of which was in place by November 9, 1978, is automatically classified as existing upon the submission of a certification to such effect by a duly authorized officer of the company that owns, operates or controls your installation and the evidence required by § 515.15(a)(5).

[44 FR 60692, Oct. 19, 1979. Redesignated and amended at 44 FR 69920, Dec. 5, 1979]

§ 515.13 Installations which ERA will classify as "existing."

ERA will classify an eligible installation as "existing" if you demonstrate to the satisfaction of ERA that the cancellation, rescheduling, or modification of the construction or acquisition of your installation would result in a substantial financial penalty or a significant operational detriment.

(a) *Substantial financial penalty.* (1) ERA will take into consideration any financially-related factor which you consider appropriate in reaching its determination on substantial financial penalty. If you demonstrate to the satisfaction of ERA that you have expended at least 25 percent of the total projected project cost as of November 9, 1978, ERA will classify your installation as "existing." In computing the 25 percent expenditures, you must include only nonrecoverable outlays expended as of November 9, 1978.

EXAMPLE: You are constructing a facility which can use either petroleum or coal, and the following outlays have been made and are projected:

	Outlays	
	As of 11/9/78	Total projected project cost
Oil handling equipment, including storage	$1,000,000	$2,000,000

	Outlays	
	As of 11/9/78	Total projected project cost
Boiler and other equipment	4,000,000	7,000,000

In general, ERA would define a maximum of $1,000,000 as a nonrecoverable outlay (oil handling equipment & oil storage) and would probably reduce this amount since certain items would be retained in an alternate fuel-firing system which used oil for startup and ignition. Outlays for the boiler are deemed recoverable, since they could be used in a coal fired facility, even though you would be required to spend an additional amount for pollution control and coal handling and storage facilities. [You may indicate your assessment of the impact of this additional amount by addressing paragraph (a)(2)(iii) of this section in your request.]

(2) If you have expended at least 25 percent of the total projected project cost, ERA will classify your facility as "existing." If you have expended less than 25 percent under the test set forth above, you may still request classification from ERA. Your request for classification may address, among others, the following factors:

(i) The nonrecoverable outlays you would incur by cancelling, rescheduling or modifying your current proposed installation in order to burn an alternate fuel or fuel mixture;

(ii) The total projected project cost and percentage of completion of the project at November 9, 1978; and

(iii) The impact that cancelling, rescheduling, or modifying your proposed installation would have upon your ability to continue in business as a sound and financially viable entity. (In the case of a subsidiary company, ERA intends to review the financial effect on the parent company unless you can demonstrate to ERA why this would not be justified).

(b) *Significant operational detriment.* ERA will make its determination under this subsection on a case-by-case basis; however, you should indicate the operational detriment you would have incurred if you had cancelled, rescheduled, or modified your installation to burn an alternate fuel or fuel mixture at November 9, 1978. Your request for classification should address the following factors:

(1) The extent of construction and anticipated start-up date;

(2) The potential impact of the loss of production which could not be rescheduled elsewhere;

(3) The potential impact on employment, including the number and type of jobs lost, excluding those that may be absorbed elsewhere within your parent company; and

(4) The anticipated annual capacity utilization factor of the unit, as well as seasonal or other variations in use.

§ 515.15 Evidence required in support of a request for classification.

(a)(1) You must submit a separate request for classification for each facility at a single site. Each request must be in writing and must be signed by the duly authorized officer of the company that owns, operates or controls the installation. Your request for classification must include:

(i) A complete description of the transitional facility;

(ii) A statement of the date on which a contract for the construction or acquisition of the installation was signed, and a description of the components or services contracted for; and

(iii) A statement of the date on which your installation became or is scheduled to become operational.

(2) ERA may request that you submit copies of any contracts concerned with the construction or acquisition of the installation.

(3) If your request is made pursuant to § 515.12(d), to document that the unit was completed prior to April 20, 1977, you must submit a certification from a duly authorized officer of the manufacturer to that effect. To document that ownership was transferred prior to April 20, 1977, you must submit evidence which clearly demonstrates the transfer of ownership.

(4) If your request is made pursuant to § 515.12(e)(1), to document that the unit was shipped by November 9, 1978, you must submit a statement of the date it was shipped by the manufacturer and either a copy of the bill of lading for the shipment of the prefabricated boiler or a dated photograph of the prefabricated boiler after it has been set in place.

(5) If your request is made pursuant to § 515.12(e)(2), to document that the main steam drum was in place by November 9, 1978, you must submit a statement of the date it was in place and either a copy of the bill of lading for the shipment of the main steam drum or a dated photograph of the main steam drum after it has been set in place.

(b)(1) If you wish to show that you will incur a substantial financial penalty, your request for classification must include:

(i) A statement of the total projected project cost of your transitional facility projected as of November 9, 1978;

(ii) An itemized list of the project expenditures as of November 9, 1978;

(iii) An itemized list of any financial penalties you will incur by cancelling or terminating contracts for the project signed as of November 9, 1978;

(iv) An itemized list of your recoverable expenditures for the project;

(v) An itemized list of the nonrecoverable outlays for the project; and/or

(vi) Any other relevant information you feel ERA should consider in reaching its determination, including information relating to the factors listed in § 515.13(a), of this part.

(2) You should provide sufficient detail to enable ERA to evaluate your claim of substantial financial penalty. When providing itemized lists, you may aggregate costs of minor items in a reasonable manner, but ERA may require you to specify these costs if the cost categories are too vague or the costs are substantial.

(3) ERA may request that you submit copies of the sections of the engineering design plan and copies of environmental analyses or their summaries which describe in detail the design specifications, the construction schedule and the estimated engineering and contingency costs of the transitional facility.

(c) If you wish to show that you will incur a significant operation detriment, your request for classification should include any relevant information you feel ERA should consider in reaching its determination, including information relating to the factors listed in § 515.13(b) of this part. You should provide sufficient detail to enable ERA to evaluate your claim of significant operational detriment.

(d) ERA may request any additional evidence it deems necessary to adequately review your request for classification.

Subpart D—Definitions

§ 515.20 Definitions.

(a) All terms defined in this subpart shall apply only to Part 515, Transitional Facilities. These definitions are not applicable to and may differ from the definitions promulgated or to be promulgated under other regulations implementing FUA.

(b) Throughout this part, the "Act" or "FUA" means the Powerplant and Industrial Fuel Use Act of 1978.

(c) Unless otherwise expressly provided; for purposes of this part of these regulations, the term:

(1) "Alternate fuel" means electricity or any fuel, other than natural gas or petroleum. The term includes:

(i) Coal;

(ii) Solar energy;

(iii) Petroleum coke, shale oil, uranium, biomass, and municipal, industrial, or agricultural wastes, wood and renewable and geothermal energy sources;

(iv) Liquid, solid, or gaseous waste byproducts of refinery or industrial operations which are commercially unmarketable, either by reason of quality or quantity;

(v) Any fuel derived from an alternate fuel; and

(vi) Waste gases from industrial operations.

(2) "Btu" means British thermal unit.

(3) "Coal" means anthracite, bituminous and sub-bituminous coal, lignite, and any fuel derivative thereof.

(4) "Conference" means an informal meeting, incident to any proceeding, between ERA and any interested person.

(5) "Construction" means substantial construction in terms of an actual and meaningful commitment to building the powerplant or MFBI, and includes more than merely clearing a

site or putting in foundation pilings for the unit.

(6) "Contract for construction or acquisition" means a legally-binding agreement or agreements for substantial onsite construction or reconstruction, or for the purchase or rental of significant equipment or appurtenances required for the construction or operation of a powerplant or MFBI, including, but not necessarily limited to, the boiler and its major components, fuel-handling equipment and pollution control equipment. This term shall not include contracts for the purchase of land, site clearance or preparation, or the installation of foundation pilings.

(7) "Duly authorized officer" means the Chief Executive Officer or his designee of a company that owns, operates or controls a facility.

(8) "Duly authorized representative" means a person who has been designated to appear before ERA in connection with a proceeding on behalf of a person interested in or aggrieved by that proceeding. The appearance may consist of the submission of applications, requests, statements, memoranda of law, other documents, or of a personal appearance, oral communication, or any other participation in the proceeding.

(9) "Electric powerplant" means any stationary electric generating unit, consisting of a boiler, a combustion turbine unit, a generator or a combined cycle unit, which produces electric power for purposes of sale or exchange, and:

(i) Has the design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 100 million Btu's per hour or greater.

(ii) As used herein, the term "electric generating unit" does not include—

(A) Any electric generating unit subject to the licensing jurisdiction of the Nuclear Regulatory Commission; and

(B) Any cogeneration facility, less than half of the annual electric power generation of which is sold or exchanged for resale.

(10) "Electric region"—The following is a list of electric regions for use with regard to this part. The regions are identified by FERC Power Supply areas as authorized by section 202(a) of the Federal Power Act except where noted.

(i) Each grouping meets one or more of the following criteria:

(A) Existing centrally-dispatched pools and hourly power brokers;

(B) Systems with joint planning and construction agreements;

(C) Systems with coordination agreements in the areas of:

(*1*) Generation reserve and system reliability criteria;

(*2*) Capacity and energy exchange policies;

(*3*) Maintenance scheduling;

(*4*) Emergency procedures for dealing with Capacity or fuel shortages;

(D) Systems within the same National Electric Council (NERC) region with historical coordination policies.

(ii) The Power Supply Areas (PSA's), referred to in the definition of electric regions, were first defined by the Federal Power Commission in 1936. The most recent reference to them is given in the 1970 National Power Survey, Vol. I, Pg. I-3-16. In cases where you find an ambiguity in a regional assignment, you shall consult with ERA for an official determination.

(iii) *Electric region groupings.*

	DOE (FERC) power supply areas
(A) Allegheny Power System (APS)	7, except Duquesne.
(B) American Electric Power System (AEP).	Entire AEP System.
(C) New England Planning Pool (NEPOOL).	1, 2.
(D) New York Planning Pool (NYPP).	3, 4.
(E) Pennsylvania-New Jersey-Maryland Interconnection (PJM).	5, 6.
(F) Commonwealth Edison Company.	14.
(G) Florida Coordination Group (FCG).	24.
(H) Middle South Utilities	25.
(I) Southern Company	22, 23.
(J) Gulf States Group	35.
(K) Tennessee Valley Authority (TVA).	20.
(L) Virginia-Carolina Group (VACAR).	18, 21.
(M) Central Area Power Coordination Group (CAPCO).	Cleveland Electric Illuminating Company, Toledo Edison Company, Ohio Edison Company, Duquesne Light Company.

	DOE (FERC) power supply areas
(N) Cincinnati, Columbus, Dayton Group (CCD)	Cincinnati Gas and Electric Company, Columbus and Southern Ohio Electric Company, Dayton Power and Light Company.
(O) Kentucky Group	19.
(P) Indiana Group	Indiana Utilities except AEP.
(Q) Illinois-Missouri Group (ILLMO)	15, 40.
(R) Michigan Electric Coordinated Systems (MECS)	11.
(S) Wisconsin-Upper Michigan Group (WUMS)	13.
(T) Mid-Continent Area Power Pool	16, 17, 26, 27, 28.
(U) Missouri-Kansas Group (MOKAN)	29, 24.
(V) Oklahoma Group	33, 36.
(W) Texas Interconnected Systems (TIS)	37, 38.
(X) Rocky Mountain Power Pool (RMPP)	31, 32.
(Y) Northwest Power Pool (NWPP)	30, 42, 43, 44, 45.
(Z) Arizona-New Mexico Group	39, 48 within Arizona.
(AA) Southern California-Nevada	47, 48 in Nevada and California.
(BB) Northern California-Nevada	46.
(CC) Alaska [non-interconnected systems to be considered separately]	49.
(DD) Idaho-Utah Group	41.

(11) "Electric utility" means any person, including any affiliate, or Federal agency, who sells electric power.

(12) "ERA" means the Economic Regulatory Administration of the Department of Energy.

(13) "Facility" means an electric powerplant or major fuel-burning installation.

(14) "FERC" means the Federal Energy Regulatory Commission.

(15) "Installation" means "major fuel-burning installation."

(16) "Fuel heat input rate" means the hourly fuel feed rate multiplied by the gross heating value of the fuel at 60 degrees F. The rate, expressed in millions of BTU's per hour, measures the maximum capacity of the unit and is not related to the rate of actual use. The fuel input rate also reflects the highest rate which can be attained in the unit among the various rates associated with the different fuel capabilities of the unit.

(17) "Main steam drum" means the drum in the boiler where the process of steam separation occurs.

(18) "Main steam drum in place" means that the main steam drum has been lifted to and hung on the field-erected boiler, so that the main steam drum is blocked or braced in place.

(19) "Major fuel-burning installation," means a stationary unit consisting of a boiler, which:

(i) Has a design capability of consuming any fuel, or mixture thereof, at a fuel heat input rate of 100 million BTU's per hour or greater.

(ii) "Major fuel-burning installation" does not include:

(A) Any electric powerplant; or

(B) Any pump or compressor used solely in connection with the production, gathering, transmission, storage, or distribution of gases or liquids, but only if there is certification to ERA of such use.

(C) Steam generators for crude oil recovery.

(20) "MFBI" means "major fuel burning installation."

(21) "Mixture" when used in relation to fuels used in a unit, means a mixture of petroleum or natural gas and an alternate fuel, or a combination of such fuels used simultaneously or alternately in such unit.

(22) "Nonrecoverable outlays" are those expenditures you have made for your transitional facility, as of November 9, 1978, which could not be used in the construction or operation of a facility to burn an alternate fuel, including any expenditures you would be required to make as a result of cancelling contracts signed prior to November 9, 1978. In determining nonrecoverable outlays, you must select the method which results in the least amount of nonrecoverable outlays. The following items are to be excluded from nonrecoverable outlays:

(i) Reimbursements from selling or salvaging equipment or appurtenances associated with the petroleum/gas boiler system; and

(ii) Expenditures for equipment or appurtenances which can be used elsewhere by the owner or operator of the powerplant or installation.

(23) "Operational" means that a unit is used and useful, has completed its testing phase and is capable of producing a product or providing a service on a continuing basis.

(24) "Person" means:

(i) Any individual corporation, company, partnership, association, firm, institution, society, trust, joint venture, or joint stock company;

(ii) Any State, the District of Columbia, Puerto Rico, and any territory or possession of the United States;

(iii) Any agency or instrumentality (including any municipality) thereof; or

(iv) A parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls.

(25) "Powerplant" means "electric powerplant."

(26) "Reconstruction" occurs when:

(i) For electric powerplants, your capital expenditure as defined by FERC on a cumulative basis for the current calendar year and preceding 2 calendar years equals or exceeds 50 percent of the expenditure for an equivalent replacement unit. Reconstruction shall not include expenditures for routine operation and maintenance. Reconstruction shall include expenditures for items capitalized (i.e., not expensed) according to the FERC Uniform System of Accounts.

(ii) For MFBI's, your capital expenditure on a cumulative basis for the current calendar year and preceding 2 calendar years equals or exceeds 50 percent of the expenditure for an equivalent replacement unit. Reconstruction shall not include expenditures for routine operation and maintenance. Reconstruction shall include expenditures for items capitalized (i.e., not expensed) according to IRS standards.

(27) "Recoverable outlays" are those expenditures you have made for your transitional facility, as of November 9, 1978, which could be used in the construction or operation of a facility to burn an alternate fuel. The following items are to be included as recoverable outlays:

(i) Reimbursements from selling or salvaging equipment or appurtenances associated with the petroleum/gas boiler system; and

(ii) Expenditures for equipment or appurtenances which can be used elsewhere by the owner or operator or the powerplant or installation.

(28) "Request for classification" means the formal request for classification of a facility as "existing" made to ERA through submission of appropriate forms and other information pertaining to eligibility and evidentiary requirements as stated in these regulations under this part.

(29) "Total projected project cost" means total expenditures, projected as of November 9, 1978, required to perform the feasibility study, engineering, and labor for the construction of your planned facility, as well as all expenditures required for the purchase of the boiler and/or nonboiler and all of its components, fuel-handling equipment, pollution control equipment, and other appurtenances necessary for the construction and operation of the facility. In calculating the total projected project cost, expenditures for marketing studies and land acquisition must be excluded.

(30) "Transitional facility" means a facility which was not operational on April 20, 1977, but for which a contract for the construction or acquisition was signed prior to November 9, 1978.

(31) "Turbine generator or combustion turbine generator" means an electric power-generating unit that is a combination of a rotary engine driven by a gas under pressure that is created by the combustion of any fuel, with an electric power generator driven by the engine.

[44 FR 60692, Oct. 19, 1979, as amended at 44 FR 69920, Dec. 5, 1979]

Subpart E—Administrative Provisions

§ 515.25 Purpose and scope.

This subpart establishes the general procedures that are applicable to this part.

§ 515.26 Notice and public comment.

When ERA receives your properly filed request for classification under this part, it will publish a notice in the FEDERAL REGISTER. ERA will provide in the notice a period of no less than 21 days for interested persons to file written data, views or arguments. ERA will not provide an opportunity for a public hearing.

§ 515.27 Conferences.

(a) You may file a written request for a conference with ERA regarding your request for classification. The request must be filed at the address provided in § 515.35. ERA in its discretion will decide whether to hold a conference.

(b) Actual notice of the time, place, and nature of the conference will be provided to the person who requested the conference. ERA will determine who may attend a conference, but a conference will generally include only the representative of the person requesting the conference, government representatives, and other persons requested by the person requesting the conference.

(c) When ERA convenes a conference in accordance with this section, any person invited may present views as to the issue or issues involved. You may submit documentary evidence at the conference. ERA will not normally have a transcript of the conference prepared but may do so at its discretion. However, a summary of major points discussed will be prepared by ERA and placed in the public record with confidential material deleted.

(d) Because a conference is solely for the exchange of views incident to a request for classification, ERA will not prepare a transcript, issue a final report or finding unless ERA in its discretion determines that it would be advisable.

§ 515.28 Appearance before ERA.

(a) A person may participate in any proceeding described in this part on his own behalf or by a duly authorized representative. Any request for classification filed by a duly authorized representative must contain a statement by such person certifying that he is a duly authorized representative. Falsification of the certification will subject the person to the sanctions stated in 18 U.S.C. 1001.

(b) ERA may deny, temporarily or permanently, the privilege of participating in conferences, including oral presentations, to any individual who is found by ERA:

(1) To have made false or misleading statements, either orally or in writing;

(2) To have filed false or materially altered documents, affidavits or writings;

(3) To lack the specific authority to represent the person seeking an ERA action; or

(4) To have disrupted or to be disrupting a proceeding.

§ 515.29 Computation of time.

(a) *Days.* (1) When ERA computes time in days under these regulations, ERA will not include the day of the act (or default) from which a period of time begins to run. ERA will include the last day of the period, unless it is a Saturday, Sunday or Federal legal holiday, in which case the period runs until the end of the next normal working day that is not a Federal legal holiday.

(2) ERA shall exclude Saturdays, Sundays or intervening Federal legal holidays from its computation of time when the period of time allowed or prescribed in the regulations is 7 days or less.

(b) *Additional time after service by mail.* Whenever ERA serves by mail decision, notice, interpretation or other document, which may specify a time period for you to perform an act, refrain from performing an act, or commence a proceeding, you may add 3 days to the period prescribed.

§ 515.30 Service.

(a) ERA will serve all decisions personally or by certified mail unless otherwise provided in these regulations. All other documents will be sent by ERA by first class mail.

(b) ERA will consider service upon your duly authorized representative to be service upon you.

(c) Service by mail is effective upon mailing. ERA will consider official United States postal receipts from certified mailing as *prima facie* evidence of service.

§ 515.31 General filing requirements.

(a) *Where to submit.* You must file your request for classification with ERA at the address provided in § 515.35.

(b) *When to submit.* Submit your request for classification under the provisions of this part within 30 days after the effective date of this final rule.

(c) *Number of copies.* You should submit four copies of your request for classification.

(d) *Completed filing.* (1) Your request for classification is considered to be filed when you have submitted four copies of your request and any required supporting documentation, and it has been accepted by ERA. If for any reason your request for classification is not acceptable, ERA will notify you within 42 days (6 weeks) from the date of receipt of any deficiencies or defects contained in your request.

(2) If ERA requests other documents or additional information from you, these will be considered to be filed upon receipt unless ERA advises you to the contrary within a reasonable time.

(e) *Signing and attestation.* (1) If you file a request for classification under this part on behalf of a company or corporation, a duly authorized official of that company or corporation must attest in writing as to the accuracy of all of the facts and statements contained in that request.

(2) If you file a request for classification under this part on behalf of a subsidiary of a company or corporation, a duly authorized official of both the controlling or parent company or corporation and its subordinate or subsidiary company or corporation must attest in writing as to the accuracy of all facts and statements contained in that request.

(3) If you file a request for classification under this part on behalf of an entity other than a company or corporation, a duly authorized official of that entity must attest in writing as to the accuracy of all of the facts and statements contained in that request.

(4) All requests, comments, attestations or other documents filed under this part by a duly authorized representative, as defined by § 515.20(c)(8), must contain the written attestation by that person that he is a duly authorized representative and state the basis for his authority.

(f) *Labeling.* You should clearly label any request for classification or other document that you file with ERA, as "Request for Classification as an Existing Facility" both on the document and on the outside of the envelope in which the document is transmitted.

(g) *Obligation to supply information when you file a request for classification, and other documents relevant thereto.* You are under a continuing obligation during the proceeding to provide the ERA with any new or newly discovered information concerning significantly changed circumstances relevant to the facility.

(h) *Request for confidential treatment.* (1)(i) If you wish to file a document with ERA claiming that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552 as amended) or is otherwise exempt by law from public disclosure, and if you wish to request ERA not to disclose such information, you must comply with the Department of Energy's Freedom of Information regulations set forth in 10 CFR Part 1004 (44 FR 1908, Jan. 8, 1979).

(2) ERA retains the right to make its own determination with regard to any claim of confidentiality. Notice of the decision by ERA to deny such claim, in whole or in part, and an opportunity to respond will be given to the person claiming confidentiality of information no less than 7 days prior to the public disclosure of such information.

(3) This subsection does not apply where information is being submitted on an ERA form which contains its own instructions as to requests for confidential treatment of information provided.

(4) Each request for ERA action must be submitted as a separate document, even if the request deals with the same or a related issue, act or transaction, or is submitted in connection with the same proceeding.

§ 515.32 Extension of time.

ERA may, in its discretion, provide an extension of time to file a request for classification if you can show good cause for the extension. You should submit your request for an extension within 30 days after the effective date of this rule.

§ 515.33 Effective date of decision.

Any decision issued by ERA under this part is effective on the date issued against all persons having actual notice of it. Such decision is deemed to be issued on the date it is signed by an authorized representative of ERA, unless the decision or other determination states otherwise.

§ 515.34 Order of precedence.

If there is any conflict or inconsistency between the provisions of this subpart and any other provision of this part, the provisions of this subpart shall contol as it relates to classifications of Transitional Facilities. ERA determinations on requests for classification that are received by ERA on or before the effective date of this final rule shall be made on the basis of the revised interim rule, or upon this final rule where the application of the final rule would result in a more favorable disposition of your request. For requests made after the effective date of this rule ERA shall apply the provisions of this final rule.

§ 515.35 Addresses for filing documents with the ERA.

All requests, reports, ERA forms, written communications or other documents are to be filed with the Assistant Administrator for Fuels Conversion, Economic Regulatory Administration, Attention: Office of Public Hearing Management, 2000 M Street, N.W., Washington, D.C., 20461.

§ 515.36 Office of Public Information.

The Office of Public Information (2000 M Street, N.W., Washington, D.C., Room B-110) is available for public inspection of documents and copying of the following information:

(a) A list of all persons who have filed a request for classification for designation as existing facilities.

(b) Each decision on a request for classification which will contain a statement setting forth the relevent facts and legal basis of each decision, with confidential information deleted, as well as written comments received from interested persons in connection with a request.

PART 516—[RESERVED]

SUBCHAPTER G—NATURAL GAS (ECONOMIC REGULATORY ADMINISTRATION)

PART 580—CURTAILMENT PRIORITIES FOR ESSENTIAL AGRICULTURAL USES

Sec.
580.01 Purpose.
580.02 Definitions.
580.03 Curtailment priorities.
580.04 Administrative procedures. [Reserved]

AUTHORITY: Secs. 401, 403, Pub. L. 95-621, 92 Stat. 3394-3395, 3396; secs. 301(b), 402(a), Pub. L. 95-91, 91 Stat. 578, 594, (42 U.S.C. 7115(b), 7117(a)); E.O. 12009, 42 FR 46267.

SOURCE: 44 FR 15646, Mar. 15, 1979, unless otherwise noted.

§ 580.01 Purpose.

The purpose of this part is to implement the authority granted to the Secretary of Energy in section 401 of the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3394-3395 (1978).

§ 580.02 Definitions.

(a) Terms defined in section 2 of the Natural Gas Policy Act of 1978 shall have the same meaning, as applicable, for purposes of this part, unless further defined in paragraph (b) of this section.

(b) The following definitions are applicable to this part:

(1) Commercial establishment—means any establishment, (including institutions and local, state and federal government agencies) engaged primarily in the sale of goods or services, where natural gas is used for purposes other than those involving manufacturing or electric power generation.

(2) Essential agricultural use—means any use of natural gas:

(i) For agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying; or

(ii) As a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food which the Secretary of Agriculture determines is necessary for full food and fiber production.

(3) Essential agricultural user—means any person who uses natural gas for an essential agricultural use as defined in paragraph (b)(2) of this section.

(4) Hospital—means a facility whose primary function is delivering medical care to patients who remain at the facility, including nursing and convalescent homes. Outpatient clinics or doctors' offices are not included in this definition.

(5) High-priority use—means any use of natural gas by a high-priority user as defined in paragraph (a)(6) of this section.

(6) High-priority user—means, in no specific order, any person who uses natural gas:

(i) In a residence, or

(ii) In a commercial establishment in amounts of less than 50 Mcf on a peak day; or

(iii) In any school or hospital; or

(iv) For minimum plant protection when operations are shut down, for police protection, for fire protection, in a sanitation facility, in a correctional facility, or for emergency situations pursuant to 18 CFR 2.78(a)(4).

(7) Interstate pipeline—means any person engaged in natural gas transportation subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act.

(8) Residence—means a dwelling using natural gas predominately for residential purposes such as space heating, air conditioning, hot water heating, cooking, clothes drying, and other residential uses, and includes apartment buildings and other multiunit residential buildings.

(9) School—means a facility, the primary function of which is to deliver instruction to regularly enrolled students in attendance at such facility. Facilities used for both educational and non-educational activities are not included under this definition unless the latter are merely incidental to the delivery of instruction.

§ 580.03 Curtailment priorities.

(a) Notwithstanding any provision of law other than section 401(b) of the Natural Gas Policy Act of 1978, or any other rule, regulation, or order of the Department of Energy, the Federal Energy Regulatory Commission or their predecessor agencies, and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless:

(1) Such curtailment does not reduce the quantity of natural gas delivered for such use below the use requirement certified by the Secretary of Agriculture under section 401(c) of the Natural Gas Policy Act of 1978 in order to meet the requirements of full food and fiber production; or

(2) Such curtailment is necessary in order to meet the requirements of high-priority users; or

(3) The Federal Energy Regulatory Commission, in consultation with the Secretary of Agriculture, determines, by rule or order issued pursuant to section 401(b) of the Natural Gas Policy Act of 1978, that use of a fuel (other than natural gas) is economically practicable and that the fuel is reasonably available as an alternative for such essential agricultural use.

(b) Any essential agricultural user who also qualifies as a high-priority user shall be a high-priority user for purposes of paragraph (a) of this section.

(c) The specific relative order of priority for all uses and users of natural gas, including high-priority and essential agricultural uses and users, shall remain as reflected in effective curtailment plans of interstate pipelines filed with the Federal Energy Regulatory Commission to the extent that the relative order of priorities does not conflict with paragraph (a) of this section.

(d) Nothing in this rule shall prohibit the injection of natural gas into storage by interstate pipelines or deliveries to its customers for their injection into storage unless it is demonstrated to the Federal Energy Regulatory Commission that these injections or deliveries are not reasonably necessary to meet the requirements of high-priority users or essential agricultural uses.

§ 580.04 Administrative procedures. [Reserved]

PART 590—ADMINISTRATIVE PROCEDURES WITH RESPECT TO THE IMPORT AND EXPORT OF NATURAL GAS

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AUTHORITY: Secs. 301(b), 402(f), and 644, Pub. L. 95-91, 91 Stat. 578, 585, and 599 (42 U.S.C. 7151(b), 7172(f), and 7254), Sec. 3, Act of June 21, 1938, c. 556, 52 Stat. 822 (15 U.S.C. 717b); E.O. 12009 (42 FR 46267, September 15, 1977); DOE Delegation Order Nos. 0204-111 and 0204-127 (49 FR 6684, February 22, 1984; 54 FR 11437, March 20, 1989).

SOURCE: 54 FR 53531, Dec. 29, 1989, unless otherwise noted.

Subpart A—General Provisions

§ 590.100 OMB Control Numbers.

The information collection requirements contained in this part have been approved by the Office of Management and Budget under Control No. 1903-0081.

§ 590.101 Purpose and scope.

The purpose of this part is to establish the rules and procedures required to be followed by persons to obtain authorizations from DOE to import or export natural gas under the Natural Gas Act and by all other persons interested in participating in a natural gas import or export proceeding before the agency. This part establishes the procedural rules necessary to implement the authorities vested in the Secretary of Energy by sections 301(b) and 402(f) of the DOE Act, which have been delegated to the Assistant Secretary.

§ 590.102 Definitions.

As used in this part:

(a) *"Assistant Secretary"* means the Assistant Secretary for Fossil Energy or any employee of the DOE who has been delegated final decisional authority.

(b) *"Contested proceeding"* means a proceeding:

(1) Where a protest or a motion to intervene, or a notice of intervention, in opposition to an application or other requested action has been filed, or

(2) Where a party otherwise notifies the Assistant Secretary and the other parties to a proceeding in writing that it opposes an application or other requested action.

(c) *"Decisional employee"* means the Assistant Secretary, presiding officials at conferences, oral presentations or trial-type hearings, and any other employee of the DOE, including consultants and contractors, who are, or may reasonably be expected to be, involved in the decision-making process, including advising the Assistant Secretary on the resolution of issues involved in a proceeding. The term includes those employees of the DOE assisting in the conduct of trial-type hearings by performing functions on behalf of the Assistant Secretary or presiding official.

(d) *"DOE"* means the Department of Energy, of which FE is a part.

(e) *"DOE Act"* means the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.).

(f) *"FE"* means the Office of The Assistant Secretary for Fossil Energy.

(g) *"FERC"* means the Federal Energy Regulatory Commission.

(h) *"Interested person"* means a person, other than a decisional employee, whose interest in a proceeding goes beyond the general interest of the public as a whole and includes applicants, intervenors, competitors of applicants, and other individuals and organizations, including non-profit and public interest organizations, and state, local, and other public officials, with a proprietary, financial or other special interest in the outcome of a proceeding. The term does not include other federal agencies or foreign governments and their representatives, unless the agency, foreign government, or representative of a foreign government is a party to the proceeding.

(i) "*Natural gas*" means natural gas and mixtures of natural gas and synthetic natural gas, regardless of physical form or phase, including liquefied natural gas and gels primarily composed of natural gas.

(j) "*NGA*" means the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821 (15 U.S.C. 717 et seq.).

(k) "*Off-the-record communication*" means a written or oral communication not on the record which is relevant to the merits of a proceeding, and about which the parties have not been given reasonable prior notice of the nature and purpose of the communication and an opportunity to be present during such communication or, in the case of a written communication, an opportunity to respond to the communication. It does not include communications concerned solely with procedures which are not relevant to the merits of a proceeding. It also does not include general background discussions about an entire industry or natural gas markets or communications of a general nature made in the course of developing agency policy for future general application, even though these discussions may relate to the merits of a particular proceeding.

(l) "*Party*" means an applicant, any person who has filed a motion for and been granted intervenor status or whose motion to intervene is pending, and any state commission which has intervened by notice pursuant to § 590.303(a).

(m) "*Person*" means any individual, firm, estate, trust, partnership, association, company, joint-venture, corporation, United States local, state and federal governmental unit or instrumentality thereof, charitable, educational or other institution, and others, including any officer, director, owner, employee, or duly authorized representative of any of the foregoing.

(n) "*Presiding official*" means any employee of the DOE who has been designated by the Assistant Secretary to conduct any stage of a proceeding, which may include presiding at a conference, oral presentation, or trial-type hearing, and who has been delegated the auhority of the Assistant Secretary to make rulings and issue orders in the conduct of such proceeding, other than final opinions and orders, orders to show cause, emergency interim orders, or conditional decisions under subpart D and orders on rehearing under subpart E.

(o) "*Proceeding*" means the process and activity, and any part thereof, instituted by FE either in response to an application, petition, motion or other filing under this part, or on its own initiative, by which FE develops and considers the relevant facts, policy and applicable law concerning the importation or exportation of natural gas and which may lead to the issuance of an order by the Assistant Secretary under subparts D and E.

(p) "*State commission*" means the regulatory body of a state or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the state or municipality, or having any regulatory jurisdiction over parties involved in the import or export arrangement.

§ 590.103 General requirements for filing documents with FE.

(a) Any document, including but not limited to an application, amendment of an application, request, petition, motion, answer, comment, protest, complaint, and any exhibit submitted in connection with such documents, shall be filed with FE under this part. Such document shall be considered officially filed with FE when it has been received and stamped with the time and date of receipt by the Office of Fuels Programs, FE. Documents transmitted to FE must be addressed as provided in § 590.104. All documents and exhibits become part of the record in the official FE docket file and will not be returned. An original and fifteen (15) copies of all applications, filings and submittals shall be provided to FE. No specific format is required. Applicants required to file quarterly reports as a condition to an authorization need only file an original and four (4) copies.

(b) Upon receipt by FE, each application or other initial request for action shall be assigned a docket number. Any petition, motion, answer, request, comment, protest, complaint or other document filed subsequently in a docketed proceeding with FE shall refer to the assigned docket number. All documents shall be signed either by the person upon whose behalf the document is filed or by an authorized representative. Documents signed by an authorized representative shall contain a certified statement that the representative is a duly authorized representative unless the representative has a certified statement already on file in the FE docket of the proceeding. All documents shall also be verified under oath or affirmation by the person filing, or by an officer or authorized representative of the firm having knowledge of the facts alleged. Each document filed with FE shall contain a certification that a copy has been served as required by § 590.107 and indicate the date of service. Service of each document must be made not later than the date of the filing of the document.

(c) A person who files an application shall state whether, to the best knowledge of that person, the same or a related matter is being considered by any other part of the DOE, including the FERC, or any other Federal agency or department and, if so, shall identify the matter and the agency or department.

§ 590.104 Address for filing documents.

All documents filed under this part shall be addressed to: Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Docket Room 3F-056, FE-50, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585. All hand delivered documents shall be filed with the Office of Fuels Programs at the above address between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

§ 590.105 Computation of time.

(a) In computing any period of time prescribed or allowed by these regulations, the day of the act or event from which the designated period of time begins to run is not included. The period of time begins to run the next day after the day of the act or event. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal Federal holiday, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a legal Federal holiday, unless otherwise provided by this part or by the terms of an FE order. Documents received after the regular business hours of 8 a.m. to 4:30 p.m. are deemed filed on the next regular business day.

(b) When a document is required to be filed with FE within a prescribed time, an extension of time to file may be granted for good cause shown.

(c) An order is issued and effective when date stamped by the Office of Fuels Programs, FE, after the order has been signed unless another effective date is specified in the order.

§ 590.106 Dockets.

The FE shall maintain a docket file of each proceeding under this part, which shall contain the official record upon which all orders provided for in subparts D and E shall be based. The official record in a particular proceeding shall include the official service list, all documents filed under § 590.103, the official transcripts of any procedures held under subpart C, and opinions and orders issued by FE under subparts D and E, and reports of contract amendments under § 590.407. All dockets shall be available for inspection and copying by the public during regular business hours between 8 a.m. and 4:30 p.m. Dockets are located in the Office of Fuels Programs, FE, Docket Room 3F-056, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585.

§ 590.107 Service.

(a) An applicant, any other party to a proceeding, or a person filing a protest shall serve a copy of all documents filed with FE upon all parties unless otherwise provided in this part. The copy of a document served upon parties shall be a true copy of the document filed with FE, but does not have to be a copy stamped with the time and date of receipt by FE. The FE shall maintain an official service list for each proceeding which shall be provided upon request.

(b) When the parties are not known, such as during the initial comment period following publication of the notice of application, service requirements under paragraph (a) of this section may be met by serving a copy of all documents on the applicant and on FE for inclusion in the FE docket in the proceeding.

(c) All documents required to be served under this part may be served by hand, certified mail, registered mail, or regular mail. It shall be the responsibility of the serving party to ensure that service is effected in a timely manner. Service is deemed complete upon delivery or upon mailing, whichever occurs first.

(d) Service upon a person's duly authorized representatives on the official service list shall constitute service upon that person.

(e) All FE orders, notices, or other FE documents shall be served on the parties by FE either by hand, registered mail, certified mail, or regular mail, except as otherwise provided in this part.

§ 590.108 Off-the-record communications.

(a) In any contested proceeding under this part:

(1) No interested person shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any decisional employee.

(2) No decisional employee shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any interested person.

(3) A decisional employee who receives, makes, or knowingly causes to be made an oral off-the-record communication prohibited by this section shall prepare a memorandum stating the substance of the communication and any responses made to it.

(4) Within forty-eight (48) hours of the off-the-record communication, a copy of all written off-the-record communications or memoranda prepared in compliance with paragraph (a)(3) of this section shall be delivered by the decisional employee to the Assistant Secretary and to the Deputy Assistant Secretary for Fuels Programs. The materials will then be made available for public inspection by placing them in the docket associated with the proceeding.

(5) Requests by a party for an opportunity to rebut, on the record, any facts or contentions in an off-the-record communication may be filed in writing with the Assistant Secretary. The Assistant Secretary shall grant such requests only for good cause.

(6) Upon being notified of an off-the-record communication made by a party in violation of this section, the Assistant Secretary may, to the extent consistent with the interests of justice and the policies of the NGA and the DOE Act, require the party to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(b) The prohibitions of paragraph (a) of the section shall apply only to contested proceedings and begin at the time either a protest or a motion to intervene or notice of intervention in opposition to the application or other requested action is filed with FE, or a party otherwise specifically notifies the Assistant Secretary and the other parties in writing of its opposition to the application or other requested action, whichever occurs first.

§ 590.109 FE investigations.

The Assistant Secretary or the Assistant Secretary's delegate may investigate any facts, conditions, practices, or other matters within the scope of this part in order to determine whether any person has violated or is about to violate any provision of the NGA or other statute or any rule, regulation, or order within the Assistant Secretary's jurisdiction. In conducting such investigations, the Assistant Secretary or the Assistant Secretary's delegate may, among other things, subpoena witnesses to testify, subpoena or otherwise require the submission of documents, and order testimony to be taken by deposition.

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Subpart B—Applications for Authorization to Import or Export Natural Gas

§ 590.201 General.

(a) Any person seeking authorization to import or export natural gas into or from the United States, to amend an existing import or export authorization, or seeking any other requested action, shall file an application with the FE under the provisions of this part.

(b) Applications shall be filed at least ninety (90) days in advance of the proposed import or export or other requested action, unless a later date is permitted for good cause shown.

[54 FR 53531, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

§ 590.202 Contents of applications.

(a) Each application filed under § 590.201 shall contain the exact legal name of the applicant, the names, titles, and mailing addresses of a maximum of two persons for the official service list, a statement describing the action sought from FE, the justification for such action, including why the proposed action is not inconsistent with the public interest, and the FE docket number, if applicable.

(b) Each application shall include the matters listed below to the extent applicable. All factual matters shall be supported to the extent practicable by the necessary data or documents. Copies of relevant documents filed or intended to be filed with FERC may be submitted to satisfy the requirements of this section. Topics to be addressed or described shall include:

(1) The scope of the project, including the volumes of natural gas involved, expressed in either Mcf or Bcf and their Btu equivalents, the dates of commencement and completion of the proposed import or export, and the facilities to be utilized or constructed;

(2) The source and security of the natural gas supply to be imported or exported, including contract volumes and a description of the gas reserves supporting the project during the term of the requested authorization;

(3) Identification of all the participants in the transaction, including the parent company, if any, and identification of any corporate or other affiliations among the participants;

(4) The terms of the transaction, such as take-or-pay obligations, make-up provisions, and other terms that affect the marketability of the gas;

(5) The provisions of the import arrangement which establish the base price, volume requirements, transportation and other costs, and allow adjustments during the life of the project, and a demonstration as to why the import arrangement is and will remain competitive over the life of the project and is otherwise not inconsistent with the public interest;

(6) For proposed imports, the need for the natural gas by the applicant or applicant's prospective customers, including a description of the persons who are expected to purchase the natural gas; and for proposed exports, the lack of a national or regional need for the gas; and

(7) The potential environmental impact of the project. To the extent possible, the application shall include a listing and description of any environmental assessments or studies being performed on the proposed gas project. The application shall be updated as the status of any environmental assessments changes.

(c) The application shall also have attached a statement, including a signed opinion of legal counsel, showing that a proposed import or export of natural gas is within the corporate powers of the applicant and a copy of all relevant contracts and purchase agreements.

(d) The Assistant Secretary or the Assistant Secretary's delegate may at any time require the applicant and other parties to make supplemental filings of additional information necessary to resolve issues raised by the application.

(e) All information and data filed in support of or against an application will be placed in the official FE docket file of the proceeding and will not be afforded confidential treatment, unless the party shows why the information or data should be exempted from public disclosure and the Assistant Secretary or Assistant Secretary's delegate determines that such information or data shall be afforded confidential treatment. Such determination shall be made in accordance with 10 CFR 1004.11.

[54 FR 53531, Dec. 29, 1989; 55 FR 18227, May 1, 1990]

§ 590.203 Deficient applications.

If an application is incomplete or otherwise deemed deficient, the Assistant Secretary or the Assistant Secretary's delegate may require the applicant to submit additional information or exhibits to remedy the deficiency. If the applicant does not remedy the deficiency within the time specified by the Assistant Secretary or the Assistant Secretary's delegate, the application may be dismissed without prejudice to refiling at another time.

§590.204 Amendment or withdrawal of applications.

(a) The applicant may amend or supplement the application at any time prior to issuance of the Assistant Secretary's final opinion and order resolving the application, and shall amend or supplement the application whenever there are changes in material facts or conditions upon which the proposal is based.

(b) The Assistant Secretary may for good cause shown by motion of a party or upon the Assistant Secretary's own initiative decline to act on, in whole or in part, an amendment or supplement requested by an applicant under paragraph (a) of this section.

(c) After written notice to FE and service upon the parties of that notice an applicant may withdraw an application. Such withdrawal shall be effective thirty (30) days after notice to FE if the Assistant Secretary does not issue an order to the contrary within that time period.

§ 590.205 Notice of applications.

(a) Upon receipt of an application, the FE shall publish a notice of application in the FEDERAL REGISTER. The notice shall summarize the proposal. Except in emergency circumstances, generally the notice shall provide a time limit of not less than thirty (30) days from the notice's date of publication in the FEDERAL REGISTER for persons to file protests, comments, or a motion to intervene or notice of intervention, as applicable. The notice may also request comments on specific issues or matters of fact, law, or policy raised by the application.

(b) The notice of application shall advise the parties of their right to request additional procedures, including the opportunity to file written comments and to request that a conference, oral presentation, or trial-type hearing be convened. Failure to request additional procedures at this time shall be deemed a waiver of any right to additional procedures should the Assistant Secretary decide to grant the application and authorize the import or export by issuing a final opinion and order in accordance with 590.316.

(c) Where negotiations between the DOE, including FE, and a foreign government have resulted in a formal policy agreement or statement affecting a particular import or export proceeding, FE shall include in the notice of application a description of the terms or policy positions of that agreement or statement to the extent they apply to the proceeding, and invite comment. A formal policy agreement or statement affecting a particular import or export proceeding that is arrived at after publication of the notice of application shall be placed on the record in that proceeding and the parties given an opportunity to comment thereon.

§ 590.206 Notice of procedures.

In all proceedings where, following a notice of application and the time specified in the notice for the filing of responses thereto, the Assistant Secretary determines to have additional procedures, which may consist of the filing of supplemental written comments, written interrogatories or other discovery procedures, a conference, oral presentation, or trial-type hearing, the Assistant Secretary shall provide the parties with notice of the procedures the Assistant Secretary has determined to follow in the proceeding and advise the parties of their right to request any additional procedures in accordance with the provisions of § 590.310. The notice of procedures may identify and request comments on specific issues of fact, law, or policy relevant to the proceeding and may establish a time limit for requesting additional procedures.

§ 590.207 Filing fees.

A non-refundable filing fee of fifty dollars ($50) shall accompany each application filed under § 590.201. Checks shall be made payable to "Treasury of the United States."

§ 590.208 Small volume exports.

Any person may export up to 100,000 cubic feet of natural gas (14.73 pounds per square inch at 60 degrees Fahrenheit) or the liquefied or compressed equivalent thereof, in a single shipment for scientific, experimental, or other non-utility gas use without prior authorization of the Assistant Secretary.

§ 590.209 Exchanges by displacement.

Any importer of natural gas may enter into an exchange by displacement agreement without the prior authorization of the Assistant Secretary when the net effect of the exchange is no different than under the importer's existing authorization. An exchange by displacement is an arrangement whereby authorized imported volumes are displaced by other gas for purposes of storage or flexibility. The term of the exchange agreement may not exceed five (5) years, the volumes imported may not exceed the importer's existing import authorization, and no actual natural gas may flow across the United States border under the terms of the exchange agreement. Any importer who enters into an exchange agreement pursuant to this section shall file with FE within fifteen (15) days after the start up of the exchange, a written description of the transaction, the exact volume of natural gas to be displaced, the name of the purchaser, and the import authorization under which the exchange is being carried out.

Subpart C—Procedures

§ 590.301 General.

The procedures of this subpart are applicable to proceedings conducted on all applications or other requested actions filed under this part. The Assistant Secretary may conduct all aspects of the procedures of this subpart or may designate a presiding official pursuant to § 590.314.

§ 590.302 Motions and answers.

(a) Motions for any procedural or interlocutory ruling shall set forth the ruling or relief requested and state the grounds and the statutory or other authority relied upon. All written motions shall comply with the filing requirements of § 590.103. Motions made during conferences, oral presentations or trial-type hearings may be stated orally upon the record, unless the Assistant Secretary or the presiding official determines otherwise.

(b) Any party may file an answer to any written motion within fifteen (15) days after the motion is filed, unless another period of time is established by the Assistant Secretary or the presiding official. Answers shall be in writing and shall detail each material allegation of the motion being answered. Answers shall state clearly and concisely the facts and legal authorities relied upon.

(c) Any motion, except for motions seeking intervention or requesting that a conference, oral presentation or trial-type hearing be held, shall be deemed to have been denied, unless the Assistant Secretary or presiding official acts within thirty (30) days after the motion is filed.

§ 590.303 Interventions and answers.

(a) A state commission may intervene in a proceeding under this part as a matter of right and become a party to the proceeding by filing a notice of intervention no later than the date fixed for filing motions to intervene in the applicable FE notice or order. If the period for filing the notice has expired, a state commission may be permitted to intervene by complying with the filing and other requirements applicable to any other person seeking to become a party to the proceeding as provided in this section.

(b) Any other person who seeks to become a party to a proceeding shall file a motion to intervene, which sets out clearly and concisely the facts upon which the petitioner's claim of interest is based.

(c) A motion to intervene shall state, to the extent known, the position taken by the movant and the factual and legal basis for such positions in order to advise the parties and the Assistant Secretary as to the specific issues of policy, fact, or law to be raised or controverted.

(d) Motions to intervene may be filed at any time following the filing of an application, but no later than the date fixed for filing such motions or notices in the applicable FE notice or order, unless a later date is permitted by the Assistant Secretary for good cause shown and after considering the impact of granting the late motion of the proceeding. Each motion or notice shall list the names, titles, and mailing addresses of a maximum of two persons for the official service list.

(e) Any party may file an answer to a motion to intervene, but such answer shall be made within fifteen (15) days after the motion to intervene was filed, unless a later date is permitted by the Assistant Secretary for good cause shown. Answers shall be in writing. Answers shall detail each material allegation of the motion to intervene being answered and state clearly and concisely the facts and legal authorities relied upon. Failure to answer is deemed a waiver of any objection to the intervention. This paragraph does not prevent the Assistant Secretary from ruling on a motion to intervene and issuing a final opinion and order in accordance with § 590.316 prior to the expiration of the fifteen (15) days in which a party has to answer a motion to intervene.

(f) If an answer in opposition to a motion to intervene is timely filed or if the motion to intervene is not timely filed, then the movant becomes a party only after the motion to intervene is expressly granted.

(g) If no answer in opposition to a motion to intervene is filed within the period of time prescribed in paragraph (e) of this section, the motion to intervene shall be deemed to be granted, unless the Assistant Secretary denies the motion in whole or in part or otherwise limits the intervention prior to the expiration of the time allowed in paragraph (e) for filing an answer to the motion to intervene. Where the motion to intervene is deemed granted, the participation of the intervenor shall be limited to matters affecting asserted rights and interests specifically set forth in the motion to intervene, and the admission of such intervenor to party status shall not be construed as recognition by FE that the intervenor might be aggrieved because of any order issued.

(h) In the event that a motion for late intervention is granted, an intervenor shall accept the record of the proceeding as it was developed prior to the intervention.

§ 590.304 Protests and answers.

(a) Any person objecting to an application filed under 590.201 of this part or to any action taken by FE under this part may file a protest. No particular form is required. The protest shall identify the person filing the protest, the application or action being objected to, and provide a concise statement of the reasons for the protest.

(b) The filing of a protest, without also filing a motion to intervene or a notice of intervention, shall not make the person filing the protest a party to the proceeding.

(c) A protest shall be made part of the official FE docket file in the proceeding and shall be considered as a statement of position of the person filing the protest, but not as establishing the validity of any assertion upon which the decision would be based.

(d) Protests shall be served on the applicant and all parties by the person filing the protest. If the person filing the protest is unable to provide service on any person identified as a party to the proceeding after a good faith effort, then FE shall effect service. However, when the parties are not known, service requirements may be met by serving a copy on the applicant and on FE as provided in § 590.107(b).

(e) Protests may be filed at any time following the filing of an application, but no later than the date fixed for filing protests in the applicable FE notice or order, unless a later date is permitted by the Assistant Secretary for good cause shown.

(f) Any party may file an answer to a protest but such answer must be filed within fifteen (15) days after the protest was filed, unless a later date is permitted by the Assistant Secretary for good cause shown.

[54 FR 53531, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

§ 590.305 Informal discovery.

The parties to a proceeding may conduct discovery through use of procedures such as written interrogatories or production of documents. In response to a motion by a party, the Assistant Secretary or presiding official may determine the procedures to be utilized for discovery if the parties cannot agree on such procedures.

§ 590.306 Subpoenas.

(a) Subpoenas for the attendance of witnesses at a trial-type hearing or for the production of documentary evidence may be issued upon the initiative of the Assistant Secretary or presiding official, or upon written motion of a party or oral motion of a party during a conference, oral presentation, or trial-type hearing, if the Assistant Secretary or presiding official determines that the evidence sought is relevant and material.

(b) Motions for the issuance of a subpoena shall specify the relevance, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, specification to the extent possible of the documents sought and the facts to be proven by them, the issues to which they relate, and why the information or evidence was not obtainable through discovery procedures agreed upon by the parties.

(c) If service of a subpoena is made by a United States Marshal or a Deputy United States Marshal, service shall be evidenced by their return. If made by another person, that person shall affirm that service has occurred and file an affidavit to that effect with the original subpoena. A witness who is subpoenaed shall be entitled to witness fees as provided in § 590.315(c).

§ 590.307 Depositions.

(a) Upon motion filed by a party, the Assistant Secretary or presiding official may authorize the taking of testimony of any witness by deposition. Unless otherwise directed in the authorization issued, a witness being deposed may be examined regarding any matter which is relevant to the issues involved in the pending proceeding.

(b) Parties authorized to take a deposition shall provide written notice to the witness and all other parties at least ten (10) days in advance of the deposition unless such advance notice is waived by mutual agreement of the parties.

(c) The requesting motion and notice shall state the name and mailing address of the witness, delineate the subject matters on which the witness is expected to testify, state the reason why the deposition should be taken, indicate the time and place of the deposition, and provide the name and mailing address of the person taking the deposition.

(d) A witness whose testimony is taken by deposition shall be sworn in or shall affirm concerning the matter about which the witness has been called to testify before any questions are asked or testimony given. A witness deposed shall be entitled to witness fees as provided in § 590.315(c).

(e) The moving party shall file the entire deposition with FE after it has been subscribed and certified. No portion of the deposition shall constitute a part of the record in the proceedings unless received in evidence, in whole or in part, by the Assistant Secretary or presiding official.

§ 590.308 Admissions of facts.

(a) At any time prior to the end of a trial-type hearing, or, if there is no trial-type hearing, prior to the issuance of a final opinion and order under § 590.404, any party, the Assistant Secretary, or the presiding official may serve on any party a written request for admission of the truth of any matters at issue in the proceeding that relate to statements or opinions of fact or of the application of law to fact.

(b) A matter shall be considered admitted and conclusively established for the purposes of any proceeding in which a request for admission is served unless, within fifteen (15) days of such time limit established by the Assistant Secretary or presiding official, the party to whom the request is directed answers or objects to the request. Any answer shall specifically admit or deny the matter, or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny, unless the answering party states that, after reasonable inquiry, the answering party has been unable to obtain sufficient information to admit or deny. If an objection is made, the answering party shall state the reasons for the objection.

(c) If the Assistant Secretary or presiding official determines that an answer to a request for admission does not comply with the requirements of this section, the Assistant Secretary or presiding official may order either that the matter is admitted or that an amended answer be served.

(d) A copy of all requests for admission and answers thereto shall be filed with FE in accordance with § 590.103. Copies of any documents referenced in the request shall be served with the request unless they are known to be in the possession of the other parties.

(e) The Assistant Secretary or presiding official may limit the number of requests for admission of facts in order to expedite a proceeding through elimination of duplicative requests.

§ 590.309 Settlements.

The parties may conduct settlement negotiations. If settlement negotiations are conducted during a conference, at the request of one of the parties, the Assistant Secretary or presiding official may order that the discussions be off-the-record with no transcript of such settlement negotiations being prepared for inclusion in the official record of the proceeding. No offer of settlement, comment or discussion by the parties with respect to an offer of settlement shall be subject to discovery or admissible into evidence against any parties who object to its admission.

§ 590.310 Opportunity for additional procedures.

Any party may file a motion requesting additional procedures, including the opportunity to file written comments, request written interrogatories or other discovery procedures, or request that a conference, oral presentation or trial-type hearing be held. The motion shall describe what type of procedure is requested and include the information required by §§ 590.311, 590.312 and 590.313, as appropriate. Failure to request additional procedures within the time specified in the notice of application or in the notice of procedure, if applicable, shall constitute a waiver of that right unless the Assistant Secretary for good cause shown grants additional time for requesting additional procedures. If no time limit is specified in the notice or order, additional procedures may be requested at any time prior to the issuance of a final opinion and order. At any time during a proceeding, the Assistant Secretary or presiding official may on his or her own initiative determine to provide additional procedures.

[54 FR 53531, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

§ 590.311 Conferences.

(a) Upon motion by a party, a conference of the parties may be convened to adjust or settle the proceedings, set schedules, delineate issues, stipulate certain issues of fact or law, set procedures, and consider other relevant matters where it appears that a conference will materially advance the proceeding. The Assistant Secretary or presiding official may delineate the issues which are to be considered and may place appropriate limitations on the number of intervenors who may participate, if two or more intervenors have substantially like interests.

(b) A motion by a party for a conference shall include a specific showing why a conference will materially advance the proceeding.

(c) Conferences shall be recorded, unless otherwise ordered by the Assistant Secretary or presiding official, and the transcript shall be made a part of the official record of the proceeding and available to the public.

§ 590.312 Oral presentations.

(a) Any party may file a motion requesting an opportunity to make an oral presentation of views, arguments, including arguments of counsel, and data on any aspect of the proceeding. The motion shall identify the substantial question of fact, law or policy at issue and demonstrate that it is material and relevant to the merits of the proceeding. The party may submit material supporting the existence of substantial issues. The Assistant Secretary or presiding official ordinarily will grant a party's motion for an oral presentation, if the Assistant Secretary or presiding official determines that a substantial question of fact, law, or policy is at issue in the proceeding and illumination of that question will be aided materially by such an oral presentation.

(b) The Assistant Secretary or presiding official may require parties making oral presentations to file briefs or other documents prior to the oral presentation. The Assistant Secretary or presiding official also may delineate the issues that are to be considered at the oral presentation and place appropriate limitations on the number of intervenors who may participate if two or more intervenors have substantially like interests.

(c) Oral presentations shall be conducted in an informal manner with the Assistant Secretary or the presiding official and other decisional employees presiding as a panel. The panel may question those parties making an oral presentation. Cross-examination by the parties and other more formal procedures used in trial-type hearings will not be available in oral presentations. The oral presentation may be, but need not be, made by legal counsel.

(d) Oral presentations shall be recorded, and the transcript shall be made part of the official record of the proceeding and available to the public.

§ 590.313 Trial-type hearings.

(a) Any party may file a motion for a trial-type hearing for the purpose of taking evidence on relevant and material issues of fact genuinely in dispute in the proceeding. The motion shall identify the factual issues in dispute and the evidence that will be presented. The party must demonstrate that the issues are genuinely in dispute, relevant and material to the decision and that a trial-type hearing is necessary for a full and true disclosure of the facts. The Assistant Secretary or presiding official shall grant a party's motion for a trial-type hearing, if the Assistant Secretary or presiding official determines that there is a relevant and material factual issue genuinely in dispute and that a trial-type hearing is necessary for a full and true disclosure of the facts.

(b) In trial-type hearings, the parties shall have the right to be represented by counsel, to request discovery, to present the direct and rebuttal testimony of witnesses, to cross-examine witnesses under oath, and to present documentary evidence.

(c) The Assistant Secretary or presiding official upon his or her own initiative or upon the motion of any party may consolidate any proceedings involving common questions of fact in whole or in part for a trial-type hearing. The Assistant Secretary or presiding official may also place appropriate limitations on the number of intervenors who may participate if two or more intervenors have substantially like interests.

(d) The Assistant Secretary or presiding official may make such rulings for trial-type hearings, including delineation of the issues and limitation of cross-examination of a witness, as are necessary to obtain a full and true disclosure of the facts and to limit irrelevant, immaterial, or unduly repetitious evidence.

(e) At trial-type hearings, the Assistant Secretary or presiding official, or any other decisional employee directed by the Assistant Secretary or presiding official, may call witnesses for testimony or presenting exhibits that directly relate to a particular issue of fact to be considered at the hearing. The Assistant Secretary or presiding official, or any other decisional employee directed by the Assistant Secretary or presiding official, may also question witnesses offered by the parties concerning their testimony.

(f) Trial-type hearings shall be recorded, and the transcript shall be made part of the official record of the proceeding and available to the public.

§ 590.314 Presiding officials.

(a) The Assistant Secretary may designate a presiding official to conduct any stage of the proceeding, including officiating at a conference, oral presentation, or trial-type hearing. The presiding official shall have the full authority of the Assistant Secretary during such proceedings.

(b) A presiding official at a conference, oral presentation, or trial-type hearing shall have the authority to regulate the conduct of the proceeding including, but not limited to, determination of the issues to be raised during the course of the conference, oral presentation, or trial-type hearing, administering oaths or affirmations, directing discovery, ruling on objections to the presentation of testimony or exhibits, receiving relevant and material evidence, requiring the advance submission of written testimony and exhibits, ruling on motions, determining the format, directing that briefs be filed with respect to issues raised or to be raised during the course of the conference, oral presentation or trial-type hearing, questioning witnesses, taking reasonable measures to exclude duplicative material, and placing limitations on the number of witnesses to be called by a party.

§ 590.315 Witnesses.

(a) The Assistant Secretary or presiding official may require that the direct testimony of witnesses in trial-type hearings be submitted in advance of the hearing and be under oath, and in written form.

(b) Witnesses who testify in trial-type hearings shall be under oath or affirmation before being allowed to testify.

(c) Witnesses subpoenaed pursuant to § 590.306 shall be paid the same fees and mileage as paid for like services in the District Courts of the United States.

(d) Witnesses subpoenaed pursuant to § 590.307 shall be paid the same fees and mileage as paid for like services in the District Court of the United States.

[54 FR 53531, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

§ 590.316 Shortened proceedings.

In any proceeding where, in response to a notice of application or notice of procedures, if applicable, no party files a motion requesting additional procedures, including the right to file written comments, or the holding of a conference, oral presentation, or trial-type hearing, or where the Assistant Secretary determines that such requested additional procedures are not required pursuant to §§ 590.310, 590.311, 590.312 and 590.313, the Assistant Secretary may issue a final opinion and order on the basis of the official record, including the application and all other filings. In any proceeding in which the Assistant Secretary intends to deny the application or grant the application with the attachment of material conditions unknown to, or likely to be opposed by, the applicant, solely on the basis of the application and responses to the notice of application or notice of procedures, if applicable, without additional procedures, the Assistant Secretary shall advise the parties in writing generally of the issues of concern to the Assistant Secretary upon which the denial or material conditions would be based and provide them with an opportunity to request additional procedures pursuant to §§ 590.310, 590.311, 590.312 and 590.313.

§ 590.317 Complaints.

(a) Any person may file a complaint objecting to the actions by any other person under any statute, rule, order or authorization applicable to an existing import or export authorization over which FE has jurisdiction. No particular form is required. The complaint must be filed with FE in writing and must contain the name and address of the complainant and the respondent and state the facts forming the basis of the complaint.

(b) A complaint concerning an existing import or export authorization shall be served on all parties to the original import or export authorization proceeding either by the complainant or by FE if the complainant has made a good faith effort but has been unable to effect service.

(c) The Assistant Secretary may issue an order to show cause under § 590.401, or may provide opportunity for additional procedures pursuant to §§ 590.310, 590.311, 590.312, or § 590.313, in order to determine what action should be taken in response to the complaint.

Subpart D—Opinions and Orders

§ 590.401 Orders to show cause.

A proceeding under this part may commence upon the initiative of the Assistant Secretary or in response to an application by any person requesting FE action against any other person alleged to be in contravention or violation of any authorization, statute, rule, order, or law administered by FE applicable to the import or export of natural gas, or for any other alleged wrong involving importation or exportation of natural gas over which FE has jurisdiction. Any show cause order issued shall identify the matters of interest or the matters complained of that the Assistant Secretary is inquiring about, and shall be deemed to be tentative and for the purpose of framing issues for consideration and decision. The respondent named in the order shall respond orally or in writing, or both, as required by the order. A show cause order is not a final opinion and order.

§ 590.402 Conditional orders.

The Assistant Secretary may issue a conditional order at any time during a proceeding prior to issuance of a final opinion and order. The conditional order shall include the basis for not issuing a final opinion and order at that time and a statement of findings and conclusions. The findings and conclusions shall be based solely on the official record of the proceeding.

§ 590.403 Emergency interim orders.

Where consistent with the public interest, the Assistant Secretary may waive further procedures and issue an emergency interim order authorizing the import or export of natural gas. After issuance of the emergency interim order, the proceeding shall be continued until the record is complete, at which time a final opinion and order shall be issued. The Assistant Secretary may attach necessary or appropriate terms and conditions to the emergency interim order to ensure that the authorized action will be consistent with the public interest.

§ 590.404 Final opinions and orders.

The Assistant Secretary shall issue a final opinion and order and attach such conditions thereto as may be required by the public interest after completion and review of the record. The final opinion and order shall be based solely on the official record of the proceeding and include a statement of findings and conclusions, as well as the reasons or basis for them, and the appropriate order, condition, sanction, relief or denial.

§ 590.405 Transferability.

Authorizations by the Assistant Secretary to import or export natural gas shall not be transferable or assignable, unless specifically authorized by the Assistant Secretary.

§ 590.406 Compliance with orders.

Any person required or authorized to take any action by a final opinion and order of the Assistant Secretary shall file with FE, within thirty (30) days after the requirement or authorization becomes effective, a notice, under oath, that such requirement has been complied with or such authorization accepted or otherwise acted upon, unless otherwise specified in the order.

§ 590.407 Reports of changes.

Any person authorized to import or export natural gas has a continuing obligation to give the Assistant Secretary written notification, as soon as practicable, of any prospective or actual changes to the information submitted during the application process upon which the authorization was based, including, but not limited to, changes to: the parties involved in the import or export arrangement, the terms and conditions of any applicable contracts, the place of entry or exit, the transporters, the volumes accepted or offered, or the import or export price. Any notification filed under this section shall contain the FE docket number(s) to which it relates. Compliance with this section does not relieve an importer or exporter from responsibility to file the appropriate application to amend a previous import or export authorization under this part whenever such changes are contrary to or otherwise not permitted by the existing authorization.

Subpart E—Applications for Rehearing

§ 590.501 Filing.

(a) An application for rehearing of a final opinion and order, conditional order, or emergency interim order may be filed by any party aggrieved by the issuance of such opinion and order within thirty (30) days after issuance. The application shall be served on all parties.

(b) The application shall state concisely the alleged errors in the final opinion and order, conditional order, or emergency interim order and must set forth specifically the ground or grounds upon which the application is based. If an order is sought to be vacated, reversed, or modified by reason of matters that have arisen since the issuance of the final opinion and order, conditional order, or emergency interim order, the matters relied upon shall be set forth with specificity in the application. The application shall also comply with the filing requirements of § 590.103.

§ 590.502 Application is not a stay.

The filing of an application for rehearing does not operate as a stay of the Assistant Secretary's order, unless specifically ordered by the Assistant Secretary.

§ 590.503 Opinion and order on rehearing.

Upon application for rehearing, the Assistant Secretary may grant or deny rehearing or may abrogate or modify the final opinion and order, conditional order, or emergency interim order with or without further proceedings.

§ 590.504 Denial by operation of law.

Unless the Assistant Secretary acts upon the application for rehearing within thirty (30) days after it is filed, it is deemed to be denied. Such denial shall constitute final agency action for the purpose of judicial review.

§ 590.505 Answers to applications for rehearing.

No answers to applications for rehearing shall be entertained. Prior to the issuance of any final opinion and order on rehearing, however, the Assistant Secretary may afford the parties an opportunity to file briefs or answers and may order that a conference, oral presentation, or trial-type hearing be held on some or all of the issues presented by an application for rehearing.

PART 595—CERTIFICATION OF USE OF NATURAL GAS TO DISPLACE FUEL OIL

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595.3 Eligibility for certification.
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595.8 Termination of eligibility.
595.9 Request for reconsideration.

AUTHORITY: Secs. 102 (3) and (8), 501(e), 644, Pub. L. 95-91, 91 Stat. 567, 568, 588, 599; 42 U.S.C. 7112(3), (8), 7191(e), 7254; E.O. 12009, 42 FR 46267.

SOURCE: 44 FR 47922, Aug. 16, 1979, unless otherwise noted.

§ 595.1 Purpose and scope.

The extensive reliance of the United States on imported crude oil and petroleum products has severe detrimental effects on the security of our energy supplies, balance of payments, and economic well-being. The national interest requires that every practical step be taken to restrain imports quickly. In addition, because of the current shortage of middle distillates as a result of crude oil shortfalls, it is necessary to restrain consumption of that fuel oil in order to rebuild stocks for next winter's heating season.

The use of natural gas is one vehicle for displacing fuel oils. The regulations in this part will facilitate oil displacement by establishing a procedure whereby the Administrator may certify to the FERC that use of natural gas, purchased by an end-user for its own consumption, will displace fuel oil. ERA certification is a precondition to obtaining interstate transportation of fuel oil displacement gas in accordance with FERC authorizing procedures in 18 CFR Part 284, Subpart F, or any other FERC rules or orders requiring ERA certification pursuant to this part.

§ 595.2 Definitions.

For the purpose of this part:

"Administrator" means the Administrator of ERA or his or her delegate.

"End-user" means any person, including a subsidiary or affiliated entity of that person, who purchases natural gas for consumption in that person's facilities and not for resale.

"Eligible seller" means any willing seller of natural gas.

"Eligible use" means that use of natural gas certified by the Administrator pursuant to § 595.4.

"ERA" means the Economic Regulatory Administration of the Department of Energy.

"FERC" means the Federal Energy Regulatory Commission.

"Fuel oil" means middle distillates or residual fuel oils including #1 and #2 heating oils, kerosene-base jet fuel, #4, #5, and #6 fuel oils; crude oil burned directly as a fuel; and blends of any of the above.

§ 595.3 Eligibility for certification.

Any end-user who has purchased or is in the process of contracting to purchase natural gas directly from an eligible seller to displace fuel oil may apply for certification under this part if:

(a) The natural gas will be used only to displace fuel oil which would otherwise be consumed in the end-user's facilities and not coal;

(b) The displaced fuel oil will not be used to displace coal in any of the end-user's facilities;

(c) The natural gas to be certified will be transported by an interstate pipeline company; and

(d) The authorization for the transportation of the natural gas to be certified derives from the procedures in 18 CFR Part 284, Subpart F or any other FERC rule or order requiring ERA certification pursuant to this part.

§ 595.4 Certification of eligible use.

The Administrator may certify that a purchase or proposed purchase of natural gas is for an eligible use if the end-user demonstrates, upon proper application that: (a) The natural gas will be used to displace fuel oil which would otherwise be consumed in the end-user's facilities during the term of the certification; (b) the natural gas will not be used by the end-user to displace coal in its facilities; and (c) the fuel oil displaced will not be used by the end-user to displace coal in its facilities. The initial certification will be effective for up to one year, unless the FERC authorizing procedures for the transportation of the certified gas require a shorter period of time. The Administrator also may issue a recertification, upon proper application within 60 days prior to the expiration of the initial certification or a previous recertification, which will be effective for up to one year, unless the FERC authorizing procedures for the transportation of the certified gas require a shorter period of time.

§ 595.5 Limitations of applicability.

The Administrator may determine to limit applicability of the regulations of this part to certain end-users or specific geographic areas when such limitation is in the public interest. In making a determination whether to establish any limitations, the Administrator may consider, among other criteria, the impact of certification or recertification on air quality, on regional or local energy supply, on refinery output and regional availability of petroleum products in light of refinery capabilities, on facilitating and advancing coal conversion programs, and on system supplies of natural gas.

§ 595.6 Application for certification and recertification.

(a) An end-user may apply for certification or recertification of an eligible use by filing a written application which must contain the following information:

(1) The company name, mailing address, and telephone number of the end-user, and the name of a person to contact regarding the application;

(2) The name and location of each facility to which the natural gas will be delivered and the volumes of natural gas to be received by each;

(3) An affidavit, signed by a responsible official representing the end-user which states:

(i) An estimate of the volumes, type, and sulfur content of the fuel oil which will be displaced by the natural gas at each of the end-user's facilities;

(ii) That any natural gas certified by the Administrator will be used by the end-user only to displace fuel oil and not to displace coal; and

(iii) That the end-user will not use the displaced fuel oil to displace coal in any of its facilities;

(4) The names and addresses of the eligible sellers with whom the end-user has entered into gas purchase and the interstate pipeline and local distribution companies with which the end-user has entered into transportation contracts or with whom the end-user is negotiating those contracts;

(5) A statement as to whether the applicant expects any transportation of the natural gas pursuant to 18 CFR Part 284, Subpart F, to be either self-implementing or to require a FERC transportation certificate of public convenience and necessity or whether the transportation of the oil displacement gas is authorized by another FERC rule or order;

(6) The FERC docket number and the date of filing of any application for a transportation certificate which has been filed with the FERC regarding this oil displacement gas;

(b) The Administrator may request any additional information he deems necessary.

(c) The applicant must notify ERA in writing if any of the above information is later determined to be incorrect or changed.

(d) An original and fifteen copies of the application should be submitted to:

Office of Petroleum Operations, Economic Regulatory Administration, Room 4126, 2000 M Street, NW., Washington, D.C. 20461.

(e) Notice of receipt of valid applications for certification or recertification will be published in the FEDERAL REGISTER within a reasonable time. An opportunity for public comment will be permitted for ten (10) calendar days from the date of publication, including an opportunity to request an oral presentation. After close of the comment period, the Administrator will review the application and any comments and make a decision whether or not to issue a certification or recertification. Such decision will be published in the FEDERAL REGISTER, and sent to the FERC, the applicant, and any person filing comments. The Administrator may certify an eligible use prior to the close of the comment period, if the need for certification is demonstrated to be of sufficient public interest to warrant expedited treatment.

§ 595.7 Reporting requirements.

Each end-user receiving an ERA certification or recertification shall submit a statement to ERA by the fifteenth day of each month after the first month during the term of the certification or recertification, which provides the following information for the preceding month:

(a) The total volume of natural gas obtained and used at each facility pursuant to the ERA certification to displace fuel oil;

(b) The total volume(s) and type(s) (including sulfur content) of fuel oil displaced at each facility by natural gas obtained pursuant to the ERA certification.

Monthly statements should contain the ERA certification docket number. Statements should be mailed to: Office of Petroleum Operations, Economic Regulatory Administration, Room 4126, 2000 M Street, NW., Washington, D.C. 20461.

§ 595.8 Termination of eligibility.

The Administrator may terminate a certification or recertification of an eligible use whenever the Administrator determines, after notice and opportunity to be heard, that: (a) The natural gas is no longer being used for an eligible use as defined in § 595.02; or (b) termination is in the public interest. Upon making the determination to terminate a certification or recertification, the Administrator will notify FERC immediately and request that FERC take appropriate action to terminate any related transportation authorization.

§ 595.9 Request for reconsideration.

(a) Any applicant whose application for certification or recertification has been denied, or whose certification or recertification has been terminated, may request reconsideration within 30 days of the date of the denial or termination. The request should contain a statement of facts and reasons supporting reconsideration and should be submitted in writing to: Office of Petroleum Operations, Economic Regulatory Administration, Room 4126, 2000 M Street, NW., Washington, D.C. 20461.

(b) If the Administrator fails to take action on the request for reconsideration within 30 days, the request is deemed denied.

(c) An applicant has not exhausted his administrative remedies until a request for reconsideration has been filed and acted upon or deemed denied.

SUBCHAPTER H—ASSISTANCE REGULATIONS

PART 600—FINANCIAL ASSISTANCE RULES

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ENTITLEMENTS [RESERVED]

APPENDIX A TO PART 600—GENERALLY APPLICABLE REQUIREMENTS
APPENDIX B TO PART 600—AUDIT REPORT DISTRIBUTEES

AUTHORITY: Secs. 644 and 646, Pub. L. 95-91, 91 Stat. 599, (42 U.S.C. 7254 and 7256); Pub. L. 97-258, 96 Stat. 1003-1005 (31 U.S.C. 6301-6308), unless otherwise noted.

Subpart A—General

SOURCE: 47 FR 44083, Oct. 5, 1982, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to this part appear at 53 FR 5261, Feb. 22, 1988.

§ 600.1 Purpose and scope.

The purposes of this part are to implement the Federal Grant and Cooperative Agreement Act, Pub. L. 97-258 (31 U.S.C. 6301—6308), and to establish uniform policies and procedures for the award and administration of DOE grants and cooperative agreements. This subpart (Subpart A) sets forth the policies and procedures applicable to both grants and cooperative agreements.

§ 600.2 Applicability.

(a) Except as otherwise provided by Federal statute or program rule, this part applies to any unsolicited application received and any solicitation issued on or after the effective date of this part, and to any new, continuation, or renewal award (and any subsequent subaward) with a beginning date on or after the effective date of this part.

(b) Any new, continuation, or renewal award (and any subsequent subaward) shall comply with any applicable requirement of a Federal statute or a Federal rule if the award is made on or after the effective date of the applicable statutory or regulatory requirement. Unless otherwise specified by DOE, any new, continuation, or renewal award (and any subsequent subaward) shall comply with any applicable Office of Management and Budget (OMB) Circular or governmentwide guidance in effect as of the date of such award.

(c) The disputes and appeals procedures set forth in § 600.26 shall apply to any new, continuation or renewal award made after the effective date of this paragraph, and to any active, expired, terminated, or closed-out grant or cooperative agreement provided, however, a final determination (see, § 600.26(a)) in any dispute is issued on or after the effective date of this paragraph. If requested in writing by the appellant or appellants, the Financial Assistance Appeals Board shall have jurisdiction, as provided in § 600.26(d), to decide an appeal from a final determination issued not more than 90 days before the effective date of this paragraph.

(d) The provisions of the Single Audit Act of 1984 (Pub. L. 98-502) and OMB Circular A-128, as implemented in Subpart D of this part, apply to fiscal years of State governments, local governments, or Indian tribes that begin after December 31, 1984.

(e) Financial assistance to foreign governments shall be governed by this part and the administrative requirements and cost principles applicable to State and local governments, to the extent appropriate. Foreign organizations shall likewise be covered by this part and the administrative requirements and cost principles applicable to their respective recipient type, to the extent appropriate. Any deviation from the requirements of this part and the applicable OMB circulars with respect to a foreign entity(ies) is not a deviation requiring approval in accordance with the procedures of § 600.4 of this part.

(f) *OMB Circulars.* (1) The following OMB Circulars apply as provided in paragraphs (a) and (b) of this section and the sections of this part where specific reference to any of the material is made:

(i) OMB Circular A-110, Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations (41 FR 32016, July 30, 1976).

(ii) OMB Circular A-21, Cost Principles Applicable to Grants, Contracts and Other Agreements with Institution of Higher Education (44 FR 12368, Mar. 6, 1979 as amended by 47 FR 333658, Aug. 3, 1982).

(iii) OMB Circular A-87, Cost Principles Applicable to Grants, Contracts and Other Agreements with State and Local Governments (46 FR 9548, Jan. 28, 1981).

(iv) OMB Circular A-122, Cost Principles Applicable to Grants, Contracts and Other Agreements with Nonprofit Organizations (45 FR 46022, July 8, 1980 as amended by 49 FR 18276, April 27, 1984).

(v) OMB Circular A-128, Audits of State and Local Governments (50 FR 19114, May 6, 1985).

(2) Copies of the OMB publications listed in paragraph (g)(1) may be obtained from the Office of Management and Budget, Office of Administration, Publications Unit, Washington, DC 20503 or from the cognizant administering office.

[47 FR 44083, Oct. 5, 1982, as amended at 48 FR 29184, June 24, 1983; 48 FR 34404, July 28, 1983; 50 FR 42356, Oct. 18, 1985; 51 FR 4297, Feb. 4, 1986; 54 FR 23959, June 5, 1989]

§ 600.3 Definitions.

The following definitions are provided for purposes of this part—

"Ad hoc committee" means a temporary committee established to perform a single, specific short-term task, after which the committee disbands.

"Applicant" means any individual, organization, agency, or entity which files a written application or preapplication for financial assistance with DOE or with a recipient (*i.e.* for a subaward).

"Application" means a written request for financial assistance.

"Approved budget" means a budget and any revision thereto which has been approved in writing by DOE for carrying out the purposes of a project.

"Assistance" means the transfer of money, property, services or anything of value to a recipient to accomplish a public purpose of support or stimulation authorized by Federal statute.

"Award" means the written document executed by a DOE Contracting Officer, after an application is approved, which contains the terms and conditions for providing financial assistance to the recipient.

"Awarding party" means DOE or a recipient who makes a subaward.

"Budget" means the applicant's financial expenditure plan for carrying out the proposed project. The budget shall include any cost sharing which is required by statute, rule, or the award.

"Budget period" means the interval of time, specified in the award, into which a project is divided for budgeting and funding purposes.

"Continuation award" means an award for a succeeding or subsequent budget period after the initial budget period of either an approved project period or renewal thereof.

"Contract" means a written procurement contract with a third party for the acquisition of property or services under a financial assistance award.

"Contracting Officer" means the DOE official authorized to execute awards on behalf of DOE and who is responsible for the business management and non-program aspects of the financial assistance process.

"Cooperative agreement" means a financial assistance instrument used by DOE to transfer money or property when the principal purpose of the transaction is accomplishment of a public purpose of support or stimulation authorized by Federal statute and substantial involvement is anticipated between DOE and the recipient during performance of the contemplated activity. For purposes of this part, the term "cooperative agreement" does not include nonfinancial assistance.

"Cost sharing" refers to the share of project costs required to be contributed by the recipient. Depending on the source and nature of the requirement, terms such as "matching" and "cost participation" may also be used to denote cost sharing.

"Department" or "DOE" means the United States Department of Energy.

"Director" means the Director, Procurement and Assistance Management Directorate, DOE.

"Discretionary financial assistance" means financial assistance provided under a Federal statute which authorizes DOE to select the recipient and the project to be supported and to determine the amount to be awarded.

"Extension" means an amendment of an award, which would otherwise expire, to provide additional time, and if appropriate, additional funds for completion of project activities.

"Federally recognized Indian tribal government" means the governing body or a governmental agency of any Indian tribe, band, nation or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688).

"Field readers" means persons with expertise to evaluate a specific application or category of applications. Field readers may act as independent individuals or as members of a group with the review generally being done by mail.

"Financial assistance" means the transfer of money or property to a recipient or subrecipient to accomplish a public purpose of support or stimulation authorized by Federal statute. For purposes of this part, financial assistance instruments are grants and cooperative agreements, and subawards.

"Grant" means a financial assistance instrument used by DOE to transfer money or property when the principal purpose of the transaction is accomplishment of a public purpose of support or stimulation authorized by Federal statute and no substantial involvement between DOE and the grantee during the performance of the contemplated activity is anticipated. For purposes of this part, the term "grant" does not include nonfinancial assistance.

"Head of a Contracting Activity (HCA)" means a DOE official with senior management authority for the award and administration of financial assistance instruments within one or more DOE organizational elements.

"Local government" means a local unit of government including specifically a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), sponsor group representative organization (as defined in 7 CFR 620.2, 40 FR 12472, Mar. 19, 1975), any other regional or interstate government entity, or any agency or instrumentality of a local government exclusive of local institutions of higher education and hospitals.

"Nonprofit organization" means any corporation, trust, foundation, or institution which is entitled to exemption under section 501(c)(3) of the Internal Revenue Code, or which is not organized for profit and no part of the net earnings of which inure to the benefit of any private shareholder or individual (except that the definition of "nonprofit organization" in the patent clause of § 600.33(b)(1) shall apply for purposes of the applicability of that clause).

"Objective merit review" means a thorough, consistent and independent examination of applications based on pre-established criteria by persons knowledgeable in the field of endeavor for which support is requested. This sort of review is conducted to provide advice to selecting officials based on an evaluation of the scientific or technical merit. The reviewers themselves may be engaged in comparable efforts in institutions or organizations similar to the applicant's or have in the past been directly involved in such activities.

"OMB" means the Office of Management and Budget.

"Project" means the set of activities described in an application, State plan, or other document that is approved by DOE for financial assistance (whether such financial assistance represents all or only a portion of the support necessary to carry out those activities).

"Project period" means the total period of time indicated in an award during which DOE expects to provide financial assistance. A project period may consist of one or more budget periods and may be extended by DOE.

"Recipient" means the organization, individual, or other entity that receives an award from DOE and is financially accountable for the use of any DOE funds or property provided for the performance of the project, and is legally responsible for carrying out the terms and conditions of the award.

"Renewal award" means an award which extends a project period by adding one or more additional budget periods and which makes an award of DOE financial assistance for the first budget period of the extended project period.

"Research" means any scientific or engineering activity which (1) constitutes a systematic, intensive study directed specifically toward greater knowledge or understanding of the subject studied and contributes to a continuing flow of new knowledge; or (2) is directed toward applying new knowledge to meet a recognized need; and/or (3) applies such knowledge toward the production of useful methods, including design, development and improvement of prototypes and new processes to meet established requirements.

"Responsible official" means the Head of a Departmental Element or a Program Assistant Secretary. These individuals are responsible for the system of objective merit review of financial assistance applications funded by their program or department element. The functions associated with the objective merit review may be delegated, but only to the level specified in the relevant sections of this part. The responsible official, however, remains ultimately responsible for the execution of these functions.

"Secretary" means the Secretary of the United States Department of Energy or designee.

"Small business" means a business concern, including its affiliates, which is independently owned and operated, is not dominant in its field of operation, and can qualify under the criteria concerning number of employees, average annual receipts, and other criteria as prescribed by the Small Business Administration (except that the definition of "small business" in the patent clause of § 600.33(b)(1) shall apply for purposes of the applicability of that clause).

"Socially and economically disadvantaged individuals" means individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities and/or those whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. Such individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and other specified minorities, or any other individual found to be disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act.

"Socially and economically disadvantaged small business concern" means any small business concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals, and whose management and daily business operations are controlled by one or more such individuals.

"Solicitation" means a document which requests the submission of applications and which describes program objectives, recipient and project eligibility requirements, evaluation criteria, award terms and conditions, and other information about the financial assistance opportunity.

"Standing committee" means a long-term committee established to review applications and may be used when required by legislation or when significant numbers of applications on specific topics are received periodically.

"State" or "State government" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory, possession or trust territory of the United States, or any agency or instrumentality of a State. The term does not include local governments, State hospitals, or State institutions of higher education.

"State plan" means a document required by statute to be submitted by a State in order to demonstrate compliance with the legal prerequisites for an award of nondiscretionary financial assistance.

"Subaward" means an award of financial assistance by a recipient to an eligible subrecipient when specifically authorized by statute or program rule. The term does not include a contract under a financial assistance award.

"Subrecipient" means the organization, individual, or other entity that receives a subaward.

"Terms and conditions" means the rights and obligations of the awarding party and the recipient or subrecipient set forth in a statute, this part, other rules, or otherwise set forth or incorporated by reference in the award or subaward document.

[47 FR 44083, Oct. 5, 1982, as amended at 51 FR 39366, Oct. 28, 1986; 53 FR 8045, Mar. 11, 1988; 54 FR 41945, Oct. 13, 1989]

§ 600.4 Deviations.

(a) *Definitions.* (1) "Deviation" means the use of any policy, procedure, form, standard, term, or condition which varies from a requirement of this part, or the waiver of any such requirement, unless such use or waiver is authorized by Federal statute. The use of optional or discretionary provisions of this part, including special restrictive conditions used in accordance with §§ 600.105 and 600.412, are not deviations. The waiver provisions of the patent requirements of § 600.33 are not subject to the requirements of this section and shall be administered in accordance with 41 CFR Part 9-9.

(2) "Single-case deviation" means a deviation which applies to one financial assistance transaction and one applicant, recipient, or subrecipient only.

(3) "Class deviation" means a deviation which applies to more than one financial assistance transaction, applicant, recipient, or subrecipient.

(b) *General.* The DOE officials specified in paragraph (c) of this section may authorize a deviation only upon a written determination that the deviation is—

(1) Necessary to achieve program objectives;

(2) Necessary to conserve public funds;

(3) Otherwise essential to the public interest; or

(4) Necessary to achieve equity.

(c) *Approval procedures.* (1) A deviation may be requested by DOE staff, an applicant for an award or subaward, a recipient, or a subrecipient. Such a request must be in writing and must be submitted to the responsible DOE Contracting Officer. An applicant for a subaward or a subrecipient shall submit any such request through the recipient.

(2) Except as provided in paragraph (c)(3) of this section—

(i) A single-case deviation may be authorized by the responsible Head of Contracting Activity (HCA). Any proposed single-case deviation from the requirements of § 600.33 or § 600.207 concerning patents or technical data shall be referred to the General Counsel or designee for review and concurrence prior to submission to the HCA.

(ii) A class deviation may be authorized by the Director or his or her designee.

(3) Whenever the approval of OMB, other Federal agency, or other DOE office is required to authorize a devi-

ation, the proposed deviation must be submitted to the Director or designee for concurrence prior to submission to the authorizing official. Any proposed class deviation from the requirements of § 600.33 or § 600.207 concerning patents or technical data shall be forwarded through the Assistant General Counsel for Patents.

(d) *Notice.* Whenever a request for a class deviation is approved, DOE shall publish a notice in the FEDERAL REGISTER at least 15 days before the class deviation becomes effective. Whenever a class deviation is contained in a proposed program rule, the preamble to the proposed rule shall describe the purpose and scope of the deviation.

(e) *Subawards.* A recipient may use a deviation in a subaward only with the prior written approval of a DOE Contracting Officer. If prior approval is not obtained, the use of a deviation in a subaward shall be a violation of the terms and conditions of the DOE award.

[47 FR 44083, Oct. 5, 1982, as amended at 53 FR 5261, Feb. 22, 1988; 53 FR 8045, Mar. 11, 1988]

§ 600.5 Selection of award instrument.

If DOE has administrative discretion in the selection of the award instrument, the DOE determination as to whether a program is principally one of procurement or assistance pursuant to Pub. L. 95-224 shall be based on the purpose of the program and the authorizing statute. This determination shall be either made or reviewed at a policy level within DOE. DOE shall review individual transactions that differ from this determination for consistency with Pub. L. 95-224. A grant or cooperative agreement shall be the appropriate instrument, in accordance with this part, when the principal purpose of the relationship is the transfer of money or property to accomplish a public purpose of support or stimulation authorized by Federal statute. DOE shall determine whether a grant or a cooperative agreement is the appropriate instrument in accordance with Pub. L. 95-224 and this part. DOE shall limit involvement between itself and the recipient in the performance of a project to the minimum necessary to achieve DOE program objectives.

§ 600.6 Discretionary awards.

(a) DOE may make new discretionary financial assistance awards on the basis of:

(1) Applications submitted in response to a financial assistance solicitation (See § 600.9);

(2) Unsolicited applications satisfying the selection criteria of § 600.14(e)(1);

(3) Applications submitted in response to a Program Opportunity Notice (PON) (see 48 CFR 917.72 for the submission, evaluation, and selection procedures to be used for a PON. When it is anticipated that a PON will result in a financial assistance award(s), the procedures in 48 CFR 917.72 shall be supplemented by the provisions set forth in §§ 600.9 and 600.10 to cover those solicitation and application requirements which are specific to financial assistance and for which there is no alternative coverage in 48 CFR 917.72; e.g., presubmission reviews and clearances, preaward assurances, etc.);

(4) Applications submitted in response to a Program Research and Development Announcement (see 48 CFR 917.73) if, after an application is selected for award, DOE determines that a grant or cooperative agreement is the appropriate award instrument;

(5) An application for an award to be made on a noncompetitive basis under § 600.7(b)(2); or

(6) Unsolicited applications which do not satisfy the selection criteria of § 600.14(e)(1)(ii) if such applications do satisfy one or more of the selection criteria of § 600.7(b)(2)(i).

(b) DOE may make renewal discretionary financial assistance awards on the basis of:

(1) Applications submitted in response to a financial assistance solicitation; or

(2) An application from an incumbent recipient if the award has been justified in accordance with § 600.7(b)(2).

(c) DOE shall solicit applications for discretionary financial assistance in a manner which provides for the maximum amount of competition feasible.

[53 FR 12138, Apr. 13, 1988]

§ 600.7 Eligibility.

(a) *General.* The eligibility of recipients and subrecipients and of projects for DOE financial assistance shall be determined in accordance with the applicable Federal statute or program rule, and paragraphs (b) and (c) of this section.

(b)(1) *Restricted eligibility.* If DOE restricts eligibility in a solicitation or program rule to less than all otherwise eligible applicants under paragraph (a) of this section, an explanation of why the restriction of eligibility is considered necessary shall be included in the solicitation or program rule. If the aggregate amount of DOE funds available for award under such a solicitation other than a program rule exceeds $250,000, such restriction of eligibility shall be supported by a written determination initiated by the responsible program office, which has been:

(i) Approved by the responsible program Assistant Secretary or his or her designee, who shall be at an organizational level not less than two levels above that of the project officer, and the Contracting Officer for the awarding office issuing the solicitation and

(ii) Concurred in by local legal counsel.

If the aggregate amount of DOE funds available for award is $250,000 or less, the written determination is to be approved by the Head of Contracting Activity (HCA) for the awarding office that will be issuing the solicitation and the Contracting Officer. Concurrence may be waived for a particular award or class of awards of $250,000 or less by local legal counsel, if they so elect.

(2) *Noncompetitive financial assistance.* DOE may award a grant or cooperative agreement on a noncompetitive basis (other than as a result of the acceptance of an unsolicited application meeting the selection criteria of § 600.14(e)(1)(ii) or an application for a continuation award in accordance with § 600.106(b)) only if the application satisfies one or more of the selection criteria in paragraph (b)(2)(i) of this section and is supported by a written determination of noncompetitive financial assistance prepared in accordance with the provisions of paragraphs (b)(2) (ii) and (iii) of this section. In addition, an announcement of the intent to make a noncompetitive financial assistance award and an explanation of why a noncompetitive financial assistance award is necessary shall be published in the FEDERAL REGISTER at least 14 calendar days prior to making an award. Public comments (or inquiries) to this announcement must be resolved by the DOE office issuing such announcement. Any such noncompetitive financial assistance is not subject to the solicitation requirements of § 600.9.

(i) *Criteria for justifying noncompetitive financial assistance.* In order for a noncompetitive award to be made under the authority of paragraph (b)(2) of this section, it must satisfy one or more of the following selection criteria in addition to the types of factors listed in § 600.14(d):

(A) The activity to be funded is necessary to the satisfactory completion of, or is a continuation or renewal of, an activity presently being funded by DOE or another Federal agency, and for which competition for support would have a significant adverse effect on continuity or completion of the activity.

(B) The activity(ies) is (are) being or would be conducted by the applicant using its own resources or those donated or provided by third parties; however, DOE support of that activity would enhance the public benefits to be derived and DOE knows of no other entity which is conducting or is planning to conduct such an activity(ies).

(C) The applicant is a unit of government and the activity to be supported is related to performance of a governmental function within the subject jurisdiction, thereby precluding DOE provision of support to another entity.

(D) The applicant has exclusive domestic capability to perform the activity successfully, based upon unique equipment, proprietary data, technical expertise, or other such unique qualifications.

(E) The applicant implements an agreement between the United States

Government and a foreign government to fund a foreign applicant.

(F) Time constraints associated with a public health, safety, or welfare or national security requirement preclude competition.

(G) The responsible Assistant Secretary, with the approval of the Director, determines that a noncompetitive award is in the public interest. This authority may not be delegated.

(ii) *Documentation requirements.* A determination of noncompetitive financial assistance (normally prepared by the responsible program official (project officer)) is required to explain the basis for the proposed noncompetitive award. The determination, the purpose of which is to justify funding on a noncompetitive basis, shall be placed in the award file and must, as a minimum, include the following information:

(A) Name of the sponsoring program office and the awarding office, the type of award proposed (grant or cooperative agreement), and the proposed recipient.

(B) A description of the nature of the financial assistance to be provided (e.g. research grant, conference grant, etc.), the amount and availability of DOE funds required, any cost sharing proposed or required, and the statutory authority for the proposed award.

(C) A statement of whether the application was solicited or unsolicited and the nature of any significant preapplication contact between the applicant and the Department. If received on an unsolicited basis, a statement of why the application does not meet the selection criteria of § 600.14(e)(1).

(D) To the extent relevant, a discussion of the programmatic evaluation conducted and the results of that evaluation, including the overall merit and relevance to the DOE mission, the anticipated objectives and probability of success in meeting them, the quality of the applicant's personnel and facilities, and the appropriateness and adequacy of the proposed budget.

(E) A brief description of the public purpose of support or stimulation to be served by the proposed award and, in nontechnical terms, identification of any particular significance or specialized character of the activity proposed to be funded.

(F) A statement of which one(s) of the criteria in paragraph (b)(2)(i) of this section is (are) being relied upon to justify the action and an explanation in general, nontechnical detail why each such criterion applies.

(iii) *Approval requirements.* Except as provided below, all determinations of noncompetitive financial assistance under paragraph (b)(2) of this section must be:

(A) Approved, prior to award, by the initiating program official (project officer), the responsible program Assistant Secretary or his or her designee, who shall be not less than two organizational levels above that of the project officer, and the Contracting Officer for the awarding office issuing the solicitation, and

(B) Concurred in by local legal counsel.

Where the amount of DOE funds is $100,000 or less for a noncompetitive financial assistance award under any program for which the HCA has been formally assigned cognizance, the determination shall be approved by the HCA and the Contracting Officer. Concurrence for a particular award or class of awards of $100,000 or less may be waived by local legal counsel, if they so elect.

(c) *DOE employees.* (1) An applicant individual who is a former DOE employee or an applicant organization that is substantially owned or controlled by one or more former DOE employees may be declared ineligible for DOE financial assistance if such applicant does not comply with the requirements of 10 CFR Part 1010, Subpart C.

(2) Except as provided in paragraph (c)(3) of this section, a current DOE employee and a business concern or organization substantially owned or controlled by one or more current DOE employees are not eligible for DOE financial assistance.

(3) The Director, with the concurrence of the Assistant General Counsel for Standards of Conduct, may exempt an applicant from the restriction of paragraph (c)(2) of this section if the applicant is determined to have unique expertise or technical re-

sources and if it is determined that providing financial assistance to the applicant would be in the public interest. DOE shall publish in the FEDERAL REGISTER a notice of any exemption under this paragraph at least 30 days prior to making an award to the exempted applicant. No exemption may be granted to a DOE employee who is or was involved in initiating, developing, reviewing or administering the financial assistance program under which assistance is being sought, or to a DOE employee who is considered "supervisory" under the Department of Energy Organization Act (42 U.S.C. 7211(a)).

(4) In reviewing any proposed financial assistance award, the Assistant General Counsel for Standards of Conduct shall consider the prohibition of 18 U.S.C. 203 (Section 203 prohibits a Government employee from receiving compensation from persons other than the United States for services rendered by the employee or another before a Government agency in relation to a particular matter in which the United States is a party or has a direct and substantial interest).

[47 FR 44083, Oct. 5, 1982, as amended at 53 FR 12138, Apr. 13, 1988]

§ 600.8 Small and disadvantaged business participation.

(a) DOE shall provide adequate opportunities for small businesses, including socially and economically disadvantaged small business concerns, to compete for DOE financial assistance awards consistent with the program statute or other Federal law, implementing rules, and program needs.

(b) DOE may use small business preferences or set-asides in DOE financial assistance programs only when authorized or required by Federal statute. DOE shall include a citation to such statutory authority in any solicitation that provides for small business preference or a set-aside.

(c) DOE shall require recipients and subrecipients to take affirmative action with regard to small and disadvantaged businesses in contracts under financial assistance awards and subawards only as authorized by Federal statute, program rules, and this part.

§ 600.9 Solicitation.

(a) *General.* A solicitation for financial assistance applications shall be in the form of a program rule or other publicly available document which invites the submission of applications by a common due date or within a prescribed period of time.

(1) A Program Assistant Secretary may annually issue a program notice describing research areas in which financial assistance is being made available. Such notice shall also state whether the research areas covered by the notice are to be added to those listed in a previously issued program rule. If they are to be included, then applications received as a result of the notice may be treated as having been in response to that previously published program rule. If they are not to be included, then applications received in response to the notice are to be treated as unsolicited applications. Solicitations (other than a program rule which serves to solicit applications), e.g., PONS and PRDAS, may be issued only by a DOE Contracting Officer.

(2) DOE shall publish either a copy or a notice of the availability of a financial assistance solicitation in the FEDERAL REGISTER. If the potential applicants are limited to State governments, DOE may, in advance of FEDERAL REGISTER publication, mail a copy of the solicitation simultaneously to each potential applicant. DOE shall publish solicitations or notices in the *Commerce Business Daily* when potential applicants include for-profit organizations or when there is the potential for significant contracting opportunities under the resulting financial assistance awards. In order to reach the widest possible audience of potentially interested applicants, DOE may also publish notices or copies of solicitations in trade and professional journals, news media, and use other means of communication, as appropriate.

(b) *Subawards.* In accordance with the provisions of the applicable statute and program rules, if a DOE financial assistance program involves the award of financial assistance by a recipient to a subrecipient, the recipient shall provide sufficient advance notice so that potential subrecipients may prepare timely applications and secure prerequisite reviews and approvals.

(c) *Contents of solicitation.* Each solicitation shall include the following types of information and such other information as may be necessary to allow potential applicants to decide whether to submit an application, to understand how applications will be evaluated, and to know what the obligations of a recipient would be:

(1) A control number assigned by the issuing DOE office;

(2) The amount of money available for award and, if appropriate, the expected size of individual awards broken down by areas of priority or emphasis, and the expected number of awards;

(3) The type of award instrument or instruments to be used;

(4) Catalog of Federal Domestic Assistance number for the program;

(5) Who is eligible to apply (see § 600.7);

(6) The expected duration of DOE support or the period of performance;

(7) Application form or format to be used, location for application submission, and number of copies required;

(8) The name of the responsible DOE Contracting Officer (or, for program notices, the program office contact) to contact for additional information, and, as appropriate, an address where application forms may be obtained;

(9) Whether loans are available under the DOE Minority Economic Impact (MEI) loan program, 10 CFR Part 800, to finance the cost of preparing a financial assistance application, and, if MEI loans are available, a general description of the eligibility requirements for such a loan, a reference to Catalog of Federal Domestic Assistance Number 81.063, and the name and address of the DOE office from which additional information and loan application forms can be obtained;

(10) Appropriate periods or due dates for submission of applications and a statement describing the consequences of late submission. If programs have established a series of due dates to allow for the comparison of applications against each other, these dates shall be indicated in the solicitation;

(11) The types of projects or activities eligible for support;

(12) Evaluation criteria (and the weight or relative importance of each), which may include one or more of the following or other criteria, as appropriate:

(i) Qualifications of the applicant's personnel who will be working on the project;

(ii) Adequacy of the applicant's facilities and resources;

(iii) Cost-effectiveness of the project;

(iv) Adequacy of the project plan or methodology;

(v) Management capability of the applicant;

(vi) Sources of financing available to the project. Any expectation concerning cost sharing shall be clearly stated. While cost sharing is encouraged, unless the cost sharing expectation is addressed in the solicitation, it shall not be considered in the evaluation process and shall be considered only at the time the award is negotiated.

(vii) Relationship of the proposed project to the objectives of the solicitation;

(13) A listing of program policy factors, if any, indicating the relative importance of each, if appropriate (see § 600.19(a));

(14) References to or copies of:

(i) Statutory authority for the program;

(ii) Applicable rules, including the appropriate subparts of this part;

(iii) Other terms and conditions applicable to awards to be made under the solicitation, including allowable and unallowable costs and reporting requirements;

(iv) Policies and procedures for patents, technical data, copyrights, audiovisual productions and exhibits;

(v) Any required assurances not included in the application form;

(15) The deadline for submission of required or optional preapplications;

(16) Date, time, and location of any briefing for applicants;

(17) Required presubmission reviews and clearances, including a statement as to whether review under OMB Circular A-95 ("Review, Evaluation, and Coordination of Federal and Federally

Assisted Projects and Programs"), Attachment A, part I, is required and, if required, the consequences of noncompliance (see § 600.11);

(18) Dates by which selections and awards are expected to be made and whether unsuccessful applications will be returned to the applicant or be retained by DOE and for what period of time;

(19) A statement that DOE is under no obligation to pay for any costs associated with preparation or submission of applications if an award is not made. If an award is made, such costs may be allowable as provided in the applicable cost principles (see § 600.1093);

(20) A statement that DOE reserves the right to fund, in whole or in part, any, all, or none of the applications submitted in response to the solicitation; and

(21) Any other relevant information, including explanatory information or justifications required by this part.

[47 FR 44083, Oct. 5, 1982, as amended at 53 FR 5261, Feb. 22, 1988; 54 FR 41946, Oct. 13, 1989]

§ 600.10 Form and content of applications and preapplications.

(a) *General.* Applications shall be required for all financial assistance projects or programs. Preapplications shall be required for all construction, land acquisition, and land development projects or programs for which the need for Federal funding exceeds $100,000 unless the cognizant program office makes a written program determination to waive the preapplication requirement.

(b) *Forms.* Applications or preapplications shall be on the form or in the format and in the number of copies specified by DOE either in this part, in a program rule, or in the applicable solicitation, and must include all required information. For State governments, local governments, or Indian tribal governments, applications shall be made on the applicable forms in the Standard Form 424 (SF 424) series. Such applicants shall not be required to submit more than the original and two copies of the application or preapplication.

(Approved by OMB under control number 1910-0400.)

(c) *Signature.* The application and any preapplication must be signed by the individual who is applying or by an individual who is authorized to act for the applicant organization and to commit the applicant to comply with the terms and conditions of the financial assistance instrument, if awarded.

(d) *Contents of a preapplication.* In general, a financial assistance preapplication shall include:

(1) A facesheet containing basic identifying information. The facesheet shall be the Standard Form (SF)424;

(2) A brief narrative statement describing the project objectives and method of accomplishment; and

(3) A project budget identifying the estimated amounts of Federal funds and non-federal contributions (cash or in-kind) needed to support the project.

(e) *Contents of an application.* In general, a financial assistance application shall include:

(1) A facesheet containing basic identifying information. The facesheet shall be the Standard Form (SF)424;

(2) A detailed narrative description of the proposed project, including the objectives of the project and the applicant's plan for carrying it out;

(3) A budget with supporting justification (see §§ 600.102 and 600.203); and

(4) Any required preaward assurances.

(f) *Incomplete applications.* DOE may return an application which does not include all information and documentation required by statute, program rule, and the solicitation, if in the judgment of the DOE Contracting Officer, the nature of the omission precludes review of the application.

(g) *Supplemental information.* During the review of a complete application, DOE may request the submission of additional information only if the information is essential to evaluate the application.

[53 FR 5261, Feb. 22, 1988, as amended at 53 FR 8045, Mar. 11, 1988; 54 FR 23959, June 5, 1989]

§ 600.11 Intergovernmental review.

Intergovernmental review of DOE financial assistance shall be conducted in accordance with 10 CFR Part 1005.

[48 FR 29184, June 24, 1983]

§ 600.12 Generally applicable requirements.

(a) "Generally applicable requirement" means Federal policies of administrative requirements that apply to (1) more than one DOE financial assistance award, or (2) a DOE financial assistance program and one or more other Federal assistance programs. Generally applicable requirements include, but are not limited to, the requirements of this part, Federal statutes, the OMB Circulars and other governmentwide guidance implemented by this part, Executive Orders, and the requirements identified in Appendix A of this part.

(b) Except as expressly exempted by Federal statute or program rule, recipients and subrecipients of DOE financial assistance shall comply with all generally applicable requirements to which, by the terms of such requirements, they are subject. DOE may require the submission of preaward assurances of compliance with one or more generally applicable requirements and may conduct preaward and postaward compliance reviews only to the extent such actions are authorized by this part, Federal statute or rule, Executive Order, or OMB directive.

§ 600.13 Application deadlines.

(a) Each solicitation shall include a deadline date for submission of applications. The established deadline shall also apply to any amendment to an application initiated by an applicant. An application or amendment shall be timely if it is:

(1) Received at the location specified in the solicitation on or before the established deadline date and time; or

(2) Received after the deadline date, and the application or amendment was sent by first class mail, was postmarked on or before the deadline date, and is received by DOE before technical evaluation of all acceptable applications submitted in response to the solicitation begins. Applicants should obtain a legibly dated mailing receipt from the U.S. Postal Service or use certified or registered mail to enable them to substantiate the date of mailing. Private metered postmarks shall not be acceptable proof of the date of mailing; and

(3) Complete (see § 600.10(d) and § 600.11(c)).

(b) DOE shall not consider and shall return any application that does not meet the requirements of paragraphs (a)(1) or (a)(2) and (a)(3) of this section.

(c) If necessary, DOE may extend an established application deadline by publishing a timely notice of the extension in the same manner as the solicitation was publicized. The extension of time shall apply to all applicants.

§ 600.14 Unsolicited applications.

(a) *General.* An unsolicited application is an application for DOE financial assistance which is not submitted in response to a solicitation or which is submitted in response to a Notice of Program Interest (see § 600.15). DOE may award financial assistance to an applicant who submits an unsolicited application for support of a project that involves an innovative idea, method or approach. DOE shall determine whether the application would result in a procurement contract or in a grant or cooperative agreement. An unsolicited application may be considered for DOE financial assistance only if the application is relevant to a public purpose of support or stimulation authorized by Federal statute.

(b) *Preapplication contact.* Anyone who is contemplating submitting an unsolicited application is encouraged, before expending extensive effort in preparing a detailed application or submitting any proprietary information to DOE, to make preliminary inquiries of DOE program staff as to DOE interest in the type of project contemplated. The potential applicant should not construe any such discussion as either encouragement to submit an unsolicited application or a promise of an award.

(c) *Preparation and submission of application.* A guide for preparing unsolicited applications/proposals is available from the Unsolicited Proposals Management Section, Reports and Analysis Branch (MA-942), Procurement and Assistance Management Directorate, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585.

(1) Unsolicited applications shall be in the format set forth in "The Guide for Submission of Unsolicited Proposals," except that a State government, local government, or Indian tribal government shall use one of the applications forms prescribed in § 600.410, as appropriate.

(2) An unsolicited application must be submitted to the Unsolicited Proposals Management Section at the address specified in paragraph (c) of this section. If there have been prior discussions with a particular DOE program office, and the applicant wants the application to be considered by that office, the applicant should indicate "For consideration by (*Name of appropriate program*)" on the face of the application.

(d) *General evaluation.* DOE shall make a general evaluation of an unsolicited application based on the following types of factors:

(1) The overall merit of the proposed project or activity.

(2) The anticipated objectives to be achieved and the probability of achieving the stated objectives.

(3) The facilities or techniques which the applicant proposes to make available to achieve the proposed project's objectives.

(4) The qualifications of the proposed project director or key personnel who are considered to be critical to the achievement of the proposed project's objectives.

(e) *Criteria for selection of an unsolicited application.* (1) DOE may select an unsolicited application only if:

(i) The application is meritorious based on the general evaluation as in paragraph (d) of this section; and

(ii) The proposed project represents a unique or innovative idea, method, or approach which would not be eligible for financial assistance under a recent, current, or planned solicitation, or if, as determined by DOE, a competitive solicitation would be inappropriate.

(2) Any request for continuation, renewal, or supplemental funding of a project which was originally funded as the result of an unsolicited application shall be evaluated in the same manner as any other request for such funding and shall not be subject to the selection criterion of paragraph (e)(1)(ii) of this section.

(f) *Justification for acceptance of an unsolicited application.* Prior to making an award on the basis of acceptance of an unsolicited application, a justification document, which describes the results of the general evaluation conducted in accordance with paragraph (d) of this section and which addresses the selection criteria in paragraph (e)(1) of this section, must be prepared and completed for the award file. The justification must be prepared and signed by the initiating program official (project officer), and approved by the responsible program Assistant Secretary or his or her designee, and the contracting officer. If the amount of DOE funds is $100,000 or less for a proposed noncompetitive financial assistance award under any program for which the HCA has been formally assigned cognizance, the justification shall be approved by the HCA and the Contracting Officer. Concurrence for a particular award or class of awards of $100,000 or less may be waived by local legal counsel, if they so elect. Further, an announcement of the intent to award based on an unsolicited application and an explanation of why such an award is being made shall be published for public comment in the FEDERAL REGISTER at least 14 calendar days prior to making an award.

(g) *Funding.* An award based on an unsolicited application may be made only if sufficient appropriated funds are available.

(h) *Unsuccessful applications.* DOE shall promptly notify in writing each applicant whose application does not satisfy the requirements of this section. DOE will return unsuccessful unsolicited applications only if requested by the applicant. This request may be made at the time of application or up to 30 days after the date of the written notification required by this paragraph.

(The information collection requirements contained in paragraph (c)(1) have been approved by the Office of Management and Budget under control numbers 0348-0005—0348-0009)

[47 FR 44083, Oct. 5, 1982, as amended at 53 FR 5262, Feb. 22, 1988; 53 FR 8046, Mar. 11, 1988; 53 FR 12139, Apr. 13, 1988; 54 FR 23959, June 5, 1989]

§ 600.15 Notice of program interest.

(a) *General.* (1) DOE may publish a periodic Notice of Program Interest in the FEDERAL REGISTER and other media, as appropriate, which describes broad, general, technical problems and areas of investigation for which DOE may award grants or cooperative agreements.

(2) DOE shall evaluate any application submitted under a Notice of Program Interest as an unsolicited application (see § 600.14).

(b) *Contents.* In addition to the information required under § 600.9(c), the notice shall include the following:

(1) A brief description of the areas of interest for which DOE may provide financial assistance.

(2) A statement about how resulting applications will be evaluated and the criteria for selection and funding as specified in § 600.14.

(3) An expiration date with an explanation that such a date does not represent a common deadline for applications but rather that applications may be submitted at any time before the notice expires.

(4) The location for application submission, which shall be the Unsolicited Proposals Management Section, Reports and Analysis Branch (MA-942), Procurement and Assistance Management Directorate, Department of Energy, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585, unless the notice specifies otherwise.

§ 600.16 Reviewer affiliations.

(a) *General.* (1) Each responsible official must establish and publish in the FEDERAL REGISTER the details of the system of objective merit review which covers the financial assistance program administered by each cognizant program office within his or her jurisdiction within 120 days of the issuance of this rule for existing programs and prior to the review of applications for new programs. More than one program may adopt the same system. If a program wants to review an application or group of applications using the criteria and procedures of an already established review system other than its own, it may do so by following the deviation procedure described in paragraph (g) of this section. DOE employees designated by responsible officials to carry out the review process shall ensure that the evaluation of applications is conducted in a fair and objective manner.

(2) Objective merit review of financial assistance applications is intended to be advisory and is not intended to replace the authority of the program official with responsibility for deciding whether an award will be made. It is expected that the cognizant project/program officer (scientific monitor) who normally also reviews the proposals for technical/scientific merit, will, additionally, review it from a program policy perspective. Nevertheless, the objective merit review system must set forth the relationship between the reviewing individuals, or the review committees or groups, and the official who has the final decision-making authority. In defining this relationship, the system must set out, as a minimum, the decision-making and documentation processes to be followed by the authorized official responsible for selection when an adverse recommendation has been received through the objective merit review process.

(3)(i) This section applies to all new and renewal applications (except applications for conferences/symposia and for awards which come under the criteria of paragraph (a)(3)(ii) of this section) in programs which make discretionary financial assistance awards and to any other financial assistance programs in which objective merit review is required by the authorizing legislation.

(ii) For projects in which multiple renewals are probable, an objective merit review need not necessarily be done at each renewal, but instead at appropriate points in the overall project period. A determination that a project need not be reviewed at each renewal shall be made in writing by the project officer at the time the initial award is issued, or at least one year prior to the date a renewal award would be issued, and concurred in by an official at least one level above the official responsible for selecting the application for award. The determination shall also indicate the reports required under the award. The criteria on which the determination that a project need not be reviewed at each renewal is based shall be included in the system of objective merit review to be established by the responsible official in accordance with paragraphs (a)(1) and (2) of this section.

(4) Each responsible official shall insure consistency among DOE field offices in the implementation of the review system(s) for his/her program area.

(5) Each formal review system must contain the elements listed in paragraphs (b) through (e) of this section.

(b) *Basic review standards.* (1) Each application may be assessed from a policy/programmatic perspective prior to undergoing merit review. Those that meet policy and programmatic considerations shall generally be reviewed by at least three qualified persons in addition to the official responsible for selection.

(2) The reviewers of any particular application may be any mixture of federal or non-federal experts, including individuals from within the cognizant program office, except as indicated otherwise below (see paragraphs (b)(3), (5) and (d)(2)(ii) of this section). The DOE shall select external (non-DOE Federal or non-federal) reviewers on the basis of their professional qualifications and expertise in the field of research.

(3) In selecting persons in accordance with § 600.16(b) (1) and (2) to review applications, such selection of additional reviewers shall not include, to the extent possible, anyone who, on behalf of the Federal Government, performed or is likely to perform any of the following duties for any of the applications:

(i) Providing substantive technical assistance to the applicant;

(ii) Approving/disapproving or having any decision-making role regarding the application;

(iii) Serving as the project officer or otherwise monitoring or evaluating the recipient's programmatic performance;

(iv) Serving as the Contracting Officer (CO), or performing business management functions for the project; or

(v) Auditing the recipient or the project.

Anyone who has line authority over a person who is ineligible to serve as a reviewer because of the above limitations is also ineligible to serve as a reviewer.

(4) It may occasionally be necessary, after the fact, to change project officer designation, thereby resulting in an individual who participated in the review of an application being appointed as the project officer. This will not be considered a violation of this policy of objective merit review provided the assignment was not expected when the review was conducted.

(5) Persons outside the cognizant program office must not have been employees of that office, including having line authority over that office, for one year prior to participation as a reviewer in the objective merit review process for the program.

(c) *Comparative review.* (1) In order to enhance the validity of the evaluation and rating process, applications can be evaluated in comparison to each other.

(2) If a program area has issued a program notice, the responsible official may implement review procedures which will result in applications being evaluated in comparison to each other. Applications in response to that notice may be assigned to a group of field readers, to a standing committee, or to an ad hoc committee, as discussed below, which is capable of reviewing them, and may be considered along with other applications which were submitted in response to the program notice. Such an application may also be eligible for review under an applicable program announcement. For solicitations, review procedures may also permit comparative evaluation with field readers, a standing committee, or

an ad hoc committee being used as appropriate.

(d) *Types of review groups*—(1) *Field readers.* (i) Objective merit review of applications may be obtained by using field readers to whom applications are sent for review and comment. Field readers may also be used as an adjunct to financial assistance application review committees when, for example, the type of expertise needed or the volume of financial assistance applications to be reviewed requires such auxiliary capacity.

(ii) Safeguards should be instituted to ensure that field readers clearly understand the process, their role, and the criteria upon which the applications are to be evaluated.

(iii) For those situations in which a standing committee is the appropriate review mechanism (see paragraph (d)(2) of this section), but a group of field readers must be used instead, it should function as nearly like a committee as possible. For example, if all members of the standing committee were to evaluate all of the applications under review, then all field readers must receive all of the applications to be reviewed even though they are in geographically separate locations and all field readers should be instructed to follow the procedures established for evaluating the applications.

(2) *Standing committees.* (i) Standing committees are normally appropriate when required by legislation or when the following conditions prevail:

(A) A sufficient number of applications on specific topics to justify the use of a standing committee(s) is received by the program on a regular basis in accordance with a predetermined review schedule;

(B) There are a sufficient number of persons with the required expertise who are willing and able to (*1*) accept appointments, (*2*) serve over reasonably protracted periods of time, and (*3*) convene at regularly scheduled intervals or at the call of the chairperson; and

(C) The legislative authority for the particular program(s) involved extends for more than one year.

(ii) Persons outside the cognizant program office shall constitute at least half the reviewers on such committees unless a deviation from this requirement has been approved under § 600.16(g) below.

(3) *Ad hoc committees.* (i) Ad hoc review committees may not exceed one year in duration and are appropriately used when use of a standing committee is not feasible or when one of the following conditions prevails:

(A) A small number of applications is received on an intermittent basis;

(B) The program is one of limited duration, usually less than one year;

(C) The applications to be reviewed have been solicited to meet a specific program objective and cannot appropriately be reviewed by a standing committee because of subject matter, time constraints, or other limitations;

(D) The volume of applications received necessitates convening an additional committee(s) of available reviewers; or

(E) It is determined that the applications submitted have special review requirements, e.g., construction of a facility, the complexity of subject matter cuts across the areas of expertise of two or more standing committees, or the subject matter is of a special, nonrecurring nature.

(ii) Ad hoc committees may not be used for reviewing financial assistance applications for any program for which a standing committee has been established (except for paragraph (d)(3)(i)(D) of this section) unless a deviation is approved under § 600.16(g) below.

(e) *Review summary.* Upon request, applicants are to be provided with a written summary of the evaluation of their application.

(f) *Reviewers with interest in application being reviewed.* Reviewers must comply with the requirements for the avoidance of conflict of interest established in § 600.17. In establishing a system of objective merit review required in § 600.16(a)(1), the responsible official shall develop procedures which will permit DOE to evaluate whether a conflict of interest exists. A committee or group of field readers which includes as objective merit reviewers any individuals who cannot meet the requirements of § 600.17 or the program's review procedures, with regard to a particular application being reviewed, e.g., officials mentioned in paragraphs (b) (3) and (5) of this section, shall operate as follows:

(1) These individuals or officials may not review, discuss, and/or make a recommendation on an application(s) in which they have a conflict of interest.

(2) In the case of a review committee, the committee member must absent himself or herself from the committee meeting during the review and discussion of the application(s) in which he/she has a conflict of interest.

(g) *Deviations.* (1) In any instance in which a program's pre-established review system is not to be used to review an application, group of applications, or class of applications, written prior approval for utilization of a different procedure, which itself must, to the extent possible, conform to the provisions of this section pertaining to objective merit review, must be obtained from the responsible official or his or her designee.

(2) If the deviation sought applies to a class of applications and constitutes a deviation from the requirements of this part, approval for deviation must be obtained in accordance with § 600.4. If such request for deviation is approved, all details of the review procedure utilized and the proceedings and determination must be fully documented.

(h) *Solicitation information.* For solicited applications, if the types of reviewers are known at the time of solicitation, or if there is a potential for the use of non-DOE evaluators, this information shall be included in the solicitation.

(i) *Outside evaluators.* An outside evaluator shall be required to sign a written statement agreeing to use the application information only for evaluation and to treat it in confidence except to the extent that the information is available to the general public without restriction as to its use from any source, including the applicant. Further, the evaluator shall be required to agree to comply with any notice or restriction placed on the application; upon completion of the evaluation, the evaluator shall return all copies of the application (or abstracts, if any) to DOE; and unless authorized by DOE, the evaluator shall not contact the applicant concerning any aspect of the application.

[47 FR 44083, Oct. 5, 1982, as amended at 54 FR 41946, Oct. 13, 1989]

§ 600.17 Conflict of interest.

Any person who participates in the review of applications for DOE financial assistance or in the administration of DOE financial assistance shall comply with §§ 1010.101(a) and 1010.302(a)(1) of the DOE rules on the conduct of employees at 10 CFR Part 1010. Current and former DOE employees who participate in any aspect of the financial assistance process shall comply with all applicable requirements of 10 CFR Part 1010.

§ 600.18 Authorized uses of information.

(a) *General.* Information contained in applications shall be used only for evaluation purposes unless such information is generally available to the public, is already the property of the Government or the Government already has unrestricted use rights, or is or has been made available to the Government from any source, including the applicant, without restriction.

(b) *Definitions.* For purposes of this section—

(1) "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(i) Are not generally known or available from other sources without obligation concerning their confidentiality;

(ii) Have not been made available by the owner to others without obligation concerning their confidentiality; and

(iii) Are not already available to the Government without obligation concerning their confidentiality.

(2) "Technical data" means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, demonstration, or engineering work or be usable or used to define a

design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data, as used in this section, does not include financial reports, cost analyses, and other information incidental to financial assistance administration.

(c) *Treatment of application information.* (1) An application may include technical data and other data, including trade secrets and/or privileged or confidential commercial or financial information, which the applicant does not want disclosed to the public or used by the Government for any purpose other than application evaluation. To protect such data, the applicant should specifically identify each page including each line or paragraph thereof containing the data to be protected and mark the cover sheet of the application with the following Notice as well as referring to the Notice on each page to which the Notice applies.

NOTICE

The data contained in pages —— of this application have been submitted in confidence and contain trade secrets or proprietary information, and such data shall be used or disclosed only for evaluation purposes, provided that if this applicant receives an award as a result of or in connection with the submission of this application, DOE shall have the right to use or disclose the data herein to the extent provided in the award. This restriction does not limit the Government's right to use or disclose data obtained without restriction from any source, including the applicant.

(2) Unless a solicitation specifies otherwise, DOE shall not refuse to consider an application solely on the basis that the application is restrictively marked.

(3) Data (or abstracts of data) marked with the Notice under paragraph (c)(1) shall be retained in confidence and used by DOE or its designated representatives as specified in § 600.16 solely for the purpose of evaluating the proposal. The data so marked shall not be disclosed or used for any other purpose except to the extent provided in any resulting award, or to the extent required by law, including the Freedom of Information Act (5 U.S.C. 552) (10 CFR Part 1004). The Government shall not be liable for disclosure or use of unmarked data and may use or disclose such data for any purpose.

(4) The Government shall obtain unlimited rights in the technical data contained in any application which results in an award except those portions of the technical data which the applicant asserts and properly marks as proprietary data, or which are not directly related to or will not be utilized in the project and are deleted from the application with the concurrence of DOE.

(5) The following clause, which applies only to technical data and not to other data such as privileged or confidential commercial or financial information shall apply to every award.

RIGHTS TO DATA IN APPLICATION

Except for technical data contained in pages —— of the recipient's application, dated ——, which are asserted by the recipient as being proprietary data, it is agreed that as a condition of this award, and notwithstanding the provisions of any notice appearing on the application, the Government shall have the right to use, duplicate, disclose and have others do so for any purpose whatsoever the technical data not identified in the above blanks contained in the application upon which this award is based.

§ 600.19 Application evaluation and selection.

(a) Applications for discretionary financial assistance, whether solicited or unsolicited, shall be evaluated by reviewers in accordance with this rule, DOE directives, and the terms and conditions of the solicitation, if any.

(b) In deciding which new applications (other than unsolicited applications) or renewal applications for discretionary financial assistance to select for award, DOE shall consider the results of the application evaluation (technical, business and financial) which has been conducted in accordance with this section, plus any intergovernmental review comments (see § 600.11), or other available advice or information as well as published program policy factors, if any. The selection of applications under any given solicitation shall be made by responsible program Assistant Secretary or his or her designee; unless, in accordance with applicable DOE directives, such selection is required to be made by the Secretary or designee.

(c) Program policy factors are factors which the selection official may use to select a range of projects that would best serve program objectives. DOE shall describe in the solicitation any program policy factor that may be used in making selections, the justification for its use and, if appropriate, the relative priority of each such factor. Examples of program policy factors are:

(1) Geographic distribution;

(2) Diverse types and sizes of applicant entities;

(3) A diversity of methods, approaches, or kinds of work; and

(4) Projects which are complementary to other DOE programs or projects.

(d) After the selection of an application, DOE may, if necessary, enter into negotiations with an applicant. Such negotiations are not a commitment that DOE will make an award.

(e) For cooperative agreements, DOE may use the source selection process (see 48 CFR 915.612 and 915.613) for the solicitation and evaluation of applications and selection of awardees.

(f) See § 600.31 for the selection process for continuation applications and § 600.14 for the selection process for unsolicited applications.

[53 FR 5262, Feb. 22, 1988, as amended at 53 FR 8046, Mar. 11, 1988]

§ 600.20 Legal authority and effect of an award.

(a) A DOE financial assistance award is valid only if it is in writing and is signed by a DOE Contracting Officer.

(b) An award may be made only if DOE approves an application and/or State plan, and if there are sufficient appropriated funds.

(c) DOE funds awarded under a grant or cooperative agreement shall be obligated as of the date the DOE Contracting Officer signs the award; however, the recipient is not authorized to incur costs under an award prior to the beginning date of the budget period shown in the award except as may be authorized in accordance with § 600.103(g), § 600.32 or § 600.422(b) of this part. The duration of the DOE financial obligation shall not extend beyond the expiration date of the budget period shown in the award unless authorized by a DOE Contracting Officer by means of a continuation or renewal award or other extension of the budget period.

[47 FR 44083, Oct. 5, 1982, as amended at 51 FR 39366, Oct. 28, 1986; 53 FR 8046, Mar. 11, 1988; 54 FR 23959, June 5, 1989]

§ 600.21 Contents of award.

Each financial assistance award shall be made on a Notice of Financial Assistance Award which includes the following, as applicable:

(a) Identification information for the project being supported, including a unique instrument number.

(b) The dates of the budget period covered by the award, and if additional funding is contemplated after such period, the expected duration of the project period.

(c) The class of recipient (*e.g.* state government, educational institution, individual).

(d) The source and amount of DOE funds authorized for obligation by the recipient during the budget period specified; the amount and/or the percentage of any required cost sharing; and estimates of total project costs for the duration of DOE support.

(e) General terms and conditions of the award, including or incorporating by reference the applicable program statute and rules, the applicable subparts of this part, and, as appropriate, generally applicable requirements.

(f) Special terms or conditions of award, including those necessary to protect DOE interests or to achieve program objectives, and those which may be required to be included on an instrument-by-instrument basis, (*e.g.* reporting requirements and payment method).

(g) The approved budget for the budget period, including any modifications resulting from negotiation.

(h) A reference to or inclusion of the approved application and/or State plan, or other statement of the purpose and objectives of the approved project (*e.g.* statement of work).

(i) The names, addresses and telephone numbers of recipient and DOE staff with responsibilities for the project.

(j) Any other provisions necessary to establish the respective rights, duties, obligations, and responsibilities of DOE and the recipient, consistent with the requirements of this part.

§ 600.22 Recipient acknowledgement of award.

(a) After signature by the DOE Contracting Officer, the award shall be sent to the applicant. The applicant shall be required to return a signed copy of the award acknowledging acceptance.

(b) The award, when mailed to the applicant, shall be accompanied by a transmittal letter or other written notice indicating the date by which the award must be acknowledged and returned. The date established by DOE shall be not less than two weeks from the date of the notice. No DOE funds shall be disbursed until the award document signed by the recipient is received by DOE.

(1) In the event an applicant declines an award or fails to acknowledge acceptance of an award, DOE shall deobligate the funds obligated by the award after providing the applicant with at least two weeks written notice of DOE's intention to deobligate.

(2) In the event a recipient acknowledges acceptance of an award but does not commence performance under the award within a reasonable period of time, DOE may terminate the award in accordance with the applicable provisions of this part.

(c) After the recipient acknowledges the award, the terms and conditions of the award may be amended only upon the written request or with the written concurrence of the recipient unless the amendment is one which DOE may make unilaterally in accordance with a program rule or this part.

§ 600.23 Notification to unsuccessful applicants.

(a) DOE shall promptly notify in writing each applicant whose application has not been selected for award or whose application cannot be funded because of the unavailability of appropriated funds. If the application was not selected, the written notice shall briefly explain why the application was not selected and, if for grounds other than unavailability of funds, shall offer the unsuccessful applicant the opportunity for a more detailed explanation upon request. If the notice of non-selection involves a solicited application, the unsuccessful applicant may specify, in its request for a more detailed explanation, any objections to or apparent defects in the selection procedures followed by DOE.

(b) In the case of a State plan disapproval, DOE shall follow the notification procedures contained in the applicable statute or program rule.

[47 FR 44083, Oct. 5, 1982, as amended at 48 FR 34404, July 28, 1983]

§ 600.24 Maximum DOE obligation.

The maximum DOE obligation to the recipient is—

(a) For monetary awards, the amount shown in the award as the amount of DOE funds obligated, and

(b) Any designated property.

DOE shall not be obligated to make any additional, supplemental, continuation, renewal, or other award for the same or any other purpose.

§ 600.25 Access to records.

(a) *Recipient records.* DOE and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of a recipient that are directly pertinent to the DOE financial assistance award, in order to make audit, examination, excerpts, and transcripts.

(b) *Subrecipient records.* DOE, the Comptroller General of the United States, and the recipient, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of a subrecipient which are directly pertinent to the financial assistance subaward, in order to make audit, examination, excerpts, and transcripts.

(c) *Contractor and subcontractor records.* With respect to any negotiated contract or subcontract in excess of $10,000 under a grant or cooperative agreement, DOE, the Comptroller General of the United States, the recipient and (if the contract was awarded under a financial assistance subaward) the subrecipient, or any of their authorized representatives shall have the right of access to any books, documents, papers, or other records of the contractor or subcontractor which are directly pertinent to that contract or subcontract, in order to make audit, examination, excerpts, and transcripts.

(d) *Duration of access right.* The right of access may be exercised for as long as the applicable records are retained by the recipient, subrecipient, contractor, or subcontractor. (See § 600.124 and § 600.442 for record retention requirements for grants and cooperative agreements based on recipient type.)

[47 FR 44083, Oct. 5, 1982, as amended at 53 FR 8046, Mar. 11, 1988]

§ 600.26 Disputes and appeals.

(a) *Final determination.* Whenever practicable, DOE shall attempt to resolve informally any dispute over the award or administration of financial assistance. At the initiative of DOE or upon the written request of an applicant for a continuation award or of a recipient, DOE shall mail (by certified mail) a brief written determination signed by a Contracting Officer, setting forth DOE's final disposition of any dispute which is not resolved informally. Such determination shall contain the following information:

(1) A summary of the dispute, including a statement of the issues and of the positions taken by the Department and the party or parties to the dispute; and

(2) The factual, legal and policy reasons for DOE's disposition of the dispute.

(b) *Right of appeal.* Except as provided in paragraph (d)(1) of this section, the final determination under paragraph (a) of this section may be appealed to the Financial Assistance Appeals Board (the Board) in accordance with the procedures set forth in 10 CFR Part 1024. If the final determination under paragraph (a) of this section involves a dispute over which the Board has jurisdiction as provided in paragraph (d)(2) of this section, the Contracting Officer's determination shall state that, with respect to such dispute, the determination shall be the final decision of the Department unless, within 60 days, a written notice of appeal is filed. If the final determination under paragraph (a) of this section involves a dispute over which the Board has no jurisdiction as provided in paragraph (d)(1) of this section, the Contracting Officer's determination shall state that, effective immediately or on a later date specified therein, the determination shall, with respect to such dispute, be the final decision of the Department.

(c) *Effect of appeal.* The filing of an appeal with the Board shall not stay any determination or action taken by DOE which is the subject of the appeal. Consistent with its obligation to protect the interests of the Federal Government, DOE may take such authorized actions as may be necessary to preserve the status quo pending decision by the Board, or to preserve its ability to provide relief in the event the Board decides in favor of the appellant.

(d) *Review on appeal.* (1) The Board shall have no jurisdiction to review:

(i) Any preaward dispute (except as provided in paragraph (d)(2)(ii) of this section), including use of any special restrictive condition pursuant to § 600.105 or § 600.412;

(ii) DOE denial of a request for a deviation under § 600.4 or § 600.406 of this part;

(iii) DOE denial of a request for a budget revision or other change in the approved project under §§ 600.103, 600.114, 600.422, or 600.430 of this part or under another term or condition of the award;

(iv) Any DOE action authorized under §§ 600.121(b) (1), (2), (3) or (5); or § 600.443 (a)(1), (a)(3) for suspensions only; or § 600.443(a)(4) for actions disapproving renewal applications or other requests for extension of time or additional funding for the same project when related to recipient noncompliance, or such actions authorized by program rule;

(v) Any DOE decision about an action requiring prior DOE approval under § 600.112(g), § 600.119, or § 600.436 of this part or under another term or condition of the award;

(vi) A DOE decision not to make a continuation award, which decision is based on the insufficiency of available appropriations;

(vii) Any matter which is under the jurisdiction of the Patent Compensation Board (10 CFR 780.3);

(viii) Any matter which may be heard by the Invention Licensing Appeals Board (10 CFR 781.65 and 781.66); or

(ix) Any other dispute not described in paragraph (d)(2) of this section.

(2) In addition to any right of appeal established by program rule, or by the terms and conditions (not inconsistent with paragraph (d)(1) of this section) of an award, the Board shall have jurisdiction to review:

(i) A DOE determination that the recipient has failed to comply with the applicable requirements of this part, the program statute or rules, or other terms and conditions of the award;

(ii) A DOE decision not to make a continuation award based on any of the determinations described in paragraph (d)(2)(i) of this section;

(iii) Termination of an award for cause, in whole or in part, by DOE;

(iv) A DOE determination that an award is void or invalid;

(v) The application by DOE of an indirect cost rate; and

(vi) DOE disallowance of costs.

(3) In reviewing disputes authorized under paragraph (d)(2) of this section, the Board shall be bound by the applicable law, statutes, and rules, including the requirements of this part, and by the terms and conditions of the award.

(4) The decision of the Board shall be the final decision of the Department.

[48 FR 34404, July 28, 1983, as amended at 53 FR 8046, Mar. 11, 1988]

§ 600.27 Debarment and suspension.

Applicants, recipients, subrecipients, and contractors under financial assistance awards may be debarred and suspended for the causes and in accordance with the procedures set forth in 10 CFR Part 1036.

[49 FR 4323, Feb. 3, 1984, as amended at 53 FR 38940, Oct. 4, 1988]

§ 600.28 Noncompliance.

(a) Except for noncompliance determinations under 10 CFR Part 1040, whenever DOE determines that a recipient has not complied with the applicable requirements of this part, with the requirements of any applicable program statute or rule, or with any other term or condition of the award, a DOE Contracting Officer shall provide to the recipient (by certified mail, return receipt requested) a written notice setting forth

(1) The factual and legal bases for the determination of noncompliance;

(2) The corrective actions and the date (not less than 30 days after the date of the notice) by which they must be taken.

(3) Which of the actions authorized under § 600.121(b) or § 600.443(a) of this part DOE may take if the recipient does not achieve compliance within the time specified in the notice, or does not provide satisfactory assurances that actions have been initiated which will achieve compliance in a timely manner.

(b) DOE may take any of the actions set forth in § 600.121(b) or § 600.443(a) of this part concurrent with the written notice required under paragraph (a) of this section or with less than 30 days written notice to the recipient whenever:

(1) There is evidence the award was obtained by fraud;

(2) The recipient ceases to exist or becomes legally incapable of performing its responsibilities under the financial assistance award; or

(3) There is a serious mismanagement or misuse of financial assistance award funds necessitating immediate action.

[53 FR 8046, Mar. 11, 1988, as amended at 54 FR 23959, June 5, 1989]

§ 600.29 Suspension and termination.

(a) *Suspension and termination for cause.* DOE may suspend or terminate an award for cause on the basis of—

(1) a noncompliance determination under § 600.121 or § 600.28;

(2) an immediate debarment or debarment of the awardee under § 600.27.

(b) *Notification requirements.* Except as provided in § 600.121(c) or § 600.28, before suspending or terminating a award for cause, DOE shall mail to the awardee (by certified mail, return receipt requested) a separate written notice in addition to that required by § 600.121(a) or § 600.28(a) at least ten days prior to the effective date of the suspension or termination. Such notice shall include, as appropriate—

(1) The factual and legal bases for the suspension or termination;

(2) The effective date or dates of the DOE action;

(3) If the action does not apply to the entire award, a description of the activities affected by the action;

(4) Instructions concerning which costs shall be allowable during the period of suspension, or instructions concerning allowable termination costs, including in either case, instructions concerning any subgrants or contracts;

(5) Instructions concerning required final reports and other closeout actions for terminated awards (see § 600.123);

(6) A statement of the awardee's right to appeal a termination for cause pursuant to § 600.26; and

(7) The dated signature of a DOE Contracting Officer.

(c) *Suspension.* (1) Unless DOE and the awardee agree otherwise, no period of suspension shall exceed 90 days.

(2) DOE may cancel the suspension at any time, up to and including the date of expiration of the period of suspension, if the awardee takes satisfactory corrective action before the expiration date of the suspension or gives DOE satisfactory evidence that such corrective action will be taken.

(3) If the suspension has not been cancelled by the expiration date of the period of suspension, the awardee shall resume the suspended activities or project unless, prior to the expiration date, DOE notifies the awardee in writing that the period of suspension shall be extended consistent with paragraph (c)(1) of this section or that the award shall be terminated.

(4) As of the effective date of the suspension, DOE shall withhold further payments and shall allow new obligations incurred by the awardee during the period of suspension only if such costs were authorized in the notice of suspension or in a subsequent letter.

(5) If the suspension is cancelled or expires and the award is not terminated, DOE shall reimburse the awardee for any authorized allowable costs incurred during the suspension and, if necessary, may amend the award to extend the period of performance.

(d) *Termination by mutual agreement.* In addition to any situation where a termination for cause pursuant to § 600.121 or § 600.28 is appropriate, either DOE or the awardee may initiate a termination of a award (or portion thereof) as described in this paragraph. If the awardee initiates a termination, the awardee must notify DOE in writing and specify the awardee's reasons for requesting the termination, the proposed effective date of the termination, and, in the case of a partial termination, a description of the activities to be terminated, and an appropriate budget revision. DOE shall terminate a award or portion thereof under this paragraph only if both parties agree to the termination and the conditions under which it shall occur. If DOE determines that the remaining activities under a partially terminated award would not accomplish the purpose for which the award was originally awarded, DOE may terminate the entire award.

(e) *Effect of termination.* The awardee shall incur no new obligations after the effective date of the termination of a award (or portion thereof), and shall cancel as many outstanding obligations as possible. DOE shall allow full credit to the awardee for the DOE share of noncancellable obligations properly incurred by the awardee prior to the effective date of the termination.

(f) *Subgrants.* Awardees shall follow the policies and procedures in this section and in § 600.121 or § 600.28 for suspending and terminating subgrants.

[47 FR 44091, Oct 5, 1982. Redesignated and amended at 53 FR 8047, Mar. 11, 1988]

§ 600.30 Responsible applicant.

(a) The signature of the applicant or an authorized official of the applicant organization on the application shall represent the applicant's preaward assurance that it is in compliance with or shall comply with—

(1) The standards for management of funds, property, and other assets, and the procurement of goods and services, as specified in this subpart and in the solicitation, if any;

(2) Generally applicable requirements which require such an assurance except that a separate signed assurance is required by 10 CFR 1040.4; and

(3) The terms and conditions of the award as described in the program rule, the solicitation, and this part.

(b) Prior to making a new, continuation, or renewal award, DOE reserves the right to make a preaward review of the applicant's ability to manage and account for a DOE award, if awarded, or to determine compliance (or intended compliance) with generally applicable requirements. If DOE determines on the basis of such a review or otherwise documents that the applicant is not in compliance or cannot or will not comply with such standards and requirements, DOE shall determine, prior to award, that the applicant is not responsible and may use special restrictive conditions or disapprove the application.

(c) The awardee shall assure that applicants for subawards comply with applicable management standards and generally applicable requirements as provided in paragraphs (a) and (b) of this section.

[47 FR 44091, Oct. 5, 1982, as amended at 50 FR 42356, Oct. 18, 1985; 51 FR 4297, Feb. 4, 1986. Redesignated and amended at 53 FR 8046, Mar. 11, 1988; 54 FR 23959, June 5, 1989]

§ 600.31 Funding.

(a) *General.* The project period during which DOE expects to provide award support for an approved project shall be specified on the Notice of Financial Assistance Award (DOE Form 4600.1). For formula award programs, the project period is the period of time covered by an approved State plan. As indicated in paragraphs (b) and (e) of this section, a project period may consist of one or more budget periods.

(b) *Budget period and continuation awards.* If the project period is 12 months or less, the budget period and the project period shall be coextensive. Except as provided in paragraph (e) of this section, multiyear awards, including formula awards, shall be funded annually within the approved project period. Funding for each budget period within the project period shall be contingent on DOE approval of a continuation application submitted in accordance with a schedule specified by DOE (see § 600.102(c)). A continuation application shall include—

(1) A statement of technical progress or status of the project to date (see § 600.115(d)(1));

(2) A detailed description of the awardee's plans for the conduct of the project during the coming year; and

(3) A detailed budget for the upcoming budget period, including an estimate of unobligated balances (see § 600.32(c)). DOE shall review a continuation application for the adequacy of the awardee's progress and planned conduct of the project in the subsequent budget period. DOE shall not require a continuation application to compete against any other application. The amount and award of continuation funding is subject to the availability of appropriations.

(c) *Renewal awards.* Discretionary renewal awards may be made either on the basis of a solicitation or on a noncompetitive basis. If DOE proposes to restrict eligibility for a discretionary renewal award to the incumbent grantee, the noncompetitive award must be justified in accordance with § 600.7(b)(2). Renewal applications must be submitted no later than 5 months prior to the scheduled expiration of the project period unless a program rule or other published instruction establishes a different application deadline. Before DOE may make a renewal award for a formula grant, the grantee must submit a revised or amended State plan in accordance with program rules and other instructions from DOE.

(d) *Extensions.* (1) Recipients of research awards may extend the expiration date of the final budget period of the project (thereby extending the project period) if additional time beyond the established expiration date is needed to assure adequate completion of the original scope of work within the funds already made available. A single extension, which shall not exceed twelve (12) months, may be made for this purpose, and must be made prior to the originally established expiration date. The recipient must notify the cognizant DOE Contracting Officer in the awarding office in writing within ten (10) days of making the extension.

(2) DOE may extend any budget period of any type of financial assistance without the need for competition or a justification of restricted eligibility if:

(i) In the case of the final budget period of a project period, the additional time necessary is 18 months or less in total, or for all other budget periods, the additional time necessary is 6 months or less in total; and

(ii) The grantee submits a written request for an extension before the expiration date of the budget period in process and includes a justification for the extension along with an expenditure plan for the use of any additional funds requested. An expenditure plan need not be provided when no additional funds are requested, unless the grantee intends to rebudget funds in such a way as to require DOE prior approval or unless the grantee is instructed otherwise by the Contracting Officer.

(e) *Retroactive extensions.* DOE may retroactively extend an expired budget period provided that the request for such extension is submitted no later than 30 days after its expiration, the awardee can satisfactorily explain why the request was not submitted prior to the expiration date, and the Contracting Officer determines that the request would have been approved had it been submitted in a timely manner.

(f) *Exceptions.* A single budget period exceeding 12 months may be coextensive with the project period only if:

(1) Required by statute; or

(2) The project is primarily for construction, alteration and renovation, or acquisition of real property, or other type of activity that requires an extended funding commitment by DOE and for which an annual continuation review is inappropriate; or

(3) At the time of award, the total period of DOE support is expected to be less than 18 months.

[47 FR 44091, Oct. 5, 1982, as amended at 51 FR 39367, Oct. 28, 1986. Redesignated and amended at 53 FR 8046, Mar. 11, 1988, and further amended at 53 FR 12140, Apr. 13, 1988; 54 FR 41947, Oct. 13, 1989]

§ 600.32 Calculation of award.

(a) *Total approved budget.* "Total approved budget" means the amount of costs authorized to be incurred during the budget period, as shown on the Notice of Financial Assistance Award, by a awardee and any subawardee or contractor as well as the estimated value of in-kind contributions, to carry out an approved project. The total approved budget consists of DOE funds for both direct and indirect costs and any required cost sharing. The total approved budget shall indicate the maximum amount of funds DOE shall provide and the minimum amount or percentage of any cost sharing the awardee is required to provide.

(b) *Excess funds.* During the term of the final budget period (or only budget period should the award have only one) for which support is provided, a awardee must notify DOE whenever it becomes apparent to the awardee that the amount of DOE funding authorized is expected to exceed its needs by more than $5,000 or 5 percent of the DOE award, whichever is greater. DOE may reduce the award by an amount which does not exceed the total amount of excess funds.

(c) *Unobligated balances*—(1) *Other than research awards.* When the awardee has unobligated balances remaining at the end of a budget period (see § 600.116) such funds may be used in the subsequent budget period if such use is authorized in the terms and conditions of the award or is included in the total approved budget shown in an amended Notice of Financial Assistance Award.

(2) *Research grants.* Any unobligated balance of funds which remains at the end of any funding period, except the final funding period of the project period, may be carried over to the next funding period, and may be used to defray costs of the period into which it is carried over. The recipient shall not be entitled to reimbursement if a continuation award is not made. Recipients may be requested to provide information with regard to expenditures in the progress report covering the previously completed period. The recipient shall also include in the Financial Status Report, for the previously completed period, the amount of the unobligated balance as of the end of the funding period.

(d) *Added funding not required.* Nothing in paragraph (c) of this section shall in any way require the DOE to increase the total amount obligated for the project.

(e) *Adjustments.* Whenever DOE adjusts the amount of an award under this subpart, it shall also make an appropriate upward or downward adjustment to the amount of required cost sharing in order that the adjusted award maintain any required percentage of DOE and non-Federal participation in the costs of the project.

[47 FR 44091, Oct. 5, 1982, as amended at 51 FR 39367, Oct. 28, 1986. Redesignated and amended at 53 FR 8047, Mar. 11, 1988; 54 FR 41948, Oct. 13, 1989]

§ 600.33 Patents, data, and copyrights.

(a) *General.* Grants shall be awarded and administered by DOE in compliance with the patent, data, and copyright provisions of this section, 41 CFR Part 9-9 and, for grants to small business firms and domestic nonprofit organizations, with OMB Circular A-124, which contains the definitions of "small business firm" and "nonprofit organization" applicable to this section. DOE shall specify, in each award, the applicable patent, data, and copyright provisions.

(b) *Required clauses.* DOE shall determine which of the clauses listed in this paragraph or in 41 CFR Part 9-9 applies, based on DOE review of the application, other information submitted by the applicant, and any negotiations. These clauses may be modified by DOE Patent Counsel, in accordance with the procedures of 41 CFR Part 9-9, for a particular grant or, in the case of a class waiver of patent rights under 41 CFR Part 9-9, for a class of grants such as those for the "Appropriate Technology" program and the program for development of inventions referred to DOE by the National Bureau of Standards under Sec. 14 of the Federal Non-Nuclear Energy Research and Development Act of 1974.

(1) *Patent Rights (Small Business Firm or Nonprofit Organization).* This clause shall apply to grants to small business firms and domestic nonprofit organizations where such grants have as a purpose the conduct of experimental, developmental, demonstration, or research work and where the small business firm or domestic nonprofit organization states in writing that it qualifies as a small business firm or domestic nonprofit organization. In exceptional circumstances, DOE may, as determined by Patent Counsel, use a patent rights clause other than the clause specified in this paragraph (b)(1).

PATENT RIGHTS (SMALL BUSINESS FIRM OR NONPROFIT ORGANIZATION)

(a) *Definitions.* (1) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code (USC).

(2) "Subject invention" means any invention of the grantee conceived or first actually reduced to practice in the performance of work under this grant.

(3) "Practical Application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under

such conditions as to establish that the invention is utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

(4) "Made" when used in relation to any invention means the conception or first actual reduction to practice of such invention.

(5) "Small Business Firm" means a small business concern as defined at Section 2 of Pub. L. 85-536 (15 USC 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standard for small business concerns involved in Government procurement, contained in 13 CFR 121.3-8, and in subcontracting, contained in 13 CFR 121.3-12, will be used.

(6) "Nonprofit Organization" means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 USC 501(c)) and exempt from taxation under Section 501(a) of the Internal Revenue Code (26 USC 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(7) "Patent Counsel" means the Department of Energy (DOE) patent counsel assisting the DOE contracting activity.

(b) *Allocation of Principal Rights.* The grantee may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 USC 203. With respect to any subject invention in which the grantee retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) *Invention Disclosure, Election of Title and Filing of Patent Applications by Grantee.* (1) The grantee will disclose each subject invention to the Patent Counsel (with notification by the Patent Counsel to the Contracting Officer) within two months after the inventor discloses it in writing to grantee personnel responsible for the administration of patent matters. The disclosure to the Patent Counsel shall be in the form of a written report and shall identify the grant under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the Patent Counsel, the grantee will promptly notify the Patent Counsel of the acceptance of any manuscript describing the invention or of any on sale or public use planned by the grantee.

(2) The grantee will elect in writing whether or not to retain title to any invention by notifying the Patent Counsel within twelve months of disclosure to the grantee; provided that in any case where publication, on sale or public use has initiated the one year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title terminates sixty days prior to the end of the statutory period.

(3) The grantee will file its initial patent application on an elected invention within two years after election or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The grantee will file patent applications in additional countries within either ten months of the corresponding initial patent application or six months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure to the Patent Counsel, election, and filing, may, at the discretion of the Patent Counsel be granted.

(d) *Conditions When the Government May Obtain Title.* (1) The grantee will convey to DOE, upon written request, title to any subject invention:

(i) If the grantee fails to disclose or elecet the subject invention within the times specified in (c) above, or elects not to retain title.

(ii) In those countries in which the grantee fails to file patent applications within the times specified in (c) above; provided, however, that if the grantee has filed a patent application in a country after the times specified in (c) above but prior to its receipt of the written request of the Patent Counsel, the grantee shall continue to retain title in that country; or

(iii) In any country in which the grantee decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in a reexamination or opposition proceeding on, a patent on a subject invention.

(e) *Minimum Rights to Grantee.* (1) The grantee will retain a nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title except if the grantee fails to disclose the subject invention within the times specified in (c) above. The grantee's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the grantee is a part and includes the right to grant sublicenses of the same scope to the extent the grantee was legally obligated to do so at the time the grant was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the grantee's business to which the invention pertains.

(2) The grantee's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with 10 CFR 781. This license will not be revoked in that field of use or the geographical areas in which the grantee has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the grantee, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign county.

(3) Before revocation or modification of the license, DOE will furnish the grantee a written notice of its intention to revoke or modify the license, and the grantee will be allowed thirty days (or such other time as may be authorized by DOE for good cause shown by the grantee) after the notice to show cause why the license should not be revoked or modified. The grantee has the right to appeal, in accordance with 10 CFR 781, any decision concerning the revocation or modification of its license.

(f) *Grantee Action to Protect Government's Interest.* (1) The grantee agrees to execute or to have executed and promptly deliver to the Patent Counsel all instruments necessary to:

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions for which the grantee retains title, and

(ii) Convey title to DOE when requested under (d) above and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) The grantee agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the grantee each subject invention made under this grant in order that the grantee can comply with disclosure provisions of (c) above and to execute all papers necessary to file patent applications on subject inventions. The disclosure format should require, as a minimum, the information requested by (c)(1) above. The grantee shall instruct such employees through the employee agreements or other suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The grantee will notify the Patent Counsel of any decision not to continue prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than thirty days before the expiration of the response period required by the relevant patent office.

(4) The grantee agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the grant) awarded by the Department of Energy. The Government has certain rights in this invention."

(5) The grantee agrees to:

(i) Provide a report prior to the close-out of the grant listing all subject inventions;

(ii) Provide notification of all contracts and subgrants under the grant for experimental, developmental, demonstration, or research work, the identity of the patent rights clause therein, and copy of each such contract or subgrant upon request;

(iii) Provide promptly a copy of the patent application, filing date, and serial number, and patent number and issue date for any subject invention in any country in which the grantee has applied for a patent.

(g) *Contracts and Subgrants Under the Grant.* (1) The grantee will include this clause, suitably modified to identify the parties, in all contracts and subgrants under the grant, regardless of tier, for experimental, developmental or research work to be performed by a small business firm or a domestic nonprofit organization. The contractor or subgrantee will retain all rights provided for the grantee in this clause, and the grantee will not, as part of the consideration for awarding the contract or subgrant, obtain rights in the contractor's or subgrantee's subject inventions.

(2) The grantee will include in all other contracts or subgrants under the grant, regardless of tier, for experimental, developmental, demonstration, or research work the patent rights clause of 41 CFR 9-9.107-5(a) or 41 CFR 9-9.107-6, as appropriate, modified to identify the parties.

(3) In the case of a contract or subgrant under the grant at any tier, DOE, the contractor or subgrantee, and the grantee agree that the mutual obligations of the parties created by the clause constitute a contract between the contractor or subgrantee and DOE with respect to those matters covered by this clause.

(h) *Reporting on Utilization of Subject Inventions.* The grantee agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the grantee or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the grantee, and such other data and information as DOE may reasonably specify. The grantee also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by DOE in accordance with paragraph (j) of this clause. To the extent data or information supplied under this section is considered by the grantee, its licensee or assignee to be privileged and confidential and is so marked, DOE agrees that, to the extent permitted by 35 U.S.C 202(c)(5), it will not disclose such information to persons outside the Government.

(i) *Preference for United States Industry.* Notwithstanding any other provision of this clause, the grantee agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the grantee or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) *March-in Rights.* The grantee agrees that with respect to any subject invention in which it has acquired title, DOE has the right in accordance with the procedures in OMB Circular A-124 to require the grantee, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the grantee, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that:

(1) Such action is necessary because the grantee or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the grantee, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by federal regulations and such requirements are not reasonably satisfied by the grantee, assignee, or licensees; or

(4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) *Special Provisions for Grants to Nonprofit Organizations.* If the grantee is a nonprofit organization, it agrees that:

(1) Rights to a subject invention in the United States may not be assigned without the approval of DOE, except where such assignment is made to an organization which has as one of its primary functions the management of inventions and which is not, itself, engaged in or does not hold a substantial interest in other organizations engaged in the manufacture or sale of products or the use of processes that might utilize the invention or be in competition with embodiments of the invention (provided that such assignee will be subject to the same provisions as the grantee);

(2) The grantee may grant exclusive licenses under United States patents or patent applications in subject inventions to persons other than small business firms for a period in excess of the earlier of:

(i) Five years from first commercial sale or use of the invention; or

(ii) Eight years from the date of the exclusive license excepting that time before regulatory agencies necessary to obtain premarket clearance, unless on a case-by-case basis, DOE approves a longer exclusive license. If exclusive field of use licenses are granted, commercial sale or use in one field of use will not be deemed commercial sale or use as to other fields of use, and a first commercial sale or use with respect to a product of the invention will not be deemed to end the exclusive period to different subsequent products covered by the invention;

(3) The grantee will share any royalties collected on a subject invention with the inventor; and

(4) The balance of any royalties or income earned by the grantee with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific research or education.

(l) *Communication.* The DOE central point of contact for communications or matters relating to this clause is the Patent Counsel.

(2) *Patent Rights (Short Form).* This clause shall apply to grants awarded to grantees other than small business firms or domestic nonprofit organizations, where such grants have as a purpose the conduct of experimental, developmental, demonstration, or research work. Prior to award or within 30 days after an award is signed by the DOE Contracting Officer, or such longer period as may be authorized by the Patent Counsel for good cause shown in writing by the applicant or grantee, the applicant or grantee may petition DOE for an advance waiver of the Government's rights to inventions conceived or first actually reduced to practice under the grant in accordance with 41 CFR part 9-9. DOE shall consider and dispose of any such request in accordance with the waiver provisions of 41 CFR part 9-9. If a waiver is granted, the appropriate waiver clause shall be substituted for the Patent Rights (Short Form) clause. DOE also may authorize an advance waiver for a class of awards when appropriate and shall specify the applicable patent rights clause in every award covered by such a waiver.

PATENT RIGHTS (SHORT FORM)

(a) *Definitions.* (1) "Subject invention" means any invention or discovery of the grantee conceived or first actually reduced to practice in the course of or under this grant and includes any art, method, process, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plants, whether patented or unpatented, under the patent laws of the United States of America or any foreign country.

(2) "Patent Counsel" means DOE Patent Counsel assisting the procuring activity.

(b) *Invention disclosures and reports.* (1) The grantee shall furnish the Patent Counsel (with notification by Patent Counsel to Contracting Officer):

(i) A written report containing full and complete technical information concerning each subject invention within 6 months after conception or first actual reduction to practice but in any event prior to any sale, public use, or public disclosure of such invention known to the grantee. The report shall identify the grant and inventor and shall be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains, a clear understanding of the nature, purpose, operation and, to the extent known, the physical, chemical, biological or electrical characteristics of the invention;

(ii) Upon request, but not more than annually, interim reports on a DOE-approved form listing subject inventions for that period and certifying that all subject inventions have been disclosed or that there were no such inventions; and

(iii) A final report on a DOE-approved form within 3 months after completion of the grant work listing all subject inventions and certifying that all subject inventions have been disclosed or that there were no such inventions.

(2) The grantee agrees that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to the grant.

(c) *Allocation of principal rights.* (1) *Assignment to the Government.*

The grantee agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the grantee under paragraphs (c)(2) and (d) of this clause.

(2) *Greater rights determination.* The grantee, or the employee-inventor with authorization of the grantee, may request greater rights than the nonexclusive license and the foreign patent rights provided in paragraph (d) of this clause on identified inventions in accordance with the procedure and criteria of 41 CFR 9.109-6. A request for a determination of whether the grantee or the employee-inventor is entitled to retain such greater rights must be submitted to the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) at the time of the first disclosure of the invention pursuant to paragraph (b)(1) of this clause or not later than 9 months after conception or first actual reduction to practice, whichever occurs first, or such longer period as may be authorized by the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) for good cause shown in writing by the grantee. The information to be submitted for greater rights determination is specified in 41 CFR 9-9.109-6(e).

(d) *Minimum rights to the Grantee.* The Grantee reserves a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires title. Revocation shall be in accordance with the procedures of paragraphs (c)(2) and (3) of the clause in 41 CFR 9-9.107-5(a). The grantee also has the right to request foreign rights in accordance with the procedures of paragraph (c)(4) of the clause in 41 CFR 9-9.107-5(a).

(e) *Employee and contractor or subgrantee agreements.* Unless otherwise authorized in writing by the Contracting Officer, the grantee shall:

(1) Obtain patent agreements to effectuate the provisions of the Patent clause from all persons who perform any part of the work under this grant except nontechnical personnel, such as clerical employees and manual laborers.

(2) The grantee shall include this clause or the Patent Rights clause of 41 CFR 9-9.107-5(a) or the clause of § 600.118(b)(1), as appropriate, modified to identify the parties in any contract or subgrant hereunder having as a purpose the conduct of experimental, research, development, or demonstration work; and

(3) Promptly notify the Contracting Officer in writing upon the award of any contract or subgrant containing a Patent Rights clause by identifying the contractor or subgrantee, the work to be performed under the contract or subgrant, and dates of award and estimated completion. Upon the request of the Contracting Officer, the grantee shall furnish a copy of the contract or subgrant to such requestor.

(f) *Atomic energy.* (1) No claim for pecuniary award or compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted by the grantee or its employees with respect to any inventions or discovery made or conceived in the course of or under this grant.

(2) Except as otherwise authorized in writing by the Contracting Officer, the grantee will obtain patent agreements to effectuate the provisions of paragraph (f)(1) of the clause from all persons who perform any part of the work under this grant except nontechnical personnel, such as clerical employees and manual laborers.

(g) *Publication.* In order that information concerning scientific or technical developments conceived or first actually reduced to practice in the course of or under the grant is not prematurely published so as to adversely affect patent interest of DOE, the grantee agrees to submit to the Patent Counsel for patent review a copy of each paper 60 days prior to its intended publication date. The grantee may publish such information after expiration of a 60-day period following such submission or prior thereto if specifically approved by the Patent Counsel, unless the grantee is informed (in writing within the 60-day period) that in order to protect patentable subject matter, publication must further be delayed. In this event, publication shall be delayed up to 100 days beyond the 60-day period or such longer period as mutually agreed to.

(3) *Rights in Technical Data (Short Form).* This clause shall apply to all grants other than those having as a purpose the conduct of a conference, symposium, or training. However, this clause does not provide protection for proprietary data. If proprietary data may be utilized under a grant, other appropriate technical data clauses (as provided in 48 CFR 952.227) may be included in the award.

RIGHTS IN TECHNICAL DATA (SHORT FORM)

(a) *Definitions.* The definitions of terms set forth in DEAR 927.401 apply to the extent these terms are used herein.

(b) *Allocation of rights.* (1) The Government shall have:

(i) Unlimited rights in technical data first produced or specifically used in the performance of this grant.

(ii) The right of the Contracting Officer or his representatives to inspect at all reasonable times up to three years after final payment under this grant all technical data first produced or specifically used in the grant (for which inspection the grantee or its contractor or subgrantee shall afford proper facilities to DOE), and

(iii) The right to have any technical data first produced or specifically used in the performance of this grant delivered to the Government as the Contracting Officer may from time-to-time direct during the progress of the work, or in any event as the Contracting Officer shall direct upon completion or termination of this grant.

(2) The grantee shall have: The right to use for its private purposes, subject to patent, security or other provisions of this grant, technical data it first produces in the performance of this grant provided the date requirements of this grant have been met as of the date of the private use of such data. The grantee agrees that the to extent it receives or is give access to proprietary data or other technical, business of financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the grantee shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authority by prior written approval of the Contracting Officer.

(c) *Copyrighted material.* (1) The grantee agrees to and does hereby grant to the Government and to others acting on its behalf:

(i) A royalty-free, nonexclusive, irrevocable, world-wide license for Governmental purposes to reproduce, distribute, display, and perform all copyrightable material first produced or composed in the performance of this grant by the grantee, its employees or any individual or concern specifically employed or assigned to originate and prepare such material and to prepare derivative works based thereon.

(ii) A license as aforesaid under any and all copyrighted or copyrightable work not first produced or composed by the grantee in the performance of this grant but which is incorporated in the material furnished under the grant, provided that such license shall be only to the extent the grantee now has, or prior to completion or close-out of the grant, may acquire the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(2) The grantee agrees that it will not knowingly include any material copyrighted by others in any written or copyrightable material furnished or delivered under this grant without a license as provided for in paragraph (c)(1)(ii) of this section, or without the consent of the copyright owner, unless it obtains specific written approval of the Contracting Officer for the inclusion of such copyright material.

(4) *Rights in Technical Data (Modified Short Form).* This clause shall apply to any grant having as a purpose the conduct of a conference, a symposium, or training.

RIGHTS IN TECHNICAL DATA—MODIFIED SHORT FORM

(1) The grantee grants to the Government a worldwide, royalty-free, non-exclusive, irrevocable license to publish, duplicate, translate, perform, exhibit and dispose of and to have others to do so, technical information or data including copyrightable material first produced by the grantee, under the grant.

(2) DOE has the right to require delivery of all technical information or data first produced by the grantee under this grant and all conference papers of a scientific or technical nature. The grantee agrees not to include in the technical information or data, or scientific or technical conference papers delivered under the grant, any material copyrighted by the grantee or any material including scientific or technical conference papers copyrighted by others without first obtaining without cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (1) above. If, nevertheless, there must be included in the technical information or data, or scientific or technical conference papers to be delivered, copyrighted material for which a license of the above scope cannot be obtained, the grantee shall obtain the written authorization of DOE to include such material prior to physical delivery to DOE.

(5) *Authorization and Consent.* This clause shall apply to any grant under which experimental, developmental, demonstration, or research work is to be performed within the United States, its possessions, or Puerto Rico.

AUTHORIZATION AND CONSENT

The Government hereby gives its authorization and consent for all use and manufacture of any invention described in and covered by a patent of the United States in the performance of this grant or any part hereof or any amendment hereto or any contract hereunder (including all lower-tier subcontracts).

(6) *Notice and Assistance.* This clause shall be applied to any grant in excess of $10,000 for construction, experimental, developmental, demonstration, or research work which is to be performed within the United States, its possessions, or Puerto Rico.

NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

The provisions of this clause shall be applicable only if the amount of this grant exceeds $10,000.

(a) The grantee shall report to the Contracting Officer, promptly and in reasonable written detail, each notice of claim of patent or copyright infringement based on the performance of this grant of which the grantee has knowledge.

(b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this grant or out of the use of any supplies furnished or work or services performed hereunder, the grantee shall furnish to the Government when requested by the Contracting Officer, all evidence and information in possession of the grantee pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the grantee has agreed to indemnify the Government.

(c) This clause shall be included in all contracts and subgrants under the grant.

(c) *Reporting of royalties.* In order that DOE may be informed regarding royalty payments to be made by a grantee in connection with any grant where the amount of the royalty payments is included in the approved budget or is to be reimbursed by the Government, the applicant shall provide:

(1) Information concerning the royalty payments expected to be made under the grant, if awarded, together with the names of the licensors, and either the patent numbers involved or such other information as will permit identification of the patents and patent applications as well as the basis

on which the royalties are to be paid; or

(2) A certification that the proposed budget includes no amount representing any royalty that would be paid by the grantee directly to others in connection with the performance of the award. If the information or certification specified in paragraphs (c)(1) and (c)(2) is not available at the time of award, DOE shall include the Reporting of Royalties clause in any applicable grant award.

REPORTING OF ROYALTIES

If this grant is in an amount which exceeds $10,000 and if any royalty payments are directly involved in the grant or are reflected in the amount of the grant award, the grantee agrees to report in writing to the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) during the performance of this grant and prior to its completion or closeout, the amount of any royalties or other payments paid or to be paid by it directly to others in connection with the performance of this grant together with the names and addresses of licensors to whom such payments are made and either the patent numbers involved or such other information as will permit the identification of the patents or other basis on which the royalties are to be paid. The approval of DOE of any individual payments or royalties shall not stop the Government at any time from contesting the enforceability, validity, or scope of, or title to, any patent under which a royalty or payments are made.

(d) *Subgrants and contracts under grants or subgrants.* The grantee shall include the applicable patent rights and rights in technical data clauses and the clauses of paragraphs (b)(5), (b)(6), and (c) of this section, as applicable, in any subgrant or contract.

(Secs. 644 and 646, Pub. L. 95-91, 91 Stat. 599, (42 U.S.C. 7254 and 7256); Pub. L. 95-224, 92 Stat. 3 (41 U.S.C. 501))

[47 FR 44091, Oct. 5, 1982, as amended at 49 FR 31392, Aug. 7, 1984. Redesignated at 53 FR 8047, Mar. 11, 1988]

§ 600.34 New restrictions on lobbying.

Each DOE solicitation involving a new Federal commitment in excess of $100,000 shall provide a full text copy of the certification requirement set forth in appendix A of 10 CFR part 601 and Disclosure of Lobbying Activities Standard Form—LLL. DOE Contracting Officers shall assure that any award in excess of the $100,000 threshold shall contain, as a term and condition of award, the requirement t comply with the certification and disclosure provision of 10 CFR 601.110 Upon receipt, the original copy of each disclosure form shall be kept with the official award file. One copy of each form shall be forwarded to the Director or designee.

[55 FR 6746, Feb. 26, 1990]

Subpart B—Grants

SOURCE: 47 FR 44091, Oct. 5, 1982, unles otherwise noted.

§ 600.100 Scope and applicability.

(a) This subpart establishes administrative rules for grants and cooperative agreements and subawards t other than State, local, and Indian tribal governments. This subpart implements OMB Circular A-110 and the Federal cost principles. Administrative rules for grants and cooperative agreements and subawards to State, loca and Indian tribal governments are prescribed in subpart E.

(b) The requirements of this subpar shall apply as indicated in § 600.2. In addition, the noncompliance procedures of §§ 600.121 and 600.29 and the closeout procedures of § 600.123 shal apply to any active grant and, in the case of the closeout procedures, to any terminated or expired grant which has not been closed out prior to the effective date of this part, provided, however, that any noncompliance determination involving an active grant is initiated on or after the effective date of this part. With the concurrence of the affected party or parties, DOE may follow the procedures set forth in § 600.29 in any suspension or termination action initiated before the effective date of this part.

[47 FR 44091, Oct. 5, 1982, as amended at 50 FR 42356, Oct. 18, 1985; 51 FR 4297, Feb. 4 1986; 53 FR 8046, Mar. 11, 1988]

§ 600.101 Definitions.

For purposes of this subpart—

"Closeout" of a grant means the process by which DOE determines that all applicable administrative actions and all required work under the grant have been completed by the grantee and by DOE.

"Cognizant agency" means the Federal department or agency responsible for negotiating indirect cost rates, conducting audits, correcting systems deficiencies, and resolving questioned costs of a particular grantee organization.

"Cost-reimbursement contract" means a contract, or subcontract under a cost-reimbursement contract, under which payment is made on the basis of allowable costs incurred during performance up to a maximum amount set forth in the contract or subcontract.

"Direct cost" means any cost that can be specifically identified with a particular project or activity, including salaries, travel, equipment and supplies directly benefiting the project or activity.

"Formula grant" means a grant DOE is required to make to any one or more eligible applicants who meet statutory prerequisites for award. The amount of a formula grant award is determined in accordance with a formula specified either in the authorizing statute or in implementing program rules.

"Grant" means an award of financial assistance, including cooperative agreements, in the form of money or property in lieu of money, by the Federal Government to an eligible recipient.

"Grantee" means the government, nonprofit corporation, individual, or other entity to whom DOE awards a grant and who is financially accountable to DOE for the use of the funds awarded and legally responsible for the performance of the project or activity(ies). An organizational grantee shall be the entire organization even if the activity or project is performed by a component part of the organization.

"Indirect cost" means a cost incurred by an organization for common or joint objectives and which cannot be identified specifically with a particular project or activity.

"Indirect cost rate" means the ratio, expressed as a percentage, of an organization's total indirect costs to its direct cost base as specified in the applicable cost principles.

"In-kind contribution" means property, services, or other noncash contribution, made by the grantee, subgrantee, or non-Federal third party, which directly benefits and can be specifically identified with a project or activity, and to which a value is assigned for purposes of cost sharing.

"Small entity" means a "small business" (as defined in § 600.3), "small governmental jurisdiction," or "small organization."

"Small governmental jurisdiction" means a government of a city, county, town, township, village, school district, or special district with a population of less than fifty thousand.

"Small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

"Subgrant" means an award of funds or other type of financial assistance authorized by statute by a grantee to an eligible subrecipient.

[47 FR 44091, Oct. 5, 1982, as amended at 53 FR 8046, Mar. 11, 1988]

§ 600.102 Grant applications.

(a) *General.* An application for a grant shall be on the form or in the format specified in a program rule, in the solicitation, or in this part (see § 600.10). DOE may also require applicants to complete—

(1) The Notice of Energy RD&D Project (DOE Form 538) if the application is for a research, development, or demonstration project; or

(2) The Management Summary Report (EIA-459E) or the Milestone Plan (EIA-459B) as a baseline plan in accordance with the Uniform Reporting System for Federal Assistance (Grants and Cooperative Agreements) (DOE/MA-0001) if required by program rule or the solicitation. If a solicitation other than a program rule requires the use of one or both of these forms, the solicitation shall contain an explanation of how the information to be provided relates to the objectives of the program.

(b) *Budgetary information.* DOE may request and the applicant shall submit the minimum budgetary information necessary to evaluate the costs of the proposed project.

(1) Applicants for research grants, other than State, local, or Indian tribal governments, will employ DOE budget forms ERF 4620.1 and ERF 4620.1A. All other applicants shall use the budget formats duplicated in the DOE Uniform Reporting System for Federal Assistance.

(2) DOE may, subsequent to receipt of an application, request additional information from an applicant when necessary for clarification or to make informed preaward determinations under § 600.103.

(c) *Continuation and renewal applications.* DOE may require that an application for a continuation or renewal award (see § 600.31 (b) and (c)) be made in the format or on the forms authorized by paragraphs (a) and (b) of this section. However, when applying for a continuation award, grantees that are State governments, local governments, or Indian tribal governments are required to submit only those pages of the application form that contain information different from that provided in the original application.

(Approved by the Office of Management and Budget under control numbers 0348-0005—0348-0009)

[47 FR 44091, Oct. 5, 1982, as amended at 51 FR 39366, Oct. 28, 1986; 53 FR 8046, Mar. 11, 1988; 54 FR 23959, June 5, 1989]

§ 600.103 Cost determinations.

(a) *General.* Except as otherwise specified by the governing program statute, program rule, or other terms and conditions of an award, costs allowable under DOE grant awards shall be determined in accordance with the applicable cost principles cited in paragraph (b) of this section. As part of an acceptable financial management system under § 600.109(b), grantees and subgrantees must have procedures for determining the reasonableness, allowability, and allocability of costs in accordance with the applicable Federal cost principles and the terms and conditions of the award.

(b) *Cost principles.* The following cost principles shall apply to grants as specified.

(1) OMB Circular A-21—Cost Principles Applicable to Grants, Contracts and Other Agreements with Institutions of Higher Education.

(2) OMB Circular A-87—Cost Principles Applicable to Grants, Contracts and Other Agreements with State and Local Governments. These cost principles shall also apply to grants to Indian tribal governments and to foreign governments to the extent appropriate.

(3) OMB Circular A-122—Cost Principles Applicable to Grants, Contracts and Other Agreements with Nonprofit Organizations. Nonprofit organization in this context refers to a private, nonprofit organization other than a nonprofit institution of higher education or hospital. However, a few nonprofit organizations, as specifically listed in Attachment C to OMB Circular A-122, are subject to the commercial cost principles as specified in paragraph (b)(5) of this section. OMB Circular A-122 shall also apply to grants to individuals.

(4) 45 CFR part 74, Appendix E, Cost Principles for Hospitals.

(5) 48 CFR 31.2 (Federal Acquisition Regulation) as modified by 48 CFR 931.2 (DOE Acquisition Regulations) for grants to for-profit organizations (other than for-profit hospitals) including corporations, partnerships, and sole proprietorships.

(6) Before a recipient may make changes in the following areas on research financial assistance awards, the written approval of the cognizant Contracting Officer at the DOE is required: (i) Changes in objectives or scope, (ii) temporary replacement or change of principal investigator or change of key personnel, and (iii) change of the institution to which the award is to be made. All other Federal prior approval requirements, including those in OMB Circulars A-21 and A-110, are waived for research awards. The recipient may maintain such internal prior approval systems as it considers necessary.

(c) *Subgrantees and contractors.* For subgrants, the grantee shall use the cost principles cited in this section that apply to the subgrantee. The grantee or subgrantee shall specify in any cost-reimbursement contract the applicable cost principles, which shall be the cost principles cited in this section that apply to the contractor.

(d) *Deviations.* Unless required by program statute, the awarding party may deviate from the requirements of the cost principles only after obtaining approval in accordance with § 600.4.

(e) *Approval requirements.* Costs that, by the terms of the cost principles or other terms or conditions of the award, subaward, or contract, require the approval of the awarding party shall be considered to have met the requirement for approval if they are included in the approved direct cost budget or in an approved indirect cost amount, proposal, or cost allocation plan. If the costs are to be charged as direct costs and they are not in the approved budget, specific prior written approval must be obtained from the designated DOE Contracting Officer, the grantee, or the subgrantee, as appropriate, before such costs are incurred by the grantee, subgrantee, or cost-type contractor (see § 600.114). No approval may be given which is inconsistent with the purpose of the grant or which deviates without authorization from the terms and conditions of the DOE award (see § 600.4). See § 600.114 for procedures for requesting prior approval under this paragraph. See paragraph (f) of this section with respect to indirect costs.

(f) *Indirect costs.* Unless restricted by Federal statute or program rule, DOE shall provide for the reimbursement of appropriate indirect costs.

(1) DOE shall include an amount for indirect costs in an award only if the application requests reimbursement of such costs and—

(i) Submits evidence that the applicant has been assigned to cognizant Federal agency responsible for establishment of indirect cost rates and indicates or provides evidence that—

(A) A current agreement containing an applicable approved indirect cost rate(s) covering all or part of the budget period for which DOE may provide funding has been established; or

(B) An indirect cost proposal has been submitted to the cognizant agency in order to establish an applicable approved indirect cost rate(s) covering all or part of the budget period for which DOE may provide funding; or

(C) An indirect cost proposal covering all or part of the budget period and applicable to the activities for which DOE may provide funding will be submitted to the cognizant agency for approval no later than three months after the beginning date of the initial budget period of the DOE award or, for subsequent budget periods, in accordance with any schedule established by the cognizant agency; or

(ii) If not assigned to a cognizant agency, the applicant includes, in the application, data that is current, complete, accurate, and sufficient to allow the DOE Contracting Officer to determine a rate(s) for indirect costs. If the total approved budget will not exceed $100,000 or if the amount requested for indirect costs does not exceed $5,000, DOE may waive the requirement for negotiation of a rate and, in lieu thereof, provide a reasonable allowance for such costs.

(2) Indirect cost proposals shall be prepared and submitted in accordance with the applicable Federal cost principles and instructions from the cognizant agency or from DOE, as appropriate.

(3) If a subgrant or contract under a grant or subgrant provides for the payment of indirect costs, the grantee or subgrantee shall be responsible for negotiating appropriate indirect costs, using the cost principles applicable to the subgrantee or contractor, unless the subgrantee or contractor has negotiated an applicable rate directly with DOE or another Federal department or agency. DOE may review and audit the procedures a grantee or subgrantee uses in conducting indirect cost negotiations.

(g) *Preaward costs*—(1) *All Awards.* Any preaward expenditures are made at the recipient's risk. Approval of preaward costs by the Contracting Officer or incurrence by the recipient does not impose any obligation on DOE if an award is not subsequently made, or if an award is made for a lesser amount than the recipient expected.

(2) *Research awards only.* (i) For new or renewal research awards, recipients may incur preaward costs up to ninety (90) days prior to the effective date of the award. Preaward costs for periods preceding 90 days prior to the effective date of the award are allowable only if approved in writing, prior to incurrence, by a DOE Contracting Officer.

(ii) For continuation awards within a multiple year project, prior to receipt of continuation funding, preaward expenditures by recipients are not subject to the limitation or approval requirements of paragraph (g)(2)(i) of this section.

(iii) Preaward costs, as incurred by the recipient, must be necessary for the effective and economical conduct of the project, and the costs must be otherwise in accordance with these rules and may not include those specific costs for which agency prior approval is required under the circulars. In any instance in which the circulars permit the agency to grant prior approval to the recipient, it is the Department's intention to do so.

(3) *Other than research awards.* All other financial assistance recipients may incur preaward costs only if the expenditure is approved in writing, prior to incurrence, by the Contracting Officer. In the case of governmental entities, the approval must additionally be reflected on the award notice.

(h) *Fee or profit.* No increment above cost may be paid to a grantee or subgrantee under a DOE grant or subgrant. A fee or profit may be paid to a contractor providing goods or services under a contract with a grantee or subgrantee.

(i) Interest penalties for late payment under a contract shall not be an allowable cost of a grant or subgrant (see § 600.119(e)).

(Secs. 644 and 646, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7254 and 7256); Pub. L. 95-224, 92 Stat. 3 (41 U.S.C. 501))

[47 FR 44091, Oct. 5, 1982, as amended at 49 FR 31392, Aug. 7, 1984; 51 FR 39366, Oct. 28, 1986; 53 FR 8046, Mar. 11, 1988, 54 FR 41948, Oct. 13, 1989]

§ 600.105 Special restrictive conditions of award.

(a) *General.* DOE may, in accordance with this section and without following the deviation procedures of § 600.4, use award conditions which are more restrictive than those specified in this subpart.

(b) *DOE procedures.* Before or at the time of award, DOE shall advise the applicant/grantee whenever DOE has determined that the applicant/grantee is not responsible on the basis of one or more of the following:

(1) Financial instability;

(2) A history of poor performance; or

(3) A management system which does not meet the requirements of this subpart.

DOE shall provide the applicant/grantee with an explanation of why any special restrictive condition is necessary and shall indicate what corrective action must be taken. If the applicant/grantee is one covered by OMB Circular A-110 and if the condition is more restrictive than is allowed by those Circulars, the Director or his or her designee shall notify OMB and other interested parties.

(c) *Subgrantees.* A grantee may place a special restrictive condition, as specified in paragraphs (a) and (b) of this section, in a subgrant award. In any such case, the grantee must notify DOE in writing within 15 days of the subgrant award. DOE shall decide whether to notify OMB and other interested parties.

[47 FR 44091, Oct. 5, 1982, as amended at 53 FR 8046, Mar. 11, 1988]

§ 600.107 Cost sharing.

(a) *General.* DOE shall specify in the solicitation or in the program rule, if any, any cost sharing requirement. The award document shall be specific as to whether the cost sharing is based on a minimum amount for the recipient or on a percentage of total costs.

(b) *Nonstatutory cost sharing.* If DOE requires that a grantee provide cost sharing which is not required by statute or which exceeds a statutory minimum, DOE shall state in the program rule or solicitation the reasons for requiring such cost sharing, recommended or required levels of cost sharing, and the circumstances under which the requirement for cost sharing may be waived or adjusted during any negotiation.

(c) *Negotiation.* Whenever DOE negotiates the amount of cost sharing, DOE may take into account such factors as the use of program income (see § 600.113), patent rights, and rights in data. Foregone fee or profit shall not be considered in establishing the extent of cost sharing.

(d) *Composition and source of cost sharing.* (1) Cost sharing may be derived from any of the following—

(i) Costs incurred by the grantee (or subgrantee) whether or not they require a cash outlay;

(ii) Cash contributed to the grantee or subgrantee(s) by non-Federal public or private organizations and individuals; or

(iii) The value of goods, including the use of property, or services donated to the grantee or subgrantee(s) by non-Federal public or private organizations and individuals (third-party in-kind contributions).

(2) To be allowable as cost sharing, a cash or in-kind contribution must:

(i) Be verifiable from the records of the grantee, subgrantees, or third parties, as applicable. Such records must show how the value placed on an in-kind contribution was determined (see paragraph (e) of this section);

(ii) Not be included as a cost or contribution for satisfying a cost sharing or matching requirement of another project or program receiving Federal funding, whether as financial assistance, under a procurement contract, or otherwise;

(iii) Be allowable under the terms and conditions of the award and meet the applicable cost principle tests of allowability (see § 600.103(b)); and

(iv) The source of the contribution may not be costs supported by another Federal assistance award unless such use is permitted by Federal statute. This restriction does not apply to:

(A) General program income, as defined in § 600.113, earned by a grantee or subgrantee under a contract under another Federal assistance award; and

(B) General revenue sharing funds under 31 U.S.C. 122 *et seq.* or countercyclical revenue sharing funds under 42 U.S.C 6721 *et seq.*

(3) General program income may be used to meet a cost sharing requirement of the grant under which the income was earned only if such use is authorized by the award (see § 600.113(e)).

(e) *Valuation of in-kind contributions.* Any grantee or subgrantee shall determine the value of services or property donated by non-Federal third parties in accordance with OMB Circular A-110, Attachment E, Paragraph 5.

[47 FR 44091, Oct. 5, 1982, as amended at 53 FR 5262, Feb. 22, 1988; 53 FR 8046, Mar. 11, 1988]

§ 600.109 Financial management systems.

(a) *General.* Except as provided in paragraph (c) of this section, grantees and sugrantees shall have financial management systems which meet the minimum standards set forth in paragraph (b) of this section.

(b) *Minimum standards.* At a minimum, grantee and subgrantee financial management systems must provide for:

(1) Accurate, current, and complete disclosure of the financial results of each project (see § 600.116 for financial reporting requirements for grantees).

(2) Records that identify adequately the source and application of funds for the financially assisted project, including information pertaining to Federal awards, subgrant awards, authorizations, obligations, unobligated balances, assets, outlays, income, and liabilities.

(3) Effective control over and accountability for all funds, property, and other assets. Grantees and subgrantees shall adequately safeguard all such funds, property, and assets and shall assure that they are used solely for authorized purposes. The requirements of this paragraph (b)(3) with respect to control and safeguarding of property shall apply to all property, including exempt property, which is required to be managed in accordance with § 600.117.

(4) Comparison of actual expenditures with approved budget amounts for each grant or subgrant, and, if re-

quired by the terms and conditions of the award, the relation of financial information to performance and unit cost data.

(5) Procedures to minimize the time elapsing between the transfer of funds from the U.S. Treasury and their disbursement for grant or subgrant purposes (see § 600.112).

(6) Procedures for determining the reasonableness, allowability, and allocability of costs in accordance with the provisions of the applicable Federal cost principles and other terms and conditions of the award or subaward.

(7) Accounting records that are supported by source documentation, such as cancelled checks, paid bills, payrolls, contract documents, etc.

(8) A systematic method to assure timely and appropriate resolution and settlement of audit findings and recommendations pertaining to subrecipients.

(c) *Individuals.* Individuals whose financial management systems do not meet the minimum standards of paragraph (b) of this section shall maintain a separate bank account for deposit of grant or subgrant funds. Disbursements by the grantee or subgrantee from this account shall be supported by source documentation such as cancelled checks, paid bills, receipts, payrolls, etc.

(d) *System reviews.* The awarding party may review the adequacy of an applicant's financial management system as part of a preaward review or at any time subsequent to award (see §§ 600.30 and 600.120). The awarding party shall rely, to the extent possible, on readily available sources of information, such as previous audit reports, to make any preaward assessment of the adequacy of the applicant's financial management system. The awarding party shall seek additional information from the applicant or perform an on-site preaward review only if necessary to assure prudent management of DOE funds.

[47 FR 44091, Oct. 5, 1982, as amended at 50 FR 42356, Oct. 18, 1985; 51 FR 4297, Feb. 4, 1986; 53 FR 8047, Mar. 11, 1988]

§ 600.110 Cash depositories.

Grantees and subgrantees shall comply with the standards governing cash depositories for advance payments (see § 600.112(b)) contained in Attachment A of OMB Circular A-110.

[47 FR 44091, Oct. 5, 1982, as amended at 53 FR 8047, Mar. 11, 1988]

§ 600.111 Bonding and insurance.

(a) The grantee or subgrantee shall use its regular bonding and insurance requirements unless the awarding party specifies either or both of the following requirements in the award:

(1) If the cost of a contract or subcontract for construction or facility improvement, including alteration and renovation of real property, exceeds $100,000, a bid guarantee, performance bond, and payment bond, as defined in Attachment B of OMB Circular A-110, shall be required.

(2) A nongovernmental grantee or subgrantee may be required to obtain or acquire additional fidelity bond coverage if the risk without such coverage would be unacceptable.

(b) Any bonds required under paragraph (a)(1) or (a)(2) of this section shall be obtained from companies holding certificates of authority as acceptable sureties (31 CFR part 223).

[47 FR 44091, Oct. 5, 1982, as amended at 53 FR 8047, Mar. 11, 1988]

§ 600.112 Payment.

(a) *General.* The awarding party shall select the payment method under a grant or subgrant with the objective of minimizing the time elapsing between the transfer of funds from the U.S. Treasury and their disbursement by the grantee or subgrantee for grant or subgrant purposes. DOE shall use the appropriate advance payment method described in paragraph (b) of this section in making payments to a grantee except that payments to a foreign organization shall be made in accordance with Department of Treasury policy applicable to such transactions.

(b) *Advance payment methods.* Advance payments may be made either through a letter of credit or by Treasury check.

(1) *Letter of credit.* A letter of credit is an instrument certified by an authorized Federal official that authorizes a grantee to draw funds needed

for immediate disbursement in accordance with the provisions of Treasury Circular 1075. The grantee must comply with Treasury Circular 1075 guidelines (31 CFR part 205) and instructions from the administering payment office in making withdrawals under the letter of credit and in reporting on cash disbursements and balances. Except as provided in paragraph (c) of this section, a letter of credit shall be used by DOE when:

(i) There is or will be a continuing relationship between a grantee and DOE for at least a 12-month period and the total amount of funds to be advanced by DOE to the grantee within that period is $120,000 or more; and

(ii) The grantee's financial management system meets the standards for fund control and accountability specified in § 600.109(b), including procedures or planned procedures that will minimize the time elapsing between the transfer of funds from the U.S. Treasury and their disbursement by the grantee.

(2) *Advance by Treasury check.* Advance by Treasury check is a payment made upon request before the grantee makes cash outlays. DOE shall use this method when the grantee meets the requirements of paragraph (b)(1)(ii) of this section but not those of paragraph (b)(1)(i).

(i) The timing and amount of cash advances to the grantee shall be as close as is administratively feasible to the actual disbursement of funds by the grantee.

(ii) If a grantee meets the requirements for advance payment, the duration of the project is 12 months or less, and the amount of the DOE award is less than $10,000, DOE may advance the entire award amount in a single Treasury payment.

(c) *Reimbursement by Treasury check.* DOE may use a reimbursement by Treasury check method of payment if the grantee does not meet the requirements of paragraph (b)(1)(ii) of this section. DOE may also use the reimbursement method if the major portion of the project or activity will be financed by private financing or Federal loans, with the DOE grant representing 25 percent or less of the total cost.

(1) For construction grants, DOE may use the reimbursement method unless DOE has an agreement with the grantee to use a letter of credit for all DOE grants, including construction grants.

(2) Grantees and subgrantees shall not be reimbursed for amounts that are to be withheld from contractors to assure satisfactory completion of contractual work under a grant or subgrant. Such amounts shall be paid only after the grantee or subgrantee makes the final payment to the contractor, including the amount withheld.

(3) DOE shall make payment within 30 days of a request for reimbursement, unless the request is improper or questionable.

(d) *Conversion from advance payment method.* DOE may convert a grantee from advance payment to reimbursement whenever the grantee no longer meets the criteria for advance payment specified in paragraph (b)(1)(ii) of this section. Any such conversion may be accomplished only after DOE has advised the grantee in writing of the reasons for the proposed action and has provided a period of at least 30 days within which the grantee may take corrective action or provide satisfactory assurances of its intention to take such action.

(e) *Requests for payment.* Grantees shall request payment on the forms specified in § 600.116.

(f) *Withholding of payment.* Unless otherwise required by statute, DOE shall not withhold payment for proper charges unless:

(1) DOE has made a determination of noncompliance in accordance with § 600.121. If DOE withholds payment without suspension or termination of the grant, DOE shall release withheld payments to the grantee after compliance is achieved. If the grant has been suspended or terminated, payment adjustments shall be governed by § 600.29; or

(2) The grantee owes money to the United States and collection of the debt by withholding grant payments would not impair the accomplishment of program objectives. Payment of the

debt may also be accomplished by accounting adjustments to cash balances in the possession of the grantee for which the grantee is accountable to the Federal government.

(3) Before withholding any payment, DOE shall notify the grantee that payments shall not be made for obligations incurred after a specified date, which shall ordinarily be no sooner than 30 days from the date of the notice, until the grantee corrects the noncompliance or pays the indebtedness to the Federal government. (See also § 600.121 for notification of noncompliance.)

(g) *Assignment of payments.* (1) With prior DOE approval and in accordance with written DOE instructions, a grantee may assign to a bank, trust company or other financing institution, including any Federal lending agency, reimbursement by Treasury check due from DOE under the following conditions:

(i) The grant provides for reimbursement totaling $1,000 or more;

(ii) The assignment covers all amounts payable under the grant that have not already been paid;

(iii) Reassignment is prohibited; and

(iv) The assignee files a written notice of grant payment assignment and a true copy of the instrument of assignment with DOE.

(2) Any interest costs resulting from a loan obtained on the basis of an assignment are unallowable charges to DOE grant funds or any required cost sharing.

(h) *Payments to subgrantees.* Grantees shall observe the requirements of this section in making or withholding payments to subgrantees except that the forms used by grantees are not required to be used by subgrantees when requesting advances or reimbursement.

[47 FR 44091, Oct. 5, 1982, as amended at 53 FR 8047, Mar. 11, 1988]

§ 600.113 Program income.

(a) *General.* Grantees and subgrantees shall be required to account for income earned from activities supported by a grant or subgrant and income resulting from DOE grant support as indicated in paragraphs (b) through (f) of this section.

(b) *Income resulting from advances of DOE funds.* With the exception of States and instrumentalities of a State, as defined in the Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4213), and their subgrantees, a grantee shall remit to DOE any interest or other investment income earned on advances of DOE funds.

(c) *Proceeds from the sale of real or tangible personal property.* The grantee or subgrantee shall account for proceeds from the sale of real property, equipment, and supplies in accordance with § 600.117.

(d) *Royalties.* The awarding party shall have no right to any royalties received by a grantee or subgrantee as a result of a copyright or a patent obtained on copyrightable material or an invention produced under the grant or subgrant unless required by the terms and conditions of the grant or subgrant award:

(e) *General program income*—(1) *Scope.* The grantee or subgrantee shall retain all ther program income (exclusive of the types of program income covered by paragraphs (b), (c) and (d) of this section), which shall be treated as general program income. Such income includes, but is not limited to, income in the form of fees for services, proceeds from the sale of energy, and usage or rental fees if the activity from which the income was earned was treated, in whole or in part, as a direct cost of the grant or subgrant and either funded by DOE or counted toward meeting a cost sharing requirement of the award. General program income does not include revenue such as taxes raised by a government under its governing power, tuition and related fees received by an institution of higher education for a regularly offered course taught by an employee performing under a grant or subgrant, or internal reimbursements or transfers of funds between components of the same legal entity (*e.g.* between agencies of a State government).

(2) *Grantee accountability.* The grantee shall report general program income on the Financial Status Report (SF-269) (OMB Nos. 0348-0001 and 1900-0127) or equivalent for the period earned or received (depending on the accounting basis used) and for the

period used (see § 600.116). The grantee shall account for general program income as prescribed in the terms and conditions of the award, which may specify the use of one or more of the options listed in (i), (ii), and (iii) of paragraph (e)(2) of this section, and which may distinguish between sources, kinds, and amounts of income in determining the option(s) to be applied. If the award does not authorize a grantee to use general program income as indicated in paragraphs (e)(2)(ii) and/or (e)(2)(iii), such program income shall be used as provided in paragraph (e)(2)(i). Unless required by statute or program rule, DOE shall have no right to any portion of general program income earned or accrued after the project period ends or the grant is terminated.

(i) General program income may be deducted from the total approved budget to determine the net costs upon which the DOE share of costs shall be calculated. If the project period consists of more than one budget period, DOE may specify that the deduction be made in a subsequent or later budget period rather than in the budget period during which the general program income was earned or received.

(ii) General program income may be used to pay all or part of the grantee's share of allowable project costs. When used in this way, the income shall be applied to the grantee's share during the current budget period unless DOE authorizes, in writing, deferral to a later budget period.

(iii) The income may be used for costs not included in the total approved budget, if DOE determines such costs are directly related to the objectives of the Federal statute under which the grant was awarded.

(3) *Subgrantee accountability.* A subgrantee shall account to the grantee for general program income in accordance with the terms and conditions of the subgrant award. Such terms and conditions shall be consistent with the provisions of this paragraph.

(f) *Records.* A grantee or subgrantee shall maintain records of the source, amount, and disposition of any income for which it is accountable to the awarding party. The access and retention requirements of § 600.25 and § 600.124 apply to program income records.

§ 600.114 Budget and project revisions.

(a) *General.* Subsequent to award, grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, certain types of postaward changes in budgets and projects shall require the prior written approval of the awarding party.

(b) *Budget changes*—(1) *Nonconstruction projects.* The grantee or subgrantee shall obtain the prior written approval of the awarding party whenever any of the following changes is anticipated under a nonconstruction award:

(i) The rebudgeting of funds either within or between budget categories for a type of cost for which approval is required under the applicable cost principles (see § 600.103).

(ii) Except as provided in § 600.32(d) for budget flexibility in research grants, any revision which would result in the need for additional DOE funding.

(iii) The transfer of funds allotted for training allowances (*i.e.* direct payments to trainees, to other expense categories).

(iv) Except for research grants, transfers among direct cost categories, or, if applicable, among separately budgeted programs, functions or activities which cumulatively exceed or are expected to exceed 5 percent of the current total approved budget, whenever the awarding party's share exceeds $100,000.

(2) *Construction projects.* The grantee shall obtain DOE prior written approval for any budget revision which would result in the need for additional DOE funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides DOE funding for both construction and nonconstruction activities, the grantee or subgrantee shall obtain prior written approval from the awarding party before

making any fund or budget transfer from one activity classification to another.

(c) *Project changes.* The grantee or subgrantee shall obtain the prior written approval of the awarding party whenever any of the following actions is anticipated:

(1) Any revision of the scope or objective of the project (regardless of whether there is an associated budget revision requiring prior approval under paragraphs (b)(1), (b)(2) or (b)(3) of this section).

(2) Designation of a new project director or principal investigator or a significant change in responsibilities of the designated project director or principal investigator under a grant award for a research project.

(3) Under nonconstruction projects, contracting or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award if such activities are treated as direct costs. This approval requirement is in addition to the approval requirements of § 600.119(c), but does not apply to the procurement of equipment, supplies, and general support services.

(d) *Additional prior approval requirements.* (1) Except as may be authorized under § 600.4 or § 600.105, the awarding party may not require prior approval for any budget revision which is not described in paragraph (b) of this section.

(2) The awarding party may require prior written approval for project revisions other than those described in paragraph (c) of this section.

(e) *Requesting prior approval.* (1) Except as provided in paragraph (e)(2) of this section, a request for prior DOE approval of any budget revision shall be on the same budget format the grantee used in its application to DOE and must be accompanied by a narrative justification for the proposed revision.

(2) A request for a budget revision which, under the applicable Federal cost principles (see § 600.103), requires DOE prior approval may be made by letter.

(3) DOE approval or disapproval of a request for a budget or project revision shall be in writing and signed by a DOE Contracting Officer.

(4) A request by a subgrantee for prior approval shall be addressed in writing to the grantee. The grantee shall promptly review such request and shall approve or disapprove the request in writing. A grantee shall not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the DOE grant award. If the revision requested by the subgrantee would result in a change to the grantee's approved budget or approved project which requires DOE prior approval, the grantee shall obtain DOE approval before approving such revision.

(5) Within 30 days after receiving a request for prior approval, the awarding party shall send the requesting party a written notice stating whether the proposed revision has been approved or disapproved, or the date when a decision is expected to be made.

[47 FR 44091, Oct. 5, 1982, as amended at 51 FR 39367, Oct. 28, 1986; 54 FR 23959, June 5, 1989]

§ 600.115 Performance reports.

(a) *General.* A grantee shall periodically assess and report to DOE progress in meeting the project objectives of the grant award. The requirements for such performance reports shall be described in any solicitation and shall be set forth in the terms and conditions of the award. The award shall specify the objectives the grantee is to achieve in performing the project, the report form or format to be used, and the frequency of required performance reports, and shall indicate whether performance shall be reported on a project, function, or activity basis.

(b) *Contents of performance reports.* Performance reports shall include:

(1) A comparison of the grantee's accomplishments with the objectives established for the reporting period, including quantification related to cost or other data if required by the terms and conditions of the award, as well as the findings of the investigator, if applicable;

(2) Reasons why established objectives were not met; and

(3) Other pertinent information, including, when appropriate, analysis and explanation of cost overruns or high unit costs.

DOE may specify in the award that the grantee provide this information on the Program/Project Status Report (Form EIA-459F), the technical reporting formats, or the Management Summary Report (see paragraph (f) of this section) contained in the DOE Uniform Reporting System for Federal Assistance (Grants and Cooperative Agreements) (DOE/MA-0001).

(Approved by the Office of Management and Budget under control number 1900-0127)

(c) *Frequency.* Performance reports shall be submitted at least annually (*i.e.* once for every 12-month period elapsed) and may be required to be submitted no more frequently than quarterly. A final report shall be required after the project period ends or the grant is terminated. The deadlines for performance reports shall be as follows:

(1) Quarterly and semiannual reports shall be submitted within 30 days after the end of the quarter or six-month period covered by the report.

(2) Annual performance reports shall be submitted within 90 days after the end of the 12-month period (generally the budget period) covered by the report or with, or as part of, any continuation or renewal application if so specified in either any pertinent program rules or the terms and conditions of award.

(3) Final performance reports shall be submitted within 90 days after the project period ends or the grant is terminated.

(4) DOE may extend the deadline date for any report if the grantee submits a written request before the deadline which adequately justifies an extension.

(d) *Relationship to Financial Status Report (FSR) (OMB Nos. 0348-0001 and 1900-0127) and other financial reports.* (1) If the FSR is used (see § 600.116), the grantee shall submit its performance reports and FSRs simultaneously for coextensive periods unless:

(i) DOE requires the grantee to submit a performance report with its continuation or renewal application; or

(ii) DOE determines that on-site technical inspections by or on behalf of DOE and certified completion data submitted by the grantee would be sufficient to evaluate construction projects; or

(iii) In order to prepare a required annual report for the Congress, DOE must receive performance reports on a date that is different from an otherwise applicable deadline.

(2) If the grantee will be using the Request for Advance or Reimbursement (SF-270) (OMB No. 0348-0004) instead of the FSR (see § 600.116(b)), DOE shall specify in the award deadlines for performance reports.

(e) *Interim reports.* The grantee shall report the following events to DOE as soon after they occur as possible:

(1) Problems, delays, or adverse conditions which will materially affect the ability to attain project objectives, or prevent the meeting of time schedules and goals. The report must describe the remedial action the grantee has taken or plans to take and any action DOE should take to alleviate the problem. (See § 600.114(e) for the procedures to be followed if additional DOE funding is required.)

(2) Favorable developments or events which enable meeting time schedules and goals sooner or at less cost than anticipated or producing more beneficial results than originally projected. (See § 600.108 (b) and (c) in the event that an excess authorization of funds occurs.)

(f) *Management Summary Report.* DOE may require that the Management Summary Report (EIA-459E) (OMB No. 1900-0127) be used as a performance report in accordance with the Uniform Reporting System for Federal Assistance (Grants and Cooperative Agreements) (DOE/MA-0001) only when such use is authorized by program rule or the need for this form is explained in the solicitation. The requirements of this section concerning reporting frequency and deadlines shall apply to the Management Summary Report. (See also § 600.102(a) with regard to use of this form as part of the grant application.)

(g) *Required copies.* The grantee shall submit an original and two copies of each required performance report unless the award specifies that the grantee may submit fewer copies.

(h) *DOE review of grantee performance.* DOE or its authorized representatives may make site visits, at any reasonable time, to review the project and to provide such technical assistance as may be necessary.

(i) *Subgrantee performance reporting.* Grantees may place performance reporting requirements on subgrant awards consistent with the provisions of this section and shall require interim reports in accordance with paragraph (e) of this section.

[47 FR 44091, Oct. 5, 1982, as amended at 51 FR 39368, Oct. 28, 1986]

§ 600.116 Financial reports.

(a) *General.* A grantee shall report financial information to DOE and, if other than DOE, the administering payment office, on one or more of the forms indicated in paragraphs (b) through (f) of this section, as specified by DOE in the terms and conditions of the award. The grantee shall submit an original and two copies of each required form unless the award specifies that the grantee may submit fewer copies. The particular form(s) specified for use shall be appropriate for the payment method used (see § 600.112) and for DOE information requirements. The grantee may provide the required information in machine usable format or computer printout instead of on the prescribed report forms. A grantee is not required to use these forms to obtain financial information from a subgrantee.

(b) *Financial Status Report (SF-269).* (1) A grantee shall use the Financial Status Report (FSR) to report the status of funds for all nonconstruction projects unless DOE specifies in the award that the Request for Advance or Reimbursement (SF-270) or the Report of Federal Cash Transactions (SF-272) shall be used for this purpose. Whenever the Request for Advance or Reimbursement form is used only for advances, even if no interim FSRs are required as provided in this paragraph, the grantee shall submit a final FSR after the project period ends or the grant is terminated.

(Approved by the Office of Management and Budget under control numbers 0348-0001 and 1900-0127; 0348-0003; and 0348-0004)

(2) Unless specified by DOE, a grantee may complete the FSR on a cash or accrual basis. DOE may require accrual reporting only if such reporting is required by program statute or rule. In any such case, the grantee shall base its financial reports to DOE on an analysis of available financial records but shall not be required to convert to an accrual accounting system.

(3) DOE may require FSRs only in the frequency specified in § 600.115(c). The grantee shall follow the deadline requirements described in § 600.115(c). Unless otherwise specified in the award, the grantee shall submit an FRS annually or, if the project period is one year or less, the grantee shall submit only a final FSR.

(4) If a grantee has unliquidated obligations when the final FRS is due, the grantee shall ask the DOE Contracting Officer whether a provisional final FSR should be submitted to be followed by a complete final FRS at a later date.

(c) *Report of Federal Cash Transactions (SF-272).* When funds are advanced to a grantee through a letter of credit or by Treasury check, the grantee shall submit to DOE a Report of Federal Cash Transactions and, when necessary, its continuation sheet (SF-272a) except that grantees under the Regional Disbursing Office system shall not be required to submit this report. For these grantees, DOE shall use information contained in the payment request to monitor grantee cash balances and to obtain disbursement information.

(Approved by the Office of Management and Budget under control number 0348-0003)

(1) The Federal Cash Transactions Report shall be submitted within 15

working days following the end of each quarter.

(2) DOE may require that grantees receiving advances totaling $1 million or more per year submit monthly SF-272 reports.

(3) DOE may waive the SF-272 requirement whenever total monthly advances to a grantee do not exceed $10,000 and DOE determines that the grantee's accounting controls are adequate to minimize excessive advances.

(4) Grantees who receive a single payment of less than $10,000 in accordance with § 600.112(b)(2)(ii) shall not be required to submit an SF-272.

(d) *Payment requests under a letter of credit.* A grantee shall use the forms specified by the administering payment office to request payment under a letter of credit (see § 600.112(b)(1)).

(e) *Request for Advance or Reimbursement (SF-270).* A grantee who does not have a letter of credit shall use the Request for Advance or Reimbursement (SF-270) for any nonconstruction project.

(1) Requests for advances by Treasury check may be submitted as necessary; however, such requests shall not be made in excess of reasonable estimates of cash outlays for a 30-day period.

(2) Requests for reimbursement shall be submitted monthly unless more frequent submission is authorized by the award.

(Approved by the Office of Management and Budget under control number 0348-0004)

(f) *Outlay Report and Request for Reimbursement for Construction Programs (SF-271).* Unless DOE specifies in the award that the grantee shall use the SF-270, the grantee shall use the Outlay Report and Request for Reimbursement for Construction Programs to request reimbursement for a construction project in the frequency specified in paragraph (e)(2) of this section.

(Approved by the Office of Management and Budget under control number 0348-0002)

(g) *Standard forms.* Standard financial report forms, instructions for their completion, and applicable definitions, are contained in OMB Circular A-110, Attachment G, and, with respect to the SF-269, in the Uniform Reporting System for Federal Assistance (DOE/MA-0001). All DOE grantees shall use these forms and instructions, except as provided in paragraph (a) of this section. Use of any nonstandard form or instructions shall be considered a deviation subject to the deviation procedures of § 600.4.

(Approved by the Office of Management and Budget under control numbers 0348-0001—0348-0004 and 1900-0127)

[47 FR 44091, Oct. 5, 1982, as amended at 53 FR 8047, Mar. 11, 1988]

§ 600.117 Property management.

(a) *Definitions.* (1) "Acquired with DOE grant funds" means that all or a portion of the acquisition cost of an item of property is a direct charge to DOE grant funds (whether the cost is incurred under the grant, a subgrant, or a cost-reimbursement contract) or all or a portion of the acquisition cost is a direct cost being used to meet a cost sharing requirement.

(2) "Acquisition cost" of an item of purchased equipment means the net invoice unit price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the equipment usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty, or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

(3) "Acquisition of property" means the purchase, construction, or fabrication of property but does not include rental of property or minor alteration or renovation of real property.

(4) "Allowable cost of the project" means, when used for purposes of determining the amount of reimbursement due under this section, the DOE (or non-Federal) share of the allowable costs which were either chargeable to DOE grant funds or counted toward meeting a cost sharing requirement of the grant during the project period. For property acquired by a subgrantee, the DOE share of the

grantee's costs shall be multiplied by the grantee's share of the subgrantee's costs to determine the DOE share of the subgrantee's costs.

(5) "Equipment" means an article of tangible personal property that has a useful life of more than two years and an acquisition cost of $500 or more. A grantee or subgrantee may use its own definition of equipment provided the definition would include all articles of equipment as defined in this paragraph.

(6) "Exempt property" means equipment and supplies acquired with DOE grant funds for which the grantee or subgrantee is not required to account to DOE except as provided in paragraph (d)(2) of this section. The exempt status must be authorized by a Federal statute.

(7) "Federally owned property" means any real or tangible personal property (equipment or supplies) owned by DOE which is furnished by DOE to a grantee for use during the project period, and any such property acquired under a grant which DOE is required by statute or by a determination made in accordance with this part to own.

(8) "Nonexempt property" means equipment and supplies acquired with DOE grant funds which are subject to the conditions for use, management, and disposition under paragraphs (d) and (e) of this section. For purposes of this section, nonexempt property includes excess personal property which has been made available to a grantee under authority of the Federal Property and Administrative Services Act, as amended by 40 U.S.C. 483, and the implementing Federal Property Management Regulations (41 CFR 101-43.320).

(9) "Real property " means land, land improvements, structures and anything attached to these so as to become a part of them. This term does not include movable machinery and other types of equipment.

(10) "Supply" means any tangible personal property other than equipment.

(b) *Applicability.* (1) Except as provided in paragraphs (b)(2) and (b)(3), this section applies to real property equipment, and supplies acquired with DOE grant funds, and to real property, equipment, and supplies furnished by DOE under a grant.

(2) The requirements of this section apply to grantees and subgrantees. The requirements of this section apply to equipment and supplies acquired by a contractor under a grant or subgrant only when the contract requires ownership of the property to remain with the grantee, subgrantee, or DOE.

(3) The requirements of this section do not apply to:

(i) Property for which only use or depreciation allowances are charged;

(ii) Property donated by a third party (whether or not counted as a third-party in-kind contribution); and

(iii) Property acquired for sale or rental rather than for use in the grant project.

(4) Grantees and subgrantees may use their own property management standards and procedures if the requirements of this section are included.

(c) *Real property.* (1) Federally owned real property shall be managed and disposed of in accordance with the terms and conditions of the award.

(2) Real property may be acquired with DOE grant funds only when authorized by Federal statute or program rule and only if DOE specifically authorizes such costs in the award. Except as otherwise required by Federal statute or program rule, the following shall apply whenever real property is acquired with DOE grant funds.

(i) Subject to the conditions in paragraphs (c)(2)(ii) and (c)(2)(iii), the grantee shall have title to such real property during and after the period of DOE grant support. A subgrantee may have title to such real property only if authorized by Federal statute or program rule.

(ii) Except as provided in paragraph (c)(2)(iv), the grantee shall notify DOE at any time if the real property becomes unnecessary for the purpose authorized under the grant or subgrant under which it was acquired. The grantee must obtain written DOE approval to use the property for any other purpose. Such use shall be limited to federally assisted projects, or to programs, projects or activities that have purposes consistent with those authorized in the statute under which the grant was awarded.

(iii) Except as provided in paragraph (c)(2)(iv) of this section, whenever real property is no longer needed or used as provided in paragraph (c)(2)(ii) of this section, the grantee must request disposition instructions from DOE. DOE shall instruct that the real property be disposed of in one of the following ways, any one of which shall result in satisfaction of the grantee's accountability:

(A) The grantee or subgrantee may be permitted to retain the real property after compensating DOE in an amount computed by applying the percentage of DOE participation in the allowable costs of the project to the current fair market value of the property.

(B) The grantee or subgrantee may be directed to sell the real property and pay DOE an amount computed by applying the percentage of DOE participation in the allowable costs of the project to the proceeds from sale (after deducting actual, reasonable selling expenses from the sales proceeds).

(C) The grantee or subgrantee may be directed to transfer title to the Federal government or to a non-Federal third party specified by DOE (although the grantee or subgrantee may suggest a potential third party transferee). The grantee or subgrantee shall be compensated in an amount computed by applying the grantee's percentage of participation in the allowable costs of the project to the current fair market value of the real property.

(D) If the real property was not wholly acquired with DOE grant funds, the proportionate shares shall be adjusted by multiplying the percentage of the acquisition cost of the property (or if donated, the market value at the time of donation) which was attributable to DOE grant funds by the percentage of DOE, grantee, or subgrantee participation in the allowable costs of the project. This requirement also applies to reimbursement due under paragraph (d) or (e) of this section.

(iv) If real property is acquired under a grant or subgrant of $10,000 or less, the grantee shall not be required to—

(A) Obtain DOE approval for any alternative use or disposition of the property after the end of the project period.

(B) Compensate DOE for its share of the acquisition cost of the real property.

(d) *Equipment*—(1) *Federally owned equipment*. Unless otherwise specified in the award, the grantee or subgrantee shall manage federally owned equipment provided by DOE or acquired with DOE grant funds in accordance with the property management standards in OMB Circular A-110, Attachment N, Paragraph 6.d., as applicable. The OMB Circular A-110 requirements shall also apply to individuals, for-profit organizations, and foreign organizations. However, if federally owned equipment has been provided under a grant, the grantee must submit annually an inventory to DOE which lists such equipment in the custody of the grantee, any subgrantee, or contractor under the grant. For federally owned equipment acquired with DOE grant funds, the grantee shall provide DOE written notification of the results of the inventory(ies) under OMB Circular A-110, Attachment N, Paragraph 6.d., as applicable.

(i) During the period of DOE support, the grantee shall notify DOE as soon as practicable whenever federally owned equipment is no longer needed for the project. For expired or terminated grants, the grantee shall report any federally owned equipment upon request by DOE as part of closeout (see § 600.123). Thereafter, DOE shall issue disposition instructions to the grantee in accordance with applicable law and regulations.

(2) *Transfer of equipment*. DOE may transfer ownership of any item of exempt or nonexempt equipment having a unit acquisition cost of $1,000 or more to the Federal government or to an eligible third party named by DOE, subject to the following:

(i) DOE must notify the grantee in writing of its intent to transfer ownership within 120 days following the end of the project period or the termination of the DOE grant under which the equipment was acquired, and must specifically identify the equipment to be transferred. DOE shall arrange for transfer as soon as possible after the notice.

(ii) DOE may transfer ownership only when the equipment is no longer needed for the project for which it was acquired, or if the grantee or subgrantee agrees to relinquish the equipment.

(iii) The grantee shall be paid any reasonable storage or shipping costs incurred plus an amount computed by multiplying the current fair market value of the equipment by the non-Federal share, if any, in the allowable costs of the project. A grantee may, in the terms of a subgrant, reserve the right to transfer equipment acquired under the subgrant as provided in this paragraph. Without DOE approval, this right may be exercised only if the project for which the equipment was acquired is transferred to another subgrantee and the equipment is to be transferred for continued use in the project. Any other exercise of this right by the grantee requires the prior written approval of DOE.

(3) Grantees and subgrantees shall comply with OMB Circular A-110, Attachment N, Paragraphs 6. b, c, and d for use, disposition, and management of such equipment.

(4) At the end of the project period or at the termination of DOE support for the project, the grantee shall provide an inventory of nonexempt equipment with a unit acquisition cost of $1,000 or more acquired by the grantee or subgrantee along with a statement of the grantee's or subgrantee's plans for continued use or recommendations for disposing of such equipment. If nonexempt equipment is acquired under a grant of $10,000 or less, and DOE does not transfer ownership under paragraph (d)(2) of this section, the grantee shall have no further obligation to DOE with respect to the use, management, or disposition of such property.

(e) *Supplies.* (1) Federally owned supplies shall be used, managed, and disposed of in accordance with the terms and conditions of the award.

(2) If, at the end of the project period or upon termination of the grant or subgrant for which supplies (other than federally owned supplies) were acquired, unused supplies exceeding $1,000 in total aggregate current fair market value remain, they may be used for any other federally funded activity of the grantee or subgrantee without compensation to DOE. Unless otherwise exempted by Federal statute, if they are not needed for any federally funded activity, the grantee or subgrantee must compensate DOE. If the supplies are retained for use on non-Federal activities, the amount due DOE shall be computed by multiplying the DOE share in the allowable costs of the project for which the supplies were acquired by the current fair market value of the supplies. If sold, the DOE share shall be multiplied by the sales proceeds or the current fair market value, whichever is greater, to determine the amount due DOE. The grantee or subgrantee may retain $100 or ten percent of the proceeds, whichever is greater, for selling and handling expenses.

[47 FR 44091, Oct. 5, 1982, as amended at 53 FR 8047, Mar. 11, 1988]

§ 600.119 Procurement under grants and subgrants.

(a) *Applicability.* This section applies to the procurement, whether by purchase, rental, or otherwise, of supplies, equipment, construction, or services by grantees and subgrantees from third parties when some or all of the cost of the procurement is a direct charge to DOE grant funds or is a direct cost being used to meet all or part of a cost sharing requirement of the DOE award.

(1) This section does not apply to procurements covered by § 600.436, Subpart E.

(2) This section does not apply to procurement of land or any other existing real property.

(b) *Grantee and subgrantee responsibilities.* Grantees and subgrantees shall comply with the grantee and subgrantee responsibility requirements of OMB Circular A-110, Attachment O, Paragraphs 2, 3, and 4.

(c) *Prior approval requirements.* (1) A grantee or subgrantee must receive prior written approval from the awarding party before entering into any sole source contract or a contract where only one bid or proposal is received when:

(i) Except as provided in paragraph (c)(1)(iii) of this section, the value of the contract is expected to exceed $5,000 in the aggregate and the grantee or subgrantee is not a State government, local government, or Indian tribal government.

(ii) [Reserved]

(iii) In the case of a research grant, the value of the contract is expected to exceed $25,000 in the aggregate, regardless of the grantee's or subgrantee's organizational type.

(2) In addition to the prior approval requirements of paragraph (c)(1), DOE may require review and approval of proposed procurements in the following instances:

(i) If DOE or the grantee determines, on the basis of a review in accordance with § 600.104 or § 600.105, that the grantee's or subgrantee's procurement procedures or operations do not comply with one or more of the applicable procurement system standards; or

(ii) Whenever authorized under OMB Circular A-110.

(3) A request for prior approval under this paragraph shall include a copy of the proposed contract and any related procurement documents, such as requests for proposals and invitations for bids, and justification for noncompetitive procurement.

(d) *Contract provisions.* In addition to the contract clauses required under OMB Circular A-110, contracts under grants and subgrants shall include the following as appropriate:

(1) In negotiated contracts whose value is more than $10,000, a clause requiring the contractor to retain records for three years after final payment is made under the contract. The provision must also require that if an audit, litigation, or other action involving the records is started before the end of the three-year period, the records must be retained until all issues arising out of the action are resolved, or until the end of the three-year period, whichever is later.

(i) If the contract is under a subgrant, the clause must require that the grantee, the subgrantee, and the Federal government shall have access to applicable records (see § 600.25).

(2) A clause requiring the contractor to comply with applicable DOE requirements concerning patents, inventions and copyrights (see § 600.118).

(3) A clause specifying the Federal cost principles applicable to a contractor under a cost-reimbursement contract.

(4) A clause requiring the contractor to include the clauses required by this paragraph (d) in any subcontract which would be required if the subcontract were a contract under a grant or subgrant except that a contractor administering a fixed-price contract shall not be required to specify Federal cost principles in a cost-reimbursement subcontract.

(e) *Payment of interest penalties.* By agreement of the grantee or subgrantee and the contractor, if consistent with the grantee's or subgrantee's usual business practices and applicable state and local law, any contract to which this section applies may provide for the payment of interest penalties on amounts overdue under such contract except that—

(1) In no case shall any obligation to pay such interest penalties be construed to be an obligation of the Federal government, and

(2) Any payment of such interest penalties may not be made from DOE funds nor be counted toward meeting a cost sharing requirement of a DOE award.

[47 FR 44091, Oct. 5, 1982, as amended at 51 FR 39368, Oct. 28, 1986; 53 FR 8047, Mar. 11, 1988; 54 FR 23959, June 5, 1989]

§ 600.120 Audit requirements.

(a) This section establishes requirements for the conduct, oversight, scope, and frequency of financial and compliance audits for recipients and subrecipients. Any financial and compliance audit of a recipient covered by paragraph (b) or (c) of this section, which is in addition to the audit required by those paragraphs, made by or on behalf of DOE shall rely, to the extent possible, on the independent audit performed pursuant to those paragraphs.

(b) *State governments, local governments, or Indian tribes.* A grantee that is a State government, a local government, or an Indian tribe, as defined therein, shall comply with the audit requirements of the Single Audit Act of 1984 and OMB Circular A-128, as implemented by Subpart D of this part.

(c) *Nonprofit organizations.* (1) Except for public hospitals and public colleges and universities that are included in an audit conducted pursuant to Subpart D of this Part, all grantees and subgrantees that are institutions of higher education, hospitals or other nonprofit organizations shall comply with the requirements of OMB Circular A-110, Attachment F, Paragraph 2.h. and shall:

(i) Conduct, or provide for the conduct of, an independent financial and compliance audit usually annually but not less frequently than every two years, on an organization-wide basis using a representative sample of Federal awards;

(ii) Make such audits in accordance with the General Accounting Office (GAO) "Standards for Audit of Governmental Organizations, Programs Activities, and Functions;" the GAO "Guidelines for Financial and Compliance Audits of Federally Assisted Programs"; OMB-approved audit compliance supplements; and generally accepted auditing standards established by the American Institute of Certified Public Accountants.

(iii) Submit the resulting audit report(s) to the cognizant audit agency, in the case of a grantee, or to the grantee, in the case of a subgrantee.

(2) Any grantee or subgrantee that is a small organization (as defined in § 600.101), which is not covered by the audit requirements of Subpart D and that receives DOE financial assistance only in the amount of $10,000 or less for a period of 18 months or less shall not be required to comply with paragraph (c)(1) of this section but may be audited in accordance with paragraph (d).

(d) *Individuals and for-profit organizations.* The awarding party may audit, or cause to be audited, grants or subgrants to individuals or for-profit organizations whenever and in the degree of detail deemed necessary by the awarding party. The awarding party shall rely on available audit reports in determining the need for an scope of such audits.

[47 FR 44091, Oct. 5, 1982, as amended at 50 FR 42356, Oct. 18, 1985; 51 FR 4297, Feb. 4, 1986]

§ 600.121 Noncompliance.

(a) Except for noncompliance determinations under 10 CFR Part 1040, whenever DOE determines that a grantee has not complied with the applicable requirements of this Part, with the requirements of any applicable program statute or rule, or with any other term or condition of the award, a DOE Contracting Officer shall provide to the grantee (by certified mail, return receipt requested) a written notice setting forth—

(1) The factual and legal bases for the determination of noncompliance;

(2) The corrective actions and the date (not less than 30 days after the date of the notice) by which they must be taken.

(3) Which of the actions authorized under paragraph (b) of this section DOE may take if the grantee does not achieve compliance within the time specified in the notice, or does not provide satisfactory assurances that actions have been initiated which will achieve compliance in a timely manner.

(b) If the grantee does not achieve compliance or provide DOE with satisfactory assurances of the initiation of actions intended to achieve compliance within the time specified in the notice under paragraph (a) of this section, DOE may take any or all of the following actions:

(1) Convert the grantee from an advance payment method to a reimbursement payment method as provided in § 600.112(d);

(2) Withhold payment as provided in § 600.112(f);

(3) Suspend the grant;

(4) Terminate the grant for cause;

(5) Disapprove renewal applications or other requests for extension of time or additional funding for the same project;

(6) Decline to make a continuation award;

(7) Invalidate an award that was obtained fraudulently;

(8) Recover funds and tangible property up to the amount of the award;

(9) Determine that the grantee is not responsible as provided in § 600.104; and

(10) Initiate such other legal actions as may be appropriate.

(c) DOE may take any of the actions set forth in paragraph (b) of this section concurrent with the written notice required under paragraph (a) of this section or with less than 30 days written notice to the grantee whenever:

(1) There is evidence the award was obtained by fraud;

(2) The grantee ceases to exist or becomes legally incapable of performing its responsibilities under the grant agreement;

(3) There is serious mismanagement or misuse of grant funds necessitating immediate action; or

(4) An immediate debarment in accordance with § 600.27(g) is warranted.

[47 FR 44091, Oct. 5, 1982, as amended at 48 FR 34405, July 28, 1983]

§ 600.123 Closeout.

DOE shall close out a grant within a reasonable period of time after the completion date of the grant. The completion date may be either the last day of the project period or the date of termination of a grant. "Closeout" means the process by which DOE determines that all required work has been performed by the grantee and that all applicable administrative actions, except as provided in paragraphs (b) and (c) of this section, have been completed by DOE and the grantee.

(a) *Final reports.* Within 90 days after the completion date of a grant, the grantee shall submit any final financial, performance, and other reports required by the terms and conditions of the award.

(b) *Final payments and adjustments.* If required or authorized by the terms and conditions of the award, DOE may make any necessary upward or downward adjustment to the DOE share of the approved budget based on the information contained in the grantee's final reports or in any audit under § 600.120. At the request of a grantee who is being reimbursed by Treasury check, DOE shall promptly pay the grantee for any unreimbursed allowable costs under the grant being closed out. The grantee shall immediately refund to DOE any unobligated funds advanced to the grantee which are not authorized to be retained by the grantee for use on other DOE awards. In the case of grants terminated for cause, payments to grantees or refunds to DOE shall be made in accordance with § 600.122.

(c) *Property.* The grantee shall provide a listing of property furnished by DOE or acquired with DOE grant funds for which such a listing is required under § 600.117. The closeout of a grant does not affect the grantee's responsibilities for property for which a grantee is accountable and which has not been transferred by DOE or disposed of in accordance with § 600.117.

(d) *Program income.* The closeout of a grant does not affect a grantee's responsibilities with respect to program income for which the grantee is accountable in accordance with § 600.113(e).

(e) *Audit.* If DOE closes out a grant without an audit or without benefit of an organizationwide or single audit covering the full period of DOE support, the grantee shall refund to DOE the amount of any costs subsequently disallowed under the closed out grant on the basis of any applicable audit report received subsequent to closeout.

(f) *Subgrants.* Grantees shall, to the extent appropriate, follow the procedures of this section in closing out subgrants.

[47 FR 44091, Oct. 5, 1982, as amended at 50 FR 42357, Oct. 18, 1985; 51 FR 4297, Feb. 4, 1986]

§ 600.124 Record retention requirements.

Grantees and subgrantees shall retain records as specified in § 600.25

for a three-year period which shall be calculated as follows:

(a) If DOE grant support is continued or renewed at annual or other intervals, the retention period for the records of each budget period shall commence on the date the annual Financial Status Report (OMB Nos. 0348-0001 and 1900-0127) (or equivalent) is submitted to DOE. In all other cases, the retention period starts on the date the grantee submits its final Financial Status Report (or equivalent) to DOE or, if the requirement for such an expenditure report has been waived, the retention period shall start 90 days after the completion date of the grant.

(b) *Equipment records.* The record retention period for the equipment records required by § 600.117 starts from the date of disposition or transfer of the property by or at the direction of the awarding party.

(c) *Program income records.* If, by the terms and conditions of the award, the grantee or subgrantee—

(1) Is accountable for program income earned or received after the end of the project period or after the termination of a grant or subgrant, or

(2) If program income earned during the project period is required to be applied to costs incurred after the end of the project period or after termination of a grant or subgrant, the record retention period shall start on the last day of the grantee's or subgrantee's fiscal year in which such income was earned or received or such costs were incurred. All other program income records shall be retained in accordance with paragraph (a) of this section.

(d) *Indirect cost computation records.* The retention period for supporting records for indirect cost rate computations or proposals submitted to the awarding party or other Federal agency for negotiation starts from the date of submission of the proposal or computation.

(1) If a local government is required to submit its indirect cost plan to the Federal government for negotiation in accordance with OMB Circular A-87, the retention period for the plan and supporting records starts from the end of the fiscal year (or other accounting period) covered by the plan.

(e) If any litigation, claim, negotiation, audit or other disputed action involving the records has been started before the expiration of the three-year period, the records shall be retained until such action and all related issues are resolved, or until the end of the regular three-year retention period, whichever is later.

(f) The awarding party may request that records be transferred to its custody. After the records are transferred to the awarding party, the three-year retention requirement does not apply to the transferred records.

(g) Microfilm copies may be substituted for original records.

(h) The retention requirements applicable to contractor and subcontractor records are specified in § 600.119(d).

Subpart C—Cooperative Agreements

SOURCE: 53 FR 5262, Feb. 22, 1988, unless otherwise noted.

§ 600.200 Scope and applicability.

(a) This subpart establishes policies and procedures for the award and administration of cooperative agreements.

(b) The requirements of this subpart shall apply as indicated in § 600.2 except that this subpart shall not apply to any new award resulting from a solicitation issued before February 22, 1988.

(c) The noncompliance procedures of § 600.121 and the suspension and termination procedures of § 600.29 which are specified for cooperative agreement use in § 600.205 shall apply, with the concurrence of the affected parties, to any applicable action initiated before February 22, 1988, and shall apply to any applicable action initiated after February 22, 1988, under an active cooperative agreement. The closeout procedures of § 600.123 which are specified in § 600.205 shall apply to any terminated or expired cooperative agreement which has not been closed out prior to February 22, 1988.

[53 FR 5262, Feb. 22, 1988, as amended at 53 FR 8047, Mar. 11, 1988]

§ 600.201 Definitions.

The definitions contained in § 600.101 except for "formula grant" and "subgrant" shall apply to all cooperative agreements. In addition, for purposes of this subpart, "participant" means the organization, individual, or other entity that receives a cooperative agreement award from DOE and is financially accountable for the use of any DOE funds or property provided for the performance of the project, and is legally responsible for carrying out the terms and conditions of the award.

§ 600.202 Selection of cooperative agreement as financial assistance instrument.

(a) *Determinations.* When DOE determines in accordance with the appropriate authorizing statute, the Federal Grant and Cooperative Agreement Act, Pub. L. 97-258, and § 600.5 that the principal purpose of the relationship is assistance and it is anticipated that there will be substantial involvement between DOE and the participant during performance of the contemplated activity, the award instrument shall be a cooperative agreement.

(b) *Substantial involvement.* Anticipated substantial involvement between DOE and the participant during performance of the contemplated activity is the only criterion which distinguishes a grant relationship from a cooperative agreement relationship.

(1) Substantial involvement exists when:

(i) Responsibility for the management, control, or direction of the project is shared by DOE and the participant, or

(ii) Responsibility for the performance of the project is shared by DOE and the participant, or

(iii) DOE has the right to intervene in the conduct or performance of project activities for programmatic reasons. Intervention includes the interruption or modification of the conduct or performance of project activities. (Suspension or termination of the cooperative agreement under § 600.122 does not constitute "intervention in the conduct or performance of project activities.")

(2) Providing technical assistance or guidance of programmatic nature to a recipient does not constitute substantial involvement if the recipient is not required to follow such guidance or if the technical assistance or guidance is provided at the request of the recipient, and such assistance or guidance is not expected to result in continuing DOE involvement in the performance of the project.

(3) Technical assistance or guidance which pertains to the administrative requirements of the award does not constitute substantial involvement.

(c) Statement of substantial involvement between DOE and the participant. Every cooperative agreement shall explicitly state the substantial involvement anticipated between DOE and the participant during performance of the project.

(1) The cooperative agreement award document shall affirmatively state, under the heading "Substantial Involvement between DOE and the Participant," all relevant information concerning the substantial involvement anticipated between DOE and the participant during performance of the project. This statement shall describe the following:

(i) The project activities in which substantial involvement between DOE and the participant is anticipated;

(ii) The specific responsibilities and authorities of DOE and the participant in the conduct and/or performance of each of the project activities in which substantial involvement is anticipated;

(iii) Any limitations on DOE/participant responsibilities and authorities in the conduct and/or performance of each of the project activities;

(iv) The duration of DOE/participant responsibilities and authorities in the conduct and/or performance of each of the project activities.

(2) A statement of substantial involvement between DOE and the participant shall be developed so that it:

(i) Represents only the DOE involvement intended and does not unnecessarily increase DOE liability under the cooperative agreement;

(ii) Integrates, as appropriate, DOE's responsibilities and involvement in project activities with administrative requirements such as performance reporting and monitoring, property management, and suspension and termination; and

(iii) Specifies which general administrative requirements applicable to cooperative agreements are deleted or modified because they are inconsistent with the provisions related to substantial involvement.

§ 600.203 Application budgetary information.

For cooperative agreement application subject to the SEB process, DOE may require that applicants, other than governmental entities, submit budget information in a different format and in greater detail than that specified in §§ 600.10, 600.102 and 600.410 only when that information is essential to evaluation under the SEB process. State, local, and Indian tribal governments shall continue to provide budget information as specified in §§ 600.10, 600.102 and 600.410 and shall be excluded from this requirement. (Also see §§ 600.10, 600.102 and 600.410 for the other requirements pertinent to application contents.)

[53 FR 5262, Feb. 22, 1988, as amended at 53 FR 8047, Mar. 11, 1988]

§ 600.204 Instrument conversion.

(a) *Conversion of a grant to a cooperative agreement.* Subsequent to the award of a grant, it may be necessary for DOE to become substantially involved with the participant in the performance of the project. However, the introduction of substantial involvement does not by itself constitute a conversion from a grant to a cooperative agreement relationship nor does it necessarily require tht a change be made in instrument type.

(1) *Determination.* When DOE determines in accordance with § 600.202 that a cooperative agreement would be the appropriate instrument because of the necessity for substantial involvement between the parties, and the substantial involvement is necessary for a period of at least twelve months beyond the expiration date of the current budget period, DOE will initiate action to convert the grant to a cooperative agreement.

(2) *Conversion.* DOE shall notify the grantee of its intention to convert from a grant to a cooperative agreement as soon as the decision is made, but no later than sixty days prior to the expiration date of the current budget period. Conversion of a grant to a cooperative agreement shall be effected at the time of negotiation of the continuation or renewal award or any extension of twelve months or more. A grant may also be converted to a cooperative agreement at any time after award when it is mutually agreed that DOE should be substantially involved in the performance of the project. The conversion shall be accomplished by an amendment to the award. The amendment documents shall:

(i) Change the instrument-type designation in the award document from "Grant" to "Cooperative Agreement";

(ii) Indicate that thereafter Subpart C of this part shall apply to the agreement in lieu of Subpart B of this part;

(iii) Add a statement of substantial involvement between DOE and the participant in accordance with § 600.202(c); and

(iv) Change any other terms, as appropriate (e.g., special provisions, reporting), to reflect the increased involvement by DOE.

(3) In the event DOE determines substantial involvement between the parties is necessary for at least twelve months after the expiration date of the current budget period and the grantee does not agree to conversion of the instrument at the time of negotiation, the grantee's refusal to agree to the conversion will be the basis for not making a continuation award, renewal award, or extension and the recipient shall have no right of appeal under § 600.26. Any refusal to accept a cooperative agreement award shall be treated in accordance with § 600.22.

(b) *Conversion of a cooperative agreement to a grant.* A cooperative agreement may be converted to a grant if DOE determines after award of a cooperative agreement that the anticipated substantial involvement between the parties will not be necessary. Conversion of a cooperative agreement to a grant shall be accomplished by a bilateral amendment to the award as soon as possible after it is determined that no substantial involvement will be necessary between DOE and the participant during performance of the activity. The amendment shall:

(1) Change the instrument type designation in the award document from "Cooperative Agreement" to "Grant";

(2) Indicate that thereafter Subpart B of this part will apply to the agreement in lieu of Subpart C of this part;

(3) Delete the "Substantial Involvement Between DOE and Participant" section from the agreement; and

(4) As necessary, change any other administrative terms which relate to the substantial involvement between DOE and the participant. If the participant does not agree to the conversion, DOE shall initiate a termination of the agreement in accordance with § 600.29.

[53 FR 5262, Feb. 22, 1988, as amended at 53 FR 8047, Mar. 11, 1988]

§ 600.205 Application, funding, and administrative requirements.

Unless otherwise specified in this subpart or Subpart A of this part, the application, funding, and administrative requirements for cooperative agreements are specified in Subpart B of this part for recipients who are other than State, local, or Indian tribal governments and Subpart E of this part for State, local and Indian tribal governments. Furthermore, the audit requirements set forth in Subpart D of this part shall apply to cooperative agreements with State and local governments.

[53 FR 8047, Mar. 11, 1988]

§ 600.206 Cost sharing.

In addition to the requirements of § 600.107 or § 600.424, the following requirements apply to research, development, and demonstration projects:

(a) When DOE awards cooperative agreements for research, development, and demonstration projects where the primary purpose of the project is the ultimate commercialization and utilization of technology by the private sector and when there are reasonable expectations that the participant will receive significant present or future economic benefits beyond the instant award as a result of the performance of the cooperative agreement, cost sharing shall be required unless waived by the cognizant Program Assistant Secretary or designee.

(b) DOE will decide, on a case-by-case basis, the amount of cost sharing required for a particular project.

(c) Factors in addition to those specified in § 600.107(c) or § 600.424 which may be considered when negotiating cost sharing for research, development, and demonstration projects include the potential benefits to a participant resulting from the project and the length of time before a project is likely to be commercially successful.

[53 FR 5265 Feb. 22, 1988 as amended at 53 FR 8047, Mar. 11, 1988]

§ 600.207 Patents, data, and copyrights.

(a) *General.* Cooperative agreements shall be awarded and administered by DOE in compliance with the patent, data, and copyright provisions of this section and 48 CFR Part 927. DOE shall specify in each award, the applicable patent, data, and copyright provisions.

(b) *Required clauses.* DOE shall determine which of the clauses listed in this paragraph or in 48 CFR Part 927 apply, based on DOE review of the application, other information submitted by the applicant, and any negotiations. These clauses may be modified by DOE Patent Counsel, in accordance with the procedures of 48 CFR Part 927, for a particular cooperative agreement or for a class of cooperative agreements. In each patent, data, and copyright clause selected for inclusion in the cooperative agreement, the terms "grant" or "contract" shall be read as "cooperative agreement" or "agreement," the terms "grantee" or "contractor" shall be read as "participant," the term "subgrant" shall be read as "subaward," and "subcontract" or "contract" awarded under a grant shall be read as "contract" under a cooperative agreement.

(1) *Patent Rights (Small Business Firm or Nonprofit Organization).* The clause set forth in § 600.118(b)(1) shall be included in cooperative agreements with small business firms and nonprof-

it organizations where such cooperative agreements have as a purpose the conduct of experimental, developmental, demonstration, or research work. The policies and procedures of § 600.118(b)(1) require the small business firm or nonprofit organization to state in writing that it qualifies as a small business firm or nonprofit organization. In exceptional circumstances, DOE may, as determined by Patent Counsel, use a patent rights clause other than the clause specified in paragraph (b)(1) of § 600.118 for such participants. Exceptional circumstances have been declared for classified subject matter, high level radioactive waste, and uranium enrichment. In addition, if the cooperative agreement is affected by an international agreement or treaty, special provisions are to be included in the clause specified herein.

(2) *Patent Rights (Long Form).* As specified by 48 CFR 927.300(a), the clause set forth in 41 CFR 9-9.107-5(a) shall be included in all cooperative agreements awarded to participants other than small business firms or nonprofit organizations, where such cooperative agreements have as a purpose the conduct of experimental, developmental, demonstration, or research work. The applicant/participant may request in advance of, or within thirty days after the award is signed, a waiver of all or any part of the rights of the United States with respect to subject inventions. DOE shall notify the applicant of this right by inserting the notice of 48 CFR 952.227-84 in all solicitations which may result in cooperative agreements calling for experimental, research, developmental, and demonstration work. For unsolicited applications, DOE shall provide this notice to the applicant prior to award. If a waiver is granted, the appropriate waiver clause shall be substituted for the Patent Rights (Long Form) clause. DOE also may authorize an advance waiver for a class of awards, when appropriate, and shall specify the applicable patent rights clause in every award covered by such a waiver. The clause set forth in 41 CFR 9-9.107-5(a) shall be modified in accordance with 41 CFR 9-9.107-5, as appropriate.

(3) *Rights in Technical Data (Long Form).* The clause set forth in 48 CFR 952.227-75 shall be included in all cooperative agreements having as a purpose the conduct of experimental, developmental, demonstration, or research work. This clause shall be modified in accordance with 48 CFR 952.227-75 Alternate I and II, as appropriate.

(4) *Additional technical data requirements.* The clause set forth in 48 CFR 952.227-73 shall be included in all cooperative agreements having as a purpose the conduct of experimental, developmental, demonstration, or research work unless all technical data requirements are known in advance of the agreement and are set forth in the cooperative agreement project description/statement of work.

(5) *Patent indemnity.* As specified in 48 CFR 927.300(a), the clause set forth in 41 CFR 9-9.103-3(b) shall be included in all cooperative agreements for experimental, developmental, demonstration, or research work, when DOE determines that the cooperative agreement will require standard supplies sold or offered for sale to the public on the commercial open market or will use the participant's practices or methods which normally are or have been used in providing goods and services on the commercial open market or will use any parts, components, practices, or methods to the extent to which the participant has secured indemnification from liability. The participant shall include this clause in contracts for the types of activities described in this paragraph.

(6) *Classified inventions.* As specified in 48 CFR 927.300(a), the clause set forth in 41 CFR 9-9.106 shall be included in every cooperative agreement which covers, or is likely to cover, classified subject matter.

(7) *Authorization and consent.* The clause set forth in § 600.33(b)(5) shall be included in all cooperative agreements under which experimental, developmental, demonstration, or research work is to be performed within the United States, its possessions, or Puerto Rico.

(8) *Notice and assistance.* The clause set forth in § 600.33(b)(6) shall be included in all cooperative agreements

in excess of $10,000 for construction, experimental, developmental, demonstration, or research work which is to be performed within the United States, its possessions, or Puerto Rico.

(9) *Reporting of royalties.* In order that DOE may be informed regarding royalty payments to be made by a participant in connection with any cooperative agreement where the amount of the royalty payments is included in the proposed budget, the applicant shall provide:

(i) Information concerning the royalty payments expected to be made under the cooperative agreement, if awarded, together with the name of the licensors, and either the patent numbers involved or such other information as will permit identification of the patents and patent applications as well as the basis on which the royalties are to be paid; or

(ii) A certification that the proposed budget includes no amount representing any royalty that would be paid by the participant directly to others in connection with the performance of the award.

(iii) If the information or certification specified in paragraphs (b)(9)(i) and (b)(9)(ii) is not available at the time of award, DOE shall include the clause set forth in § 600.33(c)(2) in any applicable cooperative agreement award.

(10) Subawards and contracts under cooperative agreements or subawards. The participant shall include the applicable clauses of this section in any subaward or contract awarded under a cooperative agreement and assure that the applicable clauses are also included by subrecipients in contracts.

[53 FR 5262, Feb. 22, 1988, as amended at 54 FR 23959, June 5, 1989]

Subpart D—Audits of State and Local Governments

SOURCE: 50 FR 42357, Oct. 18, 1985 (interim), 51 FR 4297, Feb. 4, 1986 (final), unless otherwise noted.

§ 600.300 Scope and applicability.

This Subpart implements, for DOE and recipients, the Single Audit Act of 1984, Pub. L. 98-502 and OMB Circular A-128. It establishes audit requirements for State and local governments that receive financial assistance from the Department of Energy and defines responsibilities with respect to those requirements.

§ 600.301 Definitions.

For the purposes of this subpart, the following definitions from the Single Audit Act apply:

(a) "Cognizant agency" means the Federal agency assigned by the Office of Management and Budget to carry out the responsibilities described in § 600.308 of this subpart.

(b) "Federal financial assistance" means assistance provided by a Federal agency in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, or direct appropriations, but does not include direct Federal cash assistance to individuals. It includes awards received directly from Federal agencies, or indirectly through other units of State and local governments.

(c) "Federal agency" has the same meaning as the term 'agency' in section 551(1) of Title 5, United States Code.

(d) "Generally accepted accounting principles" has the meaning specified in the generally accepted government auditing standards.

(e) "Generally accepted government auditing standards" means the *Standards For Audit of Government Organizations, Programs, Activities, and Functions,* developed by the Comptroller General, dated February 27, 1981.

(f) "Independent auditor" means:

(1) A State or local government auditor who meets the independence standards specified in generally accepted government auditing standards; or

(2) A public accountant who meets such independence standards.

(g) "Internal controls" means the plan of organization and methods and procedures adopted by management to ensure that:

(1) Resource use in consistent with laws, regulations, and policies;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data are obtained, maintained, and fairly disclosed in reports.

(h) "Indian tribe" means any Indian tribe, band, nations, or other organized group or community, including any Alaskan Native village or regional or village corporations (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(i) "Local government" means any unit of local government within a State, including a county, a borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

(j) "Major Federal Assistance Program," for State and local governments having Federal assistance expenditures between $100,000 and $100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of $300,000, or 3 percent of such total expenditures.

Where total expenditures of Federal assistance exceed $100,000,000, the following criteria apply:

Total expenditures of Federal financial assistance for all programs		Major Federal assistance program means any program that exceeds
more than	but less than	
$100 million	$1 billion	$3 million
$1 billion	$2 billion	$4 million
$2 billion	$3 billion	$7 million
$3 billion	$4 billion	$10 million
$4 billion	$5 billion	$13 million
$5 billion	$6 billion	$16 million
$6 billion	$7 billion	$19 million
Over $7 billion		$20 million

(k) "Public accountants" means those individuals who meet the qualification standards included in generally accepted government auditing standards for personnel performing government audits.

(l) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, any instrumentality thereof, and any multi-State, regional, or interstate entity that has governmental functions and any Indian tribe.

(m) "Subrecipient" means any person or government department, agency, or establishment that receives Federal financial assistance to carry out a program through a State or local government, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a direct recipient of Federal financial assistance.

§ 600.302 Policy.

The Single Audit Act requires the following:

(a) State or local governments that receive $100,000 or more a year in Federal financial assistance shall have an audit made in accordance with this subpart.

(b) State or local governments that receive between $25,000 and $100,000 a year shall have an audit made in accordance with this subpart or in accordance with Federal laws and regulations governing the programs they participate in.

(c) State or local governments that receive less than $25,000 a year shall be exempt from compliance with the Act and other Federal audit requirements. These State and local governments shall be governed by audit requirements prescribed by State or local law or regulation.

(d) Nothing in this paragraph exempts State and local governments from maintaining records of Federal financial assistance or from providing access to such records to Federal agencies, as provided for in Federal law and in §§ 600.25, 600.124, and 600.271.

§ 600.303 Scope of audit.

The Single Audit Act provides that:

(a) The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) The audit shall cover the entire operations of a State or local government or, at the option of that government, it may cover departments, agencies or establishments that received, expended, or otherwise administered Federal financial assistance during the year. However, if a State or local government receives $25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit.

(c) Public hospitals and public colleges and universities may be excluded from State and local audits and the requirements of this subpart. However, if such entities are excluded, audits of these entities shall be made in accordance with statutory requirements and the provisions of §§ 600.120(c) and 600.271.

(d) The auditor shall determine whether:

(1) The financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable laws and regulations; and

(3) The organization has complied with laws and regulations that may have material effect on its financial statements and on each major Federal assistance program.

§ 600.304 Frequency of audit.

Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant agency shall permit biennial audits, covering both years, if the government so requests. It shall also honor requests for biennial audits by governments that have an administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

§ 600.305 Internal control and compliance reviews.

The Single Audit Act requires that the independent auditor determine and report on whether the organization has internal control systems to provide reasonable assurance that it is managing Federal assistance programs in compliance with applicable laws and regulations.

(a) *Internal control review.* In order to provide this assurance the auditor must make a study and evaluation of internal control systems used in administering Federal assistance programs. The study and evaluation must be made whether or not the auditor intends to place reliance on such systems. As part of this review, the auditor shall:

(1) Test whether these internal control systems are functioning in accordance with prescribed procedures.

(2) Examine the recipient's system for monitoring subrecipients and obtaining and acting on subrecipient audit reports.

(b) *Compliance review.* The law also requires the auditor to determine whether the organization has complied with laws and regulations that may have a material effect on each major Federal assistance program.

(1) In order to determine which major programs are to be tested for compliance, State and local governments shall identify in their accounts all Federal funds received and expended and the programs under which they were received. This shall include funds received directly from Federal agencies and through other State and local governments.

(2) The review must include the selection and testing of a representative number of charges from each major Federal assistance program. The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expenditures for the program and the individual awards; the newness of the program or changes in its conditions; prior experience with the program, particularly as revealed in audits and other evaluations (e.g., inspections, program reviews); the extent to which the pro-

gram is carried out through subrecipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(i) In making the test of transactions, the auditor shall determine whether:

(A) The amounts reported as expenditures were for allowable services, and

(B) The records show that those who received services or benefits were eligible to receive them.

(ii) In addition to transaction testing, the auditor shall determine whether:

(A) Matching requirements, levels of effort and earmarking limitations were met,

(B) Federal financial reports and claims for advances and reimbursements contain information that is supported by the books and records from which the basic financial statements have been prepared, and

(C) Amounts claimed or used for matching were determined in accordance with OMB Circular A-87, "Cost principles for State and local governments," and § 600.424 of Subpart E, as implemented by this part.

(iii) The principal compliance requirements of the largest Federal aid programs may be ascertained by referring to the *Compliance Supplement for Single Audits of State and Local Governments,* issued by OMB and available from the Government Printing Office. For those programs not covered in the Compliance Supplement, the auditor may ascertain compliance requirements by researching the statutes, regulations, and agreements governing individual programs.

(3) Transactions related to other Federal assistance programs that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

[50 FR 42357, Oct. 18, 1985 (interim), 51 FR 4297, Feb. 4, 1986 (final), as amended at 54 FR 23960, June 5, 1989]

§ 600.306 Subrecipients.

State or local governments that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subrecipient shall:

(a) Determine whether State or local subrecipients have met the audit requirements of this subpart and whether those subrecipients covered by the audit requirements of § 600.120(c) have met those requirements;

(b) Determine whether the subrecipient(s) spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subrecipient made in accordance with this subpart, § 600.120(c), or through other means (e.g., program reviews) if the subrecipient has not yet had such an audit;

(c) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;

(d) Consider whether subrecipient audits necessitate adjustment of the recipients own records; and

(e) Require each subrecipient to permit independent auditors to have access to the records and financial statements as necessary to comply with this part.

§ 600.307 Relation to other audit requirements.

(a) The Single Audit Act provides that an audit made in accordance with this subpart shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides DOE with information and assurances necessary to carry out its overall responsibilities, DOE shall rely upon and use such information. However, DOE shall make or have made any additional audits which are necessary to carry out its responsibilities under Federal law and regulation. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication. The DOE Contracting Officer will be the DOE official responsible for determining the need for any additional Federal financial and compliance audit after review of the evaluation of the audit report by the cognizant Federal audit organization and review of the audit report.

(b) The provisions of this subpart do not limit the authority of Federal agencies to make, or contract for audits and evaluations of Federal financial assistance programs, nor do they limit the authority of any Federal agency Inspector General or other Federal audit official.

(c) The provisions of this subpart do not authorize any State or local government or subrecipient thereof to constrain Federal agencies, in any manner, from carrying out additional audits.

(d) If DOE makes or contracts for audits in addition to the audits made by recipients pursuant to this subpart, DOE shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits include economy and efficiency audits, program results audits, and program evaluations.

§ 600.308 Cognizant agency responsibilities.

(a) The Single Audit Act provides for cognizant Federal agencies to oversee the implementation of this subpart by recipients.

(b) The Office of Management and Budget will assign cognizant agencies for States and their subdivisions and larger local governments and their subdivisions. (Cognizance assignments/responsibilities for other types of recipients are not governed by the Single Audit Act or by this subpart.) Other Federal agencies may participate with an assigned cognizant agency, in order to fulfill the cognizance responsibilities. Smaller governments not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them the most funds whether directly or indirectly.

(c) When DOE is the cognizant agency, the DOE Office of Inspector General (DOE-OIG) shall:

(1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this subpart.

(2) Provide technical advice and liaison to State and local governments and independent auditors.

(3) Obtain or make quality control reviews of selected audits made by non-Federal audit organizations, and provide the results, when appropriate, to other interested organizations.

(4) Promtly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. DOE-OIG will also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, of any violation of law within their jurisdiction.

(5) Advise the recipient of audits that have been found not to have met the requirements set forth in this subpart. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective action is not taken, DOE-OIG shall notify the recipient and Federal awarding agencies of the facts and make recommendations for followup action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

(6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to this subpart so that the additional audits build upon such audits.

(7) Oversee the resolution of audit findings that affect the programs of more than one agency.

§ 600.309 Illegal acts or irregularities.

If the auditor becomes aware of illegal acts or other irregularities, prompt notice shall be given to recipient management officials above the level of involvement. (See also paragraph 600.310(b)(3) below for the auditor's reporting responsibilities). The recipient, in turn, shall promptly notify the cognizant agency of the illegal acts or irregularities and of proposed and actual actions, if any. Illegal acts and irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriations of funds or other assets.

§ 600.310 Audit reports.

(a) Audit reports must be prepared at the completion of the audit. Reports serve many needs of State and local governments as well as meeting the requirements of the Single Audit Act.

(b) The audit report shall state that the audit was made in accordance with the provisions of this subpart. The report shall be made up of at least:

(1) The auditor's report on financial statements and on a schedule of Federal assistance; the financial statements; and a schedule of Federal assistance, showing the total expenditures for each Federal assistance program as identified in the *Catalog of Federal Domestic Assistance.* Federal programs or grants that have not been assigned a catalog number shall be identified under the caption "other Federal assistance."

(2) The auditor's report on the study and evaluation of internal control systems must identify the organization's significant internal accounting controls, and those controls designed to provide reasonable assurance that Federal programs are being managed in compliance with laws and regulations. It must also identify the controls that were evaluated, the controls that were not evaluated, and the material weaknesses identified as a result of the evaluation.

(3) The auditor's report on compliance containing:

(i) A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;

(ii) Negative assurance on those items not tested;

(iii) A summary of all instances of noncompliance; and

(iv) An identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance.

(c) The three parts of the audit report may be bound into a single report, or presented at the same time as separate documents.

(d) All fraud, abuse, or illegal acts or indications of such acts, including all questioned costs found as the result of these acts, that auditors become aware of, should normally be covered in a separate written report submitted in accordance with paragraph 600.310(g).

(e) In addition to the audit report, the recipient shall provide comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

(f) The reports shall be made available by the State or local government for public inspection within 30 days after the completion of the audit.

(g) In accordance with generally accepted government audit standards, reports shall be submitted by the auditor to the organization audited and to those requiring or arranging for the audit. In addition, the recipient shall submit copies of the reports to each Federal department or agency that provided Federal assistance funds to the recipient. Copies of audit reports to be submitted to DOE shall be submitted to the appropriate DOE-OIG as indicated in Appendix B of this part. Subrecipients shall submit copies to recipients that provided them Federal assistance funds. The reports shall be sent within 30 days after the completion of the audit, but no later than one year after the end of the audit period unless a longer period is agreed to with the cognizant agency.

(h) Recipients of more than $100,000 in Federal funds shall submit one copy of the audit report within 30 days after issuance to the Bureau of Census, Data Preparation Division, 1201 E. 10th Street, Jeffersonville, Indiana 47132, Attn: Single Audit Clearinghouse. The clearinghouse will keep completed audits on file and follow up with State and local governments that have not submitted required audit reports.

(i) Recipients shall keep audit reports on file for three years from their issuance.

[50 FR 42357, Oct. 18, 1985, as amended at 51 FR 4297, Feb. 4, 1986]

§ 600.311 Audit resolution.

(a) As provided in § 600.308, the cognizant agency shall be responsible for monitoring the resolution of audit findings pertaining to DOE recipients that affect the programs of DOE and one or other more Federal agency(ies). If DOE is cognizant, a cognizant DOE Contracting Officer, as determined by the dollar value of awards with the recipient, will assume this responsibility for the Department. Resolution of findings that relate to the programs of DOE only will be the responsibility of the recipient and DOE. Alternate arrangements may be made on a case-by-case basis by agreement among the agencies concerned.

(b) Resolution shall be made within six months after receipt of the report by the Federal departments and agencies. Corrective action should proceed as rapidly as possible.

§ 600.312 Audit workpapers and reports.

Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extend the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or the General Accounting Office, at the completion of the audit.

§ 600.313 Audit costs.

(a) The cost of audits made in accordance with the provisions of this subpart are allowable charges to DOE and other Federal assistance programs. The charges may be considered a direct cost or an allocated indirect cost, determined in accordance with the provisions of Circular A-87, "Cost principles for State and local governments," as appropriate.

(b) Generally, the percentage of costs charged to Federal assistance programs for a single audit shall not exceed the percentage that Federal funds expended represent of total funds expended by the recipient during the fiscal year. The percentage may be exceeded, however, if appropriate documentation demonstrates higher actual cost.

§ 600.314 Sanctions.

(a) The Single Audit Act provides that no cost may be charged to Federal assistance programs for audits required by the Act that are not made in accordance with this subpart.

(b) In cases of continued inability or unwillingness to have a proper audit, DOE shall consider appropriate sanctions, including those specified in § 600.121 of this part and the following:

(1) Withholding a percentage of assistance payments until the audit is completed satisfactorily,

(2) Withholding or disallowing overhead costs, and

(3) Suspending the Federal assistance agreement until the audit is made.

§ 600.315 Auditor selection.

In arranging for audit services State and local governments shall follow the procurement standards prescribed by § 600.436 of Subpart E. The standards provide that while recipients are encouraged to enter into intergovernmental agreements for audit and other services, analysis should be made to determine whether it would be more economical to purchase the services from private firms. In instances where use of such intergovernmental agreements are required by State statutes (e.g., audit services) these statutes will take precedence.

[50 FR 42357, Oct. 18, 1985 (interim), 51 FR 4297, Feb. 4, 1986 (final), as amended at 54 FR 23960, June 5, 1989]

§ 600.316 Small and minority audit firms.

Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this subpart. Recipients of Federal assistance shall take the following steps to further this goal:

(a) Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable.

(b) Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

(c) Consider in the contract process whether firms competing for large audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

(d) Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

(e) Encourage contracting with consortiums of small audit firms as described in paragraph (a) of this section when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals.

(f) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

§ 600.317 Reporting.

The Office of the Inspector General, DOE, will report to the Director of OMB on or before March 1, 1987, and annually thereafter on the effectiveness of State and local governments in carrying out the provisions of this subpart. The report will identify each State or local government or Indian tribe that, in the opinion of the agency, is failing to comply with this subpart.

Subpart E—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

Source: 53 FR 8045 and 8087, Mar. 11, 1988, unless otherwise noted.

Editorial Note: For additional information, see related documents published at 49 FR 24958, June 18, 1984, 52 FR 20178, May 29, 1987, and 53 FR 8028, March 11, 1988.

General

§ 600.400 Purpose and scope of this subpart.

This subpart establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 600.401 Scope of §§ 600.400 through 600.405.

This section contains general rules pertaining to this part and procedures for control of exceptions from this subpart.

§ 600.402 Definitions.

As used in this part:

"*Accrued expenditures*" mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

"*Accrued income*" means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

"*Acquisition cost*" of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

"*Administrative*" requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from "*programmatic*" requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

"*Awarding agency*" means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

"*Cash contributions*" means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

"*Contract*" means (except as used in the definitions for "*grant*" and "*subgrant*" in this section and except where qualified by "*Federal*") a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

"*Cost sharing or matching*" means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

"*Cost-type contract*" means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

"*Equipment*" means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

"*Expenditure report*" means: (1) For nonconstruction grants, the SF-269 "Financial Status Report" (or other equivalent report); (2) for construction grants, the SF-271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

"*Federally recognized Indian tribal government*" means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

"*Government*" means a State or local government or a federally recognized Indian tribal government.

"*Grant*" means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

"*Grantee*" means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

"*Local government*" means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

"*Obligations*" means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

"*OMB*" means the United States Office of Management and Budget.

"*Outlays*" (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

"*Percentage of completion method*" refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

"*Prior approval*" means documentation evidencing consent prior to incurring specific cost. For the Department of Energy, this must be signed by a Contracting Officer.

"*Real property*" means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

"*Share*", when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

"*State*" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

"*Subgrant*" means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of "*grant*" in this subpart.

"*Subgrantee*" means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

"*Supplies*" means all tangible personal property other than "equipment" as defined in this subpart.

"*Suspension*" means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

"*Termination*" means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. "*Termination*" does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

"*Terms of a grant or subgrant*" mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

"*Third party in-kind contributions*" mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

"*Unliquidated obligations*" for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

"*Unobligated balance*" means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

[53 FR 8087, Mar. 11, 1988, as amended at 53 FR 8047, March 11, 1988; 54 FR 23960, June 5, 1989]

§ 600.403 Applicability.

(a) *General.* Sections 600.400 through 600.452 of this subpart apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 600.405, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this subpart);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food

Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 600.403(a) (3) through (8) are subject to Subpart E.

[53 FR 8045 and 8087, Mar. 11, 1988, as amended at 54 FR 23960, June 5, 1989]

§ 600.404 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this subpart are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 600.405.

§ 600.405 Additions and exceptions.

(a) For classes of grants and grantees subject to this subpart, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

(d) The DOE procedural requirements for requesting additions and exceptions are specified in § 600.4.

[53 FR 8087, Mar. 11, 1988, as amended at 53 FR 8047, Mar. 11, 1988]

PRE-AWARD REQUIREMENTS

§ 600.410 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only

the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ 600.411 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 600.412 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this subpart, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grante or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

POST-AWARD REQUIREMENTS

Financial Administration

§ 600.420 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§ 600.421 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR Part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 600.443(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

§ 600.422 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A-87
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122
Educational institutions	OMB Circular A-21.
For-profit organization other than a hospital and an organization named in OBM Circular A-122 as not subject to that circular.	48 CFR Part 31, Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.
For-profit organization other than a hospital and an organization named in OMB Circular A-122 as not subject to that circular..	48 CFR 931.2
Hospitals	45 CFR Part 74, Appendix E

[53 FR 8087, March 11, 1988 as amended at 53 FR 8047, March 11, 1988]

§ 600.423 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee.

§ 600.424 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 600.425, shall

not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 600.425(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this subpart. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 600.422, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§ 600.425 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 600.434.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 600.431 and 600.432.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 600.426 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501-7) and Federal agency implementing regulations. The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act, that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subgrantee shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations" have met the audit requirement. Commercial contractors (private forprofit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local govenments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 600.436 shall be followed.

CHANGES, PROPERTY, AND SUBAWARDS

§ 600.430 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 600.422) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*—(1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 600.436 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 600.422) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§ 600.431 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 600.432 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Fed-

eral Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 600.425(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Fed-

eral awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow § 600.432(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§ 600.433 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 600.434 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§ 600.435 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

§ 600.436 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition*. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 600.436. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 600.436(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

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(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § 600.422). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solication has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this seciton; or

(ii) The procurement is expected to exceed $25,000 and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed $25,000, specifies a "brand name" product; or

(iv) The proposed award over $25,000 is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than $25,000.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subconstracts exceeding $100,000, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate (Contracts other than small purchases).

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement (All contracts in excess of $10,000).

(3) Compliance with Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Chapter 60) (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees).

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3) (All contracts and subgrants for construction or repair).

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) as

supplemented by Department of Labor regulations (29 CFR Part 5) (Construction contracts in excess of $2,000 awarded by grantees and subgrantees when required by Federal grant program legislation).

(6) Compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2,000, and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clear Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15) (Contracts, subcontracts, and subgrants of amounts in excess of $100,000).

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

§ 600.437 Subgrants.

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 600.442 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this subpart which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this subpart;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this subpart do not apply to the award and administration of subgrants:

(1) Section 600.410;

(2) Section 600.411;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR Part 205, cited in § 600.421; and

(4) Section 600.450.

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

§ 600.440 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 600.441 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this subpart.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with § 600.441(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accural basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 600.441(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) *Grants that support construction activities paid by reimbursement method.* (i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 600.441(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 600.441(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 600.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 600.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 600.441(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 600.441(b)(2).

§ 600.442 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this subpart, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 600.436(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until

completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§ 600.443 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § 600.435).

§ 600.444 Termination for convenience.

Except as provided in § 600.443 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 600.443 or paragraph (a) of this section.

AFTER-THE-GRANT REQUIREMENTS

§ 600.450 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable).*

(3) *Final request for payment (SF-270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:* In accordance with § 600.432(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§ 600.451 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 600.442;

(d) Property management requirements in §§ 600.431 and 600.432; and

(e) Audit requirements in § 600.426.

§ 600.452 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

ENTITLEMENT [RESERVED]

APPENDIX A TO PART 600—GENERALLY APPLICABLE REQUIREMENTS

Socioeconomic Policy Requirements

Nondiscrimination in Federally Assisted Programs, 10 CFR part 1040 (45 FR 40514, June 13, 1980), as proposed to be amended by 46 FR 49546 (October 6, 1981).

Nondiscrimination Provisions in Federally Assisted Construction Contracts, Part III of Executive Order 11246 (September 24, 1965), 3 CFR 1964—65 Comp., p. 345.

Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, as amended (42 U.S.C. 4581).

Drug Abuse Office and Treatment Act of 1972, as amended (21 U.S.C. 1174).

Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 *et seq.*).

National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), 40 CFR part 1500, as implemented by (45 FR 20694, March 28, 1980).

Sec. 306, Clean Air Act, as amended (42 U.S.C. 7606c).

Sec. 508, Federal Water Pollution Control Act of 1972 (33 U.S.C. 1251 *et seq.*); Executive Order 11738, September 12, 1973.

Title XIV, Public Health Service Act, as amended (42 U.S.C. 300f—*et seq.*).

Sec. 102(a), Flood Disaster Protection Act of 1973 (Pub. L. 93-234, 87 Stat. 975).

10 CFR part 1022, "Protection of Wetlands and Floodplains."

Uniform Relocation Assistance and Land Acquisition Policies Act of 1970 (42 U.S.C. 4601 *et seq.*).

Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 *et seq.*) (15 CFR part 930).

Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*).

Sec. 106, National Historic Preservation Act of 1966, as amended (16 U.S.C. 470f); Executive Order 11593, "Protection and Enhancement of the Cultural Environment," May 13, 1971, 3 CFR 1971 Comp., p. 154; Archaeological and Historic Preservation Act of 1966 (16 U.S.C. 469 *et seq.*); Protection of Historic and Cultural Properties, 36 CFR part 800.

Wild and Scenic Rivers Act of 1968, as amended (16 U.S.C. 1271 *et seq.*).

Protection of Human Subjects, 10 CFR part 745.

Federal Laboratory Animal Welfare Act (7 U.S.C. 2131 *et seq.*) (9 CFR parts 1, 2, and 3).

Lead-Based Paint Prohibition (42 U.S.C. 4831(b)).

Sec. 7(b), Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

Cargo Preference Act of 1954 (46 U.S.C. 1241(b)) (46 CFR § 381.7).

International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 1517).

Executive Order 12138, "Creating a National Women's Business Enterprise Policy and Prescribing Arrangements for Developing, Coordinating, and Implementing a National Program for Women's Business Enterprise," (May 18, 1979) 3 CFR 1979 Comp., p. 393.

Sec. 403(b), Power Plant and Industrial Fuel Use Act of 1978, (42 U.S.C. 8373(b)); Executive Order 12185 (December 17, 1979, 3 CFR 1979 Comp., p. 474).

Administrative and Fiscal Policy Requirements

The Hatch Act (5 U.S.C. 1501-1508).

Federal Reports Act, as amended by the Paperwork Reduction Act of 1980, Pub. L. 96-511 (44 U.S.C. 3501 *et seq.*).

OMB Circular A-111, Jointly Funded Assistance to State and Local Governments and Nonprofit Organizations—Policies and Procedures.

Federal Claims Collection Act of 1966, Pub. L. 89-508, 89 Stat. 309 (31 U.S.C. 951 *et seq.*).

OMB Circular A-88, Coordinating Indirect Cost Rates and Audit at Educational Institutions.

OMB Circular A-73, Audit of Federal Operations and Programs.

Single Audit Act of 1984, Pub. L. 98-502.

OMB Circular A-128, Audits of State and Local Governments.

[47 FR 44108, Oct. 5, 1982, as amended at 50 FR 42361, Oct. 18, 1985; 51 FR 4297, Feb. 4, 1986]

APPENDIX B TO PART 600—AUDIT REPORT DISTRIBUTEES

Distributee: Manager, Eastern Region, Office of Inspector General, U.S. Department of Energy, P.O. Box 1328, Oak Ridge, Tennessee 37831-1328.

For recipients in: Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Vermont, Virgin Islands, Virginia, West Virginia, Wisconsin.

Distributee: Manager, Western Region, Office of Inspector General, U.S. Department of Energy, P.O. Box 5400, Albuquerque, New Mexico 87115.

For recipients in: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wyoming.

[50 FR 42361, Oct. 18, 1985; 51 FR 4297, Feb. 4, 1986]

PART 601—NEW RESTRICTIONS ON LOBBYING

Sec.

Subpart A—General

601.100 Conditions on use of funds.
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601.110 Certification and disclosure.

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601.400 Penalties.
601.405 Penalty procedures.
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Subpart E—Exemptions

601.500 Secretary of Defense.

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601.600 Semi-annual compilation.
601.605 Inspector general report.
APPENDIX A TO PART 601—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 601—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Public Law 101-121 (31 U.S.C. 1352); Secs. 644 and 646, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7254 and

7256); Pub. L. 96-258, 96 Stat. 1003-1005 (31 U.S.C. 6301-6308).

SOURCE: 55 FR 6737 and 6746, Feb. 26, 1990, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

Subpart A—General

§601.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§601.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 601.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B—Activities by Own Employees

§ 601.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 601.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 601.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 601.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 601.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 601.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 601.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 601.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 601.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 601.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 601.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 601.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 601.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or

September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 601.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 601—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal

contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

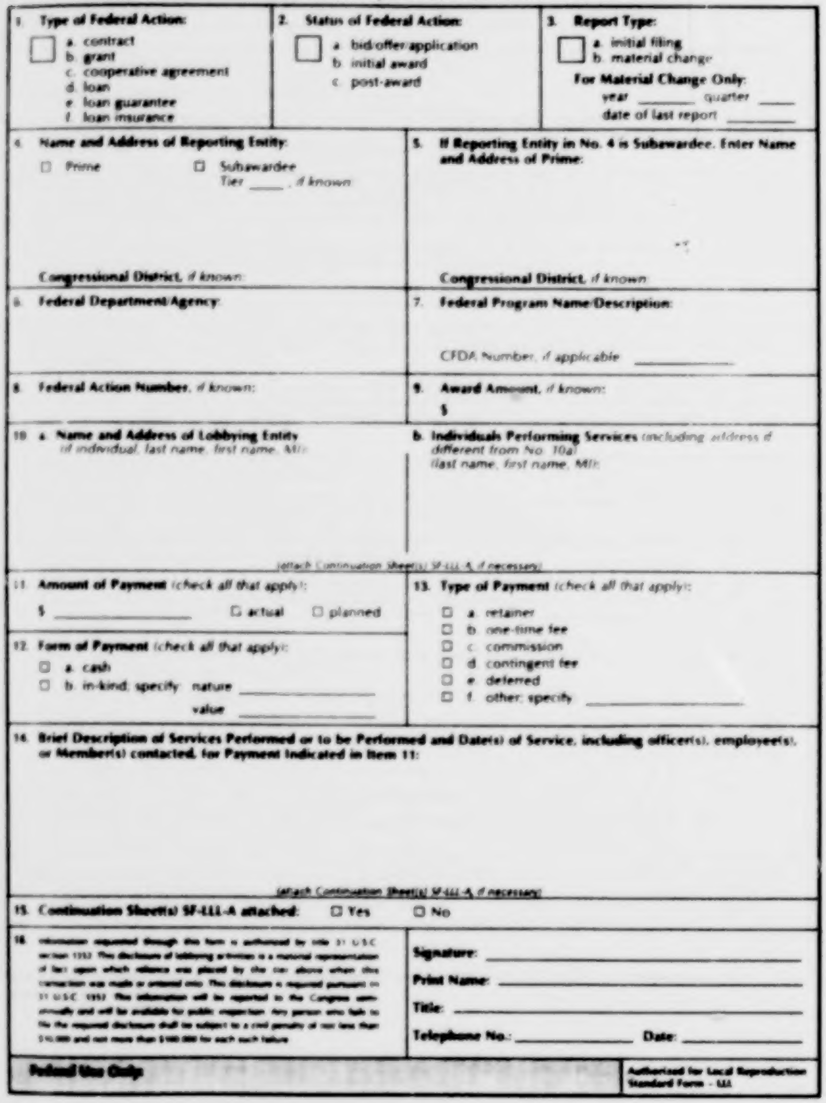
Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 601—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)



1. Type of Federal Action:
☐
a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

2. Status of Federal Action:
☐
a. bid/offer/application
b. initial award
c. post-award

3. Report Type:
☐
a. initial filing
b. material change
For Material Change Only:
year ________ quarter ____
date of last report ________

4. Name and Address of Reporting Entity:
☐ Prime ☐ Subawardee
Tier _____, *if known:*
Congressional District, *if known:*

5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:
Congressional District, *if known:*

6. Federal Department/Agency:

7. Federal Program Name/Description:
CFDA Number, *if applicable:* ____________

8. Federal Action Number, *if known:*

9. Award Amount, *if known:*
$

10. a. Name and Address of Lobbying Entity
(if individual, last name, first name, MI):

b. Individuals Performing Services *(including address if different from No. 10a)*
(last name, first name, MI):

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply):*
$ ________________ ☐ actual ☐ planned

12. Form of Payment *(check all that apply):*
☐ a. cash
☐ b. in-kind; specify: nature ________________
value ________________

13. Type of Payment *(check all that apply):*
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: ________________

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: ____________________
Print Name: ____________________
Title: ____________________
Telephone No.: ______________ **Date:** ______________

Federal Use Only:

Authorized for Local Reproduction
Standard Form - LLL

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: ______________________ **Page** ____ **of** ____

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Standard Form - LLL-A

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

PART 605—SPECIAL RESEARCH GRANTS PROGRAM

Sec.

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605.20 Dissemination of results.
APPENDIX A—THE OFFICE OF BASIC ENERGY SCIENCE

AUTHORITY: Section 31 of the Atomic Energy Act, as amended, Pub. L. 83-703, 68 Stat. 919 (42 U.S.C. 2051); sec. 107 of the Energy Reorganization Act of 1974, Pub. L. 93-438, 88 Stat. 1240 (42 U.S.C. 5817); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. 93-577, 88 Stat. 1878 (42 U.S.C. 5901 *et seq.*); Secs. 644 and 646 of the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7254 and 7256); Federal Grant and Cooperative Agreement Act, as amended (31 U.S.C. 6301 *et seq.*).

SOURCE: 55 FR 10036, Mar. 19, 1990, unless otherwise noted.

§ 605.1 Purpose and scope.

This part sets forth the policies and procedures applicable to the award and administration of special research grants by the DOE Office of Energy Research for basic and applied research and related conference and training activities.

§ 605.2 Applicability.

(a) This part applies to all special research grants awarded after the effective date of this amended rule.

(b) Except as otherwise provided by this part, the award and administration of special research grants shall be governed by 10 CFR part 600 (DOE Financial Assistance Rules).

§ 605.3 Definitions.

In addition to the definitions provided in 10 CFR part 600, the following definitions are provided for purposes of this part—

(a) *Basic and applies research* means basic and applied research and that part of development not related to the development of specific systems or products. The primary aim of research is scientific study and experimentation directed toward advancing the state-of-the-art or increasing knowledge or understanding rather than focusing on a specific system or product.

(b) *Grantee obligation* means the amounts of orders placed, contracts and subgrants awarded, services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

(c) *Principal investigator* means the scientist or other individual designated by the recipient to direct the project.

(d) *Related conference* means scientific or technical conferences, symposia, workshops or seminars for the purpose of communicating or exchanging information or views pertinent to the basic and applied research of OER.

(e) *Special purpose equipment* means equipment which is used only for research, medical, scientific, or other technical activities.

§ 605.4 Deviations.

Single-case deviations from this part may be authorized in writing by the Director or Deputy Director of OER or the Head of a Contracting Activity upon the written request of DOE staff, an applicant for an award, or a recipient. A request from an applicant or a recipient must be submitted to or through the cognizant contracting officer. Whenever a proposed deviation from this part would be a deviation from 10 CFR part 600, the deviation must also be authorized in accordance with the procedures prescribed in that part.

§ 605.5 Special research grants.

(a) DOE may make special research grants under this part for basic and applied research and related conference and training activities in the OER program areas set forth in paragraph (b) of this section and described in Appendix A of this part.

(b) The program areas are:

(1) Basic Energy Sciences, which includes:

(i) Energy Biosciences;

(ii) Chemical Sciences;

(iii) Geosciences;

(iv) Engineering Research;

(v) Materials Sciences;

(vi) Advanced Energy Projects;

(2) High Energy and Nuclear Physics, which includes:

(i) Nuclear Physics;

(ii) High Energy Physics;

(iii) Superconducting Super Collider

(3) Health and Environmental Research, which includes:

(i) Physical and Technological Research;

(ii) Ecological Research;

(iii) Health Effects Research;

(iv) Human Health and Assessments; and

(v) Carbon Dioxide Research;

(4) Fusion Energy, which includes:

(i) Applied Plasma Physics;

(ii) Confinement Systems;

(iii) Development and Technology

(5) Field Operations Management, which includes Nuclear Engineering Research;

(6) Scientific Computing Staff;

(7) Other program areas as may be described by notice published in the FEDERAL REGISTER.

§ 605.6 Eligibility.

Any university or other institution of higher education or other nonprofit or for-profit organization, non-Federal agency, or entity is eligible for a special research grant. An unaffiliated individual also is eligible for a special research grant.

§ 605.7 [Reserved]

§ 605.8 Solicitation.

(a) The Catalog of Federal Domestic Assistance number for this program is 81.049, and its solicitation control number is SRG 10 CFR part 605.

(b) An application for a new grant under this solicitation may be submitted at any time to DOE at the address specified in paragraph (c) of this section. New applications shall receive consideration for funding generally within 6 months but, in any event, no later than 12 months from the date of receipt by DOE.

(c) Applicants may obtain application forms, described in § 605.9(b), and additional information from the Acquisition and Assistance Management Division, Office of Energy Research, ER-64, Department of Energy, Washington, DC 20545, (301) 353-5544, and shall submit applications to the same address.

(d) DOE shall publish annually, in the FEDERAL REGISTER, a notice of the availability of special research grants. DOE shall also publish in the Commerce Business Daily an abbreviated notice citing the FEDERAL REGISTER notice of availability and this part, and DOE may also publish notices or abbreviated notices of availability in trade and professional journals, and news media, and use other means of communication, as appropriate.

(1) Each notice of availability shall cite this part and shall include:

(i) The Catalog of Federal Domestic Assistance number and solicitation control number of the program;

(ii) The amount of money available or estimated to be available for award;

(iii) The name of the responsible DOE program official to contact for additional information, and an address where application forms may be obtained;

(iv) The address for submission of applications; and

(v) Any evaluation criteria in addition to those set forth in § 605.10.

(2) The notice of availability may also include any other relevant information helpful to applicants such as:

(i) Program objectives,

(ii) A research agenda or potential areas for research initiatives,

(iii) Problem areas requiring additional research, and

(iv) Any other information which identifies areas in which grants may be made.

(e) DOE is under no obligation to pay for any costs associated with the preparation or submission of applications.

(f) DOE reserves the right to fund, in whole or in part, any, all, or none of the applications submitted.

(g) To be considered for a continuation or renewal award under this part, an incumbent grantee shall submit a continuation or renewal application as provided in § 605.9 (c) and (h).

§ 605.9 Applications.

(a) An original and seven copies of the application for initial support must be submitted except that State governments, local governments, or Indian tribal governments shall not be required to submit more than the original and two copies of the application.

(b) Each new or renewal application in response to this part must include—

(1) An application face sheet page, DOE Form 4650.2 (approved by OMB under OMB Control No. 1910-1400). However, the facesheet of the application for State and local governments and Indian tribal government applicants shall be the facesheet of Standard Form (SF) 424 (approved by OMB under OMB Control Number 0348-0043).

(2) A detailed description of the proposed project, including the objectives of the project, its relationship to DOE's program and the applicant's plan for carrying it out;

(3) Detailed information about the background and experience of the principal investigator(s) (including references to publications), the facilities and experience of the applicant, and the cost-sharing arrangements, if any.

(4) A budget with supporting justification sufficient to evaluate the costs of the proposed project.

(i) Budget information provided by State and local government and Indian tribal government applicants shall be on Standard Form 424A, Budget Information for Non-Construction Programs, (approved under OMB Control No. 0348-0044). All other applicants shall use budget forms ERF 4620.1 and ERF 4620.A1 (approved by OMB under Control No. 1910-1400).

(ii) DOE may, subsequent to receipt of an application, request additional budgetary information from an applicant when necessary for clarification or to make informed preaward determinations under 10 CFR part 600.

(5) Any preaward assurances required pursuant to 10 CFR parts 600 and 605.11.

(c) Applications for a continuation or a renewal award must be submitted in an original and *seven* copies, except that State governments, local governments, or Indian tribes are required to submit only an original and two copies, and for continuation awards need submit only those pages of application form that contain information different from that provided in the original application (approved by OMB under OMB Control Numbers 0348-0005-0348-0009).

(d) The application must be signed by an official who is authorized to act for the applicant organization and to commit the applicant to comply with the terms and conditions of the grant, if awarded, or by an unaffiliated individual applicant.

(e) All applications which involve research, development, or demonstration activities when such activities: (1) Have a unique geographic focus and are directly relevant to the governmental responsibilities of a State or local government within the geographic area; (2) necessitate the preparation of an Environmental Impact Statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.* (1976)); or (3) are to be initiated at a particular site or location and require unusual measures to limit the possibility of adverse exposure or hazard to the general public, are subject to the provisions of Executive Order 12372 and 10 CFR part 1005. Anyone planning to submit such applications should contact ER for further information about compliance requirements.

(f) DOE may return an application which does not include all information and documentation required by statute, this part, 10 CFR part 600 and the notice of availability of grants, when the nature of the omission precludes review of the application.

(g) During the review of a complete application, DOE may request the submission of additional information only if the information is essential to evaluate the application.

(h) Except as provided in paragraph (c) of this section, each application for a continuation award must be submitted no later than six months before the expiration of the current budget period and must be on the same forms as required for initial applications, as appropriate.

(i) In addition to including the information described in paragraphs (b), (c), and (d) of this section, an application for a renewal award must be submitted no later than six months prior to the scheduled expiration of the project period and must be on the same forms and include the same type of information as that required for initial applications. The renewal application must outline and justify a program and budget for the proposed project period, showing in detail the estimated cost of the proposed project, together with an indication of the amount of funds needed and the amount of cost sharing, if any. The application also shall describe and explain the reasons for any change in the scope or objectives of the proposed project, and shall compare and explain any difference between the estimates in the proposed budget and actual costs experienced as of the date of the application.

(j) DOE is not required to return to the applicant an application which is not selected or funded.

§ 605.10 Application evaluation and selection.

(a) Applications shall be evaluated for funding generally within 6 months but, in any event, no later than 12 months from the date of receipt by DOE. After DOE has held an application for 6 months, the applicant may, in response to DOE's request, be required to revalidate the terms of the original application.

(b) DOE staff shall perform an initial evaluation of all applications to ensure that the information required by this part is provided, that the proposed effort is technically sound and feasible, and that the effort is consistent with program funding priorities. For applications which pass the initial evaluation, DOE shall review and evaluate each application received based on the criteria set forth below and in accordance with the ER objective Merit Review System developed as required under DOE Financial Assistance Regulations 10 CFR part 600.

(c) DOE shall select evaluators on the basis of their professional qualifications and expertise in the field of research. Evaluators shall be required to comply with all applicable DOE rules or directives concerning the use of outside evaluators.

(d) DOE shall evaluate new and renewal applications based on the following criteria which are listed in descending order of importance:

(1) The scientific and technical merit of the research;

(2) The appropriateness of the proposed method or approach;

(3) Competency of research personnel and adequacy of proposed resources;

(4) Reasonableness and appropriateness of the proposed budget; and

(5) Other appropriate factors, established and set forth by ER in a notice of availability or in a specific solicitation.

(e) Also DOE shall consider, as part of the evaluation, other available advice or information as well as program policy factors such as ensuring an appropriate balance among the program areas listed in § 605.5(b) of this part.

(f) In addition to the evaluation criteria set forth in paragraphs (d) and (e) of this section, DOE shall consider the grantee's performance under the existing grant during the evaluation of a renewal or continuation application.

(g) Selection of applications for award will be based upon the findings of the technical evaluations, the importance and relevance of the proposed research to ER's missions, and fund availability. Cost reasonableness and realism will also be considered to the extent appropriate.

(h) After the selection of an application, DOE may, if necessary, enter into negotiations with an applicant. Such negotiations are not a commitment that DOE will make an award.

§ 605.11 Additional requirements.

(a) A grantee performing research, development, or related activities involving the use of human subjects must comply with DOE regulations in 10 CFR part 745 "Protection of Human Subjects" and any additional provisions which may be included in the Special Terms and Conditions of the grant.

(b) A grantee performing research involving recombinant DNA molecules and/or organisms and viruses containing recombinant DNA molecules shall comply with the National Institutes of Health "Guidelines for Research Involving Recombinant DNA Molecules (51 FR 16958, May 7, 1986), or such later revision of those guidelines as may be published in the FEDERAL REGISTER. (The guidelines are available from the office of Recombinant DNA Activities, National Institutes of Health, Bldg. 31, Rm. 4B11, Bethesda, MD 20892.)

(c) Any grantee performing research on warm-blooded animals shall comply with the Federal Laboratory Animal Welfare Act of 1966, as amended (7 U.S.C. 2131 *et seq.*) and the regulations promulgated thereunder by the Secretary of Agriculture at 9 CFR chapter I, subchapter A, pertaining to the care, handling, and treatment of warm blooded animals held or used for research, teaching, or other activities supported by Federal awards. The grantee shall comply with the guidelines described in DHHS Publication No. [NIH] 86-23, "Guide for the Care and Use of Laboratory Animals" or succeeding revised editions. (This guide is available from the Office for Protection from Research Risks, Office of the Director, National Institutes of Health, Building 31, Room 4B09, Bethesda, Maryland 20205.)

§ 605.12 Funding.

(a) The project period during which DOE expects to provide grant support for an approved project under this part shall generally not exceed three years and may exceed five years only if DOE makes a renewal award or otherwise extends the grant award. The project period shall be specified on the Notice of Financial Assistance Award (DOE Form 4600.1).

(b) Each budget period for a grant under this part shall generally be 12 months and may be as much as 24 months as determined appropriate by ER programs.

§ 605.13 Cost sharing.

Cost sharing is not required nor will it be considered as a criterion in the evaluation and selection process unless otherwise provided under § 605.10(d)(5).

§ 605.14 Limitation of DOE liability.

Grants awarded under this part are subject to the requirement that the maximum DOE obligation to the recipient is the amount shown in the Notice of Financial Assistance Award as the amount of DOE funds obligated. DOE shall not be obligated to make any additional, supplemental, continuation, renewal or other award for the same or any other purpose.

§ 605.15 Fee.

(a) Notwithstanding 10 CFR part 600, a fee may be paid, in appropriate circumstances, to a grantee which is a small business concern as qualified under the criteria and size standards of 13 CFR part 121 in order to permit the concern to participate in the Special Research Grant Program. Whether or not it is appropriate to pay a fee shall be determined by the Contracting Officer who shall, at a minimum, apply the following guidelines:

(1) Whether the acceptance of the grant will displace other work the small business is currently engaged in or committed to assume in the near future; or

(2) Whether the acceptance of the grant will, in the absence of paying a fee, cause substantial financial distress to the business. In evaluating financial distress, the Contracting Officer shall balance current displacement against reasonable future benefit to the company. (If the award will result in the beneficial expansion of the existing business base of the company, then no fee would generally be appropriate.) Fees shall not be paid to other entities except as a deviation from 10 CFR part 600, nor shall fees be paid under grants in support of conferences.

(b) To request a fee, a small business concern shall submit with its application a written self certification that it is a small business concern qualified under the criteria and size standards in 13 CFR part 121. In addition, the application must state the amount of fee requested for the entire project period and the basis for requesting that amount, and must also state why payment of a fee by DOE would be appropriate.

(c) If the Contracting Officer determines that payment of a fee is appropriate under paragraph (a) of this section, the amount of fee shall be that determined to be reasonable by the Contracting Officer. The Contracting Officer shall, at a minimum, apply the following guidelines in determining the fee amount:

(1) The grant fee base shall include the estimated allowable cost of direct salaries and wages and allocable fringe benefits. This fee base shall exclude all other direct and indirect costs.

(2) The grant fee amount expressed as a percentage of the appropriate fee base pursuant to paragraph (c)(1) of this section, shall not exceed the percentage rate of fee that would result if a Federal agency contracted for the same amount of salaries, wages, and allocable fringe benefits under a cost reimbursement contract.

(3) Grant fee amounts, determined pursuant to paragraphs (c)(1) and (c)(2) of this section, shall be appropriately reduced when:

(i) Advance payments are provided; and/or

(ii) Title to property acquired with DOE grant funds vests in the grantee (10 CFR part 600).

(d) Notwithstanding 10 CFR part 600, any fee awarded shall be a fixed fee and shall be payable on an annual basis in proportion to the work completed, as determined by the Contracting Officer, upon satisfactory submission and acceptance by DOE of the annual technical progress report. If the project period is shortened due to termination, or the project period is not fully funded, the fee shall be reduced by an appropriate amount.

§§ 605.16—605.17 [Reserved]

§ 605.18 National security.

Activities under a Special Research Grant shall not involve classified information (i.e., Restricted Data, formerly Restricted Data, National Security Information). However, if in the opinion of the grantee or DOE such involvement becomes expected prior to the closeout of the grant, the grantee or DOE shall notify the other in writing immediately. If the grantee believes any information developed or acquired may be classifiable, the grantee shall not provide the potentially classifiable information to anyone, including the DOE officials with whom the grantee normally communicates, except the Director of Classification, and shall protect such information as if it were classified until notified by DOE that a determination has been made that it does not require such handling. Correspondence which includes the specific information in question shall be sent by registered mail to U.S. Department of Energy, Attn: Director of Classification, DP-32, Washington, DC 20545. If the information is determined to be classified the grantee may wish to discontinue the project in which case the grantee and DOE shall terminate the grant by mutual agreement. If the grant is to be terminated, all material deemed by DOE to be classified shall be forwarded to DOE, in a manner specified by DOE, for proper disposition. If the grantee and DOE wish to continue the grant, even though classified information is involved, the grantee shall be required to obtain both personnel and facility security clearances through the Office of Safeguards and Security for Headquarters awarded grants, or from the cognizant field office Division of Safeguards and Security for grants obtained through DOE field organizations. Costs associated with handling and protecting any such classified information shall be negotiated at the time that the determination to proceed is made.

§ 605.19 Reports.

(a) A grantee shall periodically report to DOE on the grantee's progress in meeting the project objectives of the grant award. The following types of reports shall be used:

(1) *Performance reports.* Performance reports shall include:

(i) A description of the research carried out during the reporting period including a comparison of the grantee's accomplishments with the objectives established for that reporting period.

(ii) If applicable, reasons why established objectives were not met;

(iii)Where there are significant deviations from the estimates in the budget, the rationale for increases or decreases in the time expended on the project by the principal investigator or other researchers; and

(iv) Other pertinent information, including, when appropriate, reports of travel, both foreign and domestic, analysis and explanation of cost overruns (underruns) or high (low) unit costs. Annual performance reports shall be submitted with any renewal or continuation application if there is one; if not, they shall be submitted within 90 days after the end of the budget period covered by the report. For budget periods exceeding twelve months a performance report is also required 90 days after the first 12 months of the budget period unless waived by the Contracting Officer. If a report is part of a continuation or renewal application it shall be bound separately.

(2) *Notice of Energy R&D Project.* A Notice of Energy R&D Project, DOE Form 538, which summarizes the purpose and scope of the project, must be submitted in accordance with the Distribution and Schedule of Documents set forth at the end of this section. Copies of the form may be obtained from the Contracting Officer.

(3) *Special Reports.* The grantee shall report the following events to DOE as soon after they occur as possible:

(i) Problems, delays, or adverse conditions which will materially affect the ability to attain project objectives, or prevent the meeting of time schedules and goals. The report must describe the remedial action the grantee has taken or plans to take and any action DOE should take to alleviate the problems.

(ii) Favorable developments or events which enable meeting time schedules and goals sooner or at less cost than anticipated or producing more beneficial results than originally projected.

(4) *Final report.* A final report summarizing the entire investigation must be submitted by the grantee within 90 days after the project period ends or the grant is terminated. Satisfactory completion of a grant will be contingent upon the receipt of this report. The final report shall follow the outline agreed upon for the performance reports, if any, or when a project has been renewed, the final report may refer to previously submitted performance report for details and may be a synopsis of the entire project. Manuscripts prepared for publication should be appended.

(5) *Financial status report* (FSR) (OMB No. 0348-0039). The FSR is required within 90 days after completion of each budget period; for budget periods exceeding 12 months, an FSR is also required within 90 days after this first 12 months unless waived by the Contracting Officer.

(b) DOE may extend the deadline date for any report if the grantee submits a written request before the deadline which adequately justifies an extension.

(c) A table summarizing the various types of reports, time for submission, number of copies is set forth below. The schedule of reports shall be as prescribed in this table, unless the award document specifies otherwise. These reports shall be submitted by the grantee to the awarding office.

(d) *DOE review of grantee performance.* DOE or its authorized representatives may make site visits, at any reasonable time, to review the project. DOE may provide such technical assistance as may be requested.

(e) *Subrecipient performance reporting.* Grantees may place performance reporting requirements on a subrecipient consistent with the provisions of this section.

§ 605.20 Dissemination of results.

(a) Grantees are encouraged to disseminate research results promptly to the scientific community. DOE reserves the right to utilize, and have others utilize, to the extent it deems appropriate, the reports resulting from research grants.

(b) DOE may waive the technical reporting requirement of any performance report set forth in § 605.19(a), if the grantee submits to DOE a copy of its own report which is published or accepted for publication in a recognized scientific or technical journal and which satisfies the information requirements of the program.

(c) Grantees are urged to publish results through normal publication channels in accordance with the applicable provisions of 10 CFR part 600.

(d) The article shall include an acknowledgment that the research was supported, in whole or in part, by a DOE grant, and specify the grant number, but state that such support does not constitute an endorsement by DOE of the views expressed in the article.

DISTRIBUTION AND SCHEDULE OF DOCUMENTS

Type	When due	Number of copies for awarding office
1. Summary: 200 words on scope and purpose (Notice of Energy R&D Project)	Immediately after a grant is initially awarded and with each application for renewal	3
2. Renewal or continuation application	6 months before the budget period ends	8
3. Annual Technical Progress Report	With renewal or continuation application, if any; otherwise within 90 days after the end of each budget period. For budget periods exceeding 12 months, a report is also required 90 days after the first 12-month period.	8
4. Other progress reports, brief topical reports, etc. (Desired when significant results develop or when work has direct programmatic impact)	As deemed appropriate by the grantee	3
5. Reprints, Conference papers	Same as 4. above	3
6. Final report	Within 90 days after completion or termination of the project	3
7. Financial Status Report	Within 90 days after completion of the project period; for budget periods exceeding 12 months an FSR is also required within 90 days after the first 12-month period.	3

NOTE: Report types 3,4,5, and 6 require with submission two copies of DOE Form 1332.16, University-Type Contractor and Grantee Recommendations for Disposition of Scientific and Technical Document.

APPENDIX A—THE OFFICE OF BASIC ENERGY SCIENCE

This program supports basic science research efforts in a variety of disciplines to broaden the energy supply and technology base of knowledge. The major science divisions and their objectives are as follows:

(i) *Energy Biosciences*

The primary objective of this program is to generate a base of understanding of fundamental biological mechanisms in the areas of botanical and microbiological sciences. This work serves as the underpinning for DOE's efforts in biomass production of fuels and chemicals, microbial conversions of biomass, and biological systems for the conservation of energy.

(ii) *Chemical Sciences*

This program has as its primary objectives: increased understanding of basic chemical or physical phenomena which are likely to be important to existing or future technological concepts for production or conversion of energy; discovery of new phenomena bearing on chemical or physical aspects of energy processes; elucidation of fundamentally new general techniques for separation of energy-related mixtures or for the chemical analysis of energy-related substances. Also included is a study of the basic chemical and physical properties of the actinide elements and their compounds. This program supports the operation of the Stanford Synchrotron Radiation Laboratory and the production of a broad variety of isotopically enriched research materials.

(iii) *Geosciences*

The goal of this program is to develop a quantitative, predictive understanding of the energy-related aspects of geological, geophysical and geochemical processes within the earth and in the solar-terrestrial interface. This understanding and knowledge base is needed to provide for long-range requirements of U.S. efforts in energy resources recognition, evaluation, utilization, and their long-term environmental implications. The program is stressing fundamental research related to discovery and recovery of domestic oil and gas resources.

(iv) *Engineering Research*

This program's objectives are: (1) To extend the body of knowledge underlying current engineering practice in order to open new ways for enhancing energy savings and production, prolonging useful equipment life, and reducing costs while maintaining output and performance quality; and (2) to broaden the technical and conceptual base for solving future engineering problems in the energy technologies.

(v) *Materials Sciences*

The objective of this program is to increase our understanding of phenomena and properties important to materials behavior which will contribute to meeting the needs of present and future energy technologies. It is comprised of the subfields metallurgy, ceramics, solid state physics, materials chemistry, and related disciplines where the emphasis is on the science of materials.

(vi) *Advanced Energy Projects*

The objective of this program is to support exploratory research on novel concepts related to energy. The concepts may be in any field related to energy. The research is usually aimed at establishing the scientific feasibility of a concept and, where appropriate, also at estimating its economic viability.

Office of High Energy and Nuclear Physics

This program supports 90% of the U.S. effort in high energy and nuclear physics. The objective of these programs are indicated below.

(i) *Nuclear Physics (Including Nuclear Data Program)*

The primary objectives of this program are an understanding of the interactions and structures of atomic nuclei and nuclear matter at the most elementary level possible, and an understanding of the fundamental forces of nature as manifested in nuclear matter.

(ii) *High Energy Physics (Including Supercollider Activities)*

The primary objectives of this program are to understand the nature and relationships among the fundamental forces of nature and to understand the ultimate structure of matter in terms of the properties and interrelations of its basic constituents.

Office of Health and Environmental Research

The goals of this research program are as follows:

Provide, through basic and applied research, the scientific information required to identify, understand and anticipate the long-term health and environmental consequences of energy use and development.

Utilize the Department's unique resources to solve major scientific problems in medicine and biology.

The goals of the program are accomplished through the effort of its divisions, which are:

(i) Physical and Technological Research

The objectives of this subprogram are to develop new concepts and techniques for detecting and measuring hazardous physical and chemical agents related to energy production; characterize the atmospheric transport and chemical transformations of radionuclides and energy-related chemical effluents in order to define pathways to human exposure; determine the physical and chemical mechanisms of radiation action in biological systems; and develop new instrumentation and technology for biological and biomedical research.

(ii) Ecological Research

The objectives of this subprogram are to identify the physical, chemical, and biological processes that cycle nutrients and energy-related materials through terrestrial and aquatic ecosystems, including the coastal oceans; and to determine the resiliency of ecosystems to natural and energy-related stresses. Fundamental research in hydrological transport, mobility, and degradation of energy substances at shallow depth will continue to receive increased attention.

(iii) Health Effects Research

The objectives of this subprogram are to develop information in experimental biological systems for estimating or predicting risks of carcinogenesis, mutagenesis, and delayed toxicological effects associated with human exposures to energy-related radiations and chemicals; to define mechanisms involved in the induction of biological damage following exposure to low levels of energy-related agents; to support fundamental research on biomolecular structure, gene structure, functions and control, genetic damage and repair, and cell transformation and to create new tools and resources for characterizing the molecular nature of the human genome.

Increased emphasis will be placed on developing technologies and resources for characterization of the human genome and the utilization of unique resources for the determination of biological structure.

(iv) Human Health and Assessments

The goals of this subprogram fall into two broad categories, human health and nuclear medicine.

The objectives of the human health component are to ascertain by epidemiologic and dosimetric methods and potential spectrum of risks to human health related to energy generation and usage, operation of DOE facilities, and nuclear medicine procedures, and to detect and measure significant health effects in humans exposed to naturally occurring radiation, primarily radon and its daughter products, and energy-related chemicals. Increased emphasis in the future will be on the use of biochemical, genetic, and molecular endpoints.

The nuclear medicine component is aimed at enhancing the beneficial applications of radiation, radionuclides, and stable isotopes in the diagnosis, study, and treatment of human diseases. This includes the development of new techniques for stable and radioactive isotope production, labeled pharmaceuticals, imaging devices, and radiation beam applications for the improved diagnosis and therapy of human diseases or the study of human physiological processes. Increased emphasis for the future will be on the development of new isotopes and radiopharmaceuticals for studies of human nutrition, cardiac function, neurological disorders, and disease control.

(v) Carbon Dioxide Research

This program's goal is to develop a sound, quantitative atmospheric carbon dioxide knowledge base to aid in energy policy decision making. This goal involves the following objectives: improve knowledge of the carbon cycle; improve estimates of future atmospheric carbon dioxide; improve understanding of the effects of atmospheric carbon dioxide on climate; improve understanding of the direct carbon dioxide effects on productivity of nature and agricultural systems; develop and verify methods for the detection of climate change due to increasing atmospheric carbon dioxide; identify, define and quantify indirect effects; define possible options for mitigating long-term consequences of a higher CO_2 atmosphere.

Office of Fusion Energy

The magnetic fusion energy program is an applied research and development program whose goal is to develop the scientific and technological information required to design and construct magnetic fusion energy systems. This goal is pursued by three divisions, whose major functions are as listed below.

(i) Applied Plasma Physics

This Division seeks to develop that body of physics knowledge which permits advancement of the fusion program on a sound basis. APP research programs provide: (1) The theoretical understanding of fusion plasmas necessary for interpreting results from present experiments, and the planning and design of future confinement devices; (2) the data on plasma properties, atomic physics and new diagnostic techniques for operational support of confinement experiments; and (3) critical tests and evaluation of promising alternate fusion concepts that may lead to more economic fusion reactor systems.

(ii) *Confinement Systems*

This Division has as its primary objective the conduct of research efforts to investigate and resolve basic physics issues associated with medium- to large-scale confinement devices. These devices are used to experimentally explore the limits of specific confinement concepts as well as to study associated physical phenomena. Specific areas of interest include: The production of increased plasma densities and temperatures, the understanding of the physical laws governing plasma energy transport and confinement scaling, equilibrium and stability of high plasma pressure, the investigation of plasma interaction with radio-frequency waves, and the study and control of particle transport in the plasma.

(iii) *Development and Technology*

This Division supports the research and development of the technology necessary for the fabrication and operation of present and future plasma and fusion devices. The program also pursues R&D and system studies pertaining to critical feasibility issues of fusion technology and development.

Field Operations Management

This office administers special purpose support programs that cut across DOE program areas and in conjunction with this activity related conferences and research and training initiatives are funded to further these areas of interest.

(i) *Nuclear Engineering Research*

The objective of this program is to support research efforts aimed at strengthening university-based nuclear engineering programs. Specific areas of basic and applied research of interest include: (1) Material behavior in a radiation environment typical of advanced nuclear power plants; (2) real-time instrumentation that identifies and applies innovative measurement technologies in nuclear-related fields (3) advanced nuclear reactor concepts; (4) applied nuclear sciences that address improvements in the applications of radiation and the understanding of the interaction of radiation with matter; (5) engineering science research applicable to advanced nuclear reactor concepts, industry safety and reliability concerns; (6) neutronics that address improvements in reactor computational methodologies and knowledge of the basic fission processes; and (7) nuclear thermal hydraulics that address improvements of models and analysis of thermal hydraulic behavior in an advanced nuclear reactor system.

Scientific Computing Staff

The goal of this program is to advance the understanding of the fundamental concepts of mathematics, statistics, and computer science underlying the complex mathematical models of the key physical processes involved in the research and development programs in DOE. Broad emphasis is given in three major categories: analytical and numerical methods, information analysis techniques, and advanced computer concepts.

SUBCHAPTER I—SALES REGULATION

PART 622—CONTRACTUAL PROVISIONS

§ 622.103 Dispute provisions.

(a) Except as provided in paragraph (b) of this section, all DOE contracts for the sale of personal property to any organization outside the U.S. Government shall include a Disputes clause which provides for:

(1) Binding final decisions by the Contracting Officer, subject to appeal;

(2) Appeal rights pursuant to the Contract Disputes Act of 1978;

(3) Continuation of performance by the contractor at the direction of the contracting officer pending final resolution of the dispute.

(b) Exceptions:

(1) The provisions of this part shall not apply to contracts for sale of electric power by the Power Marketing Administrations;

(2) The Secretary may exempt a contract or class of contracts from this requirement upon determination that it would not be in the public interest in an individual contract or class of contracts with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, to include the Disputes clause, as permitted by Section 3 of the Contract Disputes Act of 1978.

(c) The Energy Board of Contract Appeals (EBCA) has cognizance over disputes relating to DOE Sales contracts.

(d) The Disputes clause in § 624.102-4 shall be used in accordance with this § 622.103.

(Sec. 644, Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7254))

[46 FR 34559, July 2, 1981]

PART 624—CONTRACT CLAUSES

§ 624.102-4 Disputes.

The following clause shall be used in accordance with the provisions of § 622.103:

DISPUTES

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.). If a dispute arises relating to the contract, the purchaser may submit a claim to the Contracting Officer who shall issue a written decision on the dispute.

(b) "Claim" means:

(1) A written request submitted to the Contracting Officer;

(2) For payment of money, adjustment of contract terms, or other relief;

(3) Which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) For which a Contracting Officer's decision is demanded.

(c) In the case of disputed requests or amendments to such requests for payment exceeding $50,000, or with any amendment causing the total request in dispute to exceed $50,000, the purchaser shall certify, at the time of submission of a claim, as follows:

I certify that the claim is made in good faith, that the supporting data is accurate and complete to the best of my knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable.

(Purchaser's Name) ————————

(Title) ————————————

(d) The Government shall pay the Purchaser interest.

(1) On the amount found due to the purchaser and unpaid on claims submitted under this clause;

(2) At the rates fixed by the Secretary of the Treasury;

(3) From the date the amount is due until the Government makes payment.

(e) The purchaser shall pay the Government interest:

(1) On the amount found due to the Government and unpaid on claims submitted under this clause;

(2) At the rates fixed by the Department of Energy for the payment of interest on past due accounts;

(3) From the date the amount is due until the purchaser makes payment.

(f) The decision of the Contracting Officer shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency unless an appeal or action is timely commenced within the times specified by the Contract Disputes Act of 1978.

(g) The purchaser shall comply with any decision of the Contracting Officer and at the direction of the Contracting Officer shall proceed diligently with performance of this contract pending final resolution of any request for relief, claim, appeal, or action related to this contract.

(Sec. 644, Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7254))

[46 FR 34559, July 2, 1981]

PART 625—PRICE COMPETITIVE SALE OF STRATEGIC PETROLEUM RESERVE PETROLEUM

Sec.
625.1 Application and purpose.
625.2 Definitions.
625.3 Standard sales provisions.
625.4 Publication of the Standard Sales Provisions.
625.5 Failure to perform in accordance with SPR Contracts of Sale.
APPENDIX A TO PART 625—STANDARD SALES PROVISIONS

AUTHORITY: 15 U.S.C. 761; 42 U.S.C. 7101; 42 U.S.C. 6201.

SOURCE: 48 FR 56541, Dec. 21, 1983, unless otherwise noted.

§ 625.1 Application and purpose.

This part shall apply to all price competitive sales of SPR petroleum by DOE. This section provides the rules for developing standard contract terms and conditions and financial and performance responsibility measures; notifying potential purchasers of those terms, conditions and measures; choosing applicable terms, conditions and measures for each sale of SPR petroleum; and notifying potential purchasers of which terms, conditions and measures will be applicable to particular sales of SPR petroleum.

§ 625.2 Definitions.

(a) *DOE*. DOE is the Department of Energy established by Pub. L. 95-91 (42 U.S.C. 7101 *et seq.*) and any component thereof including the SPR Office.

(b) *Notice of Sale*. The Notice of Sale is the document announcing the sale of SPR petroleum, the amount, type and location of the petroleum being sold, the delivery period and the procedures for submitting offers. The Notice of Sale will specify which contractual provisions and financial and performance responsibility measures are applicable to that particular sale of petroleum, and will provide other pertinent information.

(c) *Petroleum*. Petroleum means crude oil, residual fuel oil or any refined petroleum product (including any natural gas liquid and any natural gas liquid product) owned or contracted for by DOE and in storage in any permanent SPR facility, or temporarily stored in other storage facilities, or in transit to such facilities (including petroleum under contract but not yet delivered to a loading terminal).

(d) *Price Competitive Sale*. A price competitive sale of SPR petroleum is one in which contract awards are made to those responsive, responsible persons offering the highest prices; sales conducted pursuant to rules adopted under section 161(e) of the Energy Policy and Conservation Act (EPCA), Pub. L. 94-163 (42 U.S.C. 6201 *et seq.*), are not price competitive sales.

(e) *Purchaser*. A purchaser is any person or entity (including a Government agency) which enters into a contract with DOE to purchase SPR petroleum.

(f) *SPR*. SPR is the Strategic Petroleum Reserve, that program of the Department of Energy established by Title I, Part B of EPCA.

(g) *Standard Sales Provisions*. The Standard Sales Provisions are a set of terms and conditions of sale, which may contain or describe financial and performance responsibility measures, for petroleum sold from the SPR under this part.

§ 625.3 Standard sales provisions.

(a) *Contents.* The Standards Sales Provisions shall contain contract clauses which may be applicable to price competitive sales of SPR petroleum, including terms and conditions of sale, and purchaser financial and performance responsibility measures, or descriptions thereof. At his discretion, the Secretary or his designee may specify in a Notice of Sale which of such terms and conditions, or financial and performance responsibility measures, shall apply to a particular sale of SPR petroleum; and, he may specify any revisions in such terms, conditions and measures, and any additional terms, conditions and measures which shall be applicable to that sale, that are consistent with the SPR Drawdown Plan adopted on December 1, 1982.

(b) *Acceptance by offerors.* All offerors must, as part of their offers for SPR petroleum in response to a Notice of Sale, agree without exception to all contractual provisions and financial and performance responsibility measures which the Notice of Sale makes applicable to the particular sale.

(c) *Award of contracts.* No contract for the sale of SPR petroleum may be awarded to any offeror who has not unconditionally agreed to all contractual provisions and financial and performance responsibility measures which the Notice of Sale makes applicable to the particular sale.

(d) *Contract documents.* The terms and conditions which the Notice of Sale makes applicable to a particular sale may be incorporated into a contract for the sale of SPR petroleum by reference to the Notice of Sale.

§ 625.4 Publication of the Standard Sales Provisions.

(a) *Publication.* The Standard Sales Provisions shall be published in the FEDERAL REGISTER and in the Code of Federal Regulations as an appendix to this rule.

(b) *Revisions of the Standard Sales Provisions.* The Standard Sales Provisions shall be reviewed periodically and republished in the FEDERAL REGISTER, with any revisions.

(c) *Notification of applicable clauses.* The Notice of Sale will specify, by referencing the FEDERAL REGISTER and the Code of Federal Regulations in which the latest version of the Standard Sales Provisions was published, which contractual terms and conditions and contractor financial and performance responsibility measures contained or described therein are applicable to that particular sale.

§ 625.5 Failure to perform in accordance with SPR Contracts of Sale.

(a) *Ineligibility.* In addition to any remedies available to the Government under the Contract of Sale, in the event that a purchaser fails to perform in accordance with applicable SPR petroleum sale contractual provisions, and such failure is not excused by those provisions, the Headquarters Senior Procurement Official, at his discretion, may make such purchaser ineligible for future awards of SPR petroleum sales contracts.

(b) *Determination of ineligibility.* No purchaser shall be made ineligible for the award of any SPR sales contract prior to notice and opportunity to respond in accordance with the requirements of this subsection.

(1) Upon the determination that a purchaser is to be considered for ineligibility, the purchaser shall be sent by certified mail return receipt requested, the following:

(i) Notification that the Headquarters Senior Procurement Official is considering making the purchaser ineligible for future awards;

(ii) Identification of the SPR sales contract which the purchaser failed to comply with, along with a brief description of the events and circumstances relating to such failure;

(iii) Advice that the purchaser may submit in writing for consideration by the Headquarters Senior Procurement Official in determining whether or not to impose ineligibility on the purchaser, any information or argument in opposition to the ineligibility; and

(iv) Advice that such information or argument in opposition to the ineligibility must be submitted within a certain time in order to be considered by the Headquarters Senior Procurement Official, such time to be not less than 21 days.

(2) After elapse of the time period established under paragraph (b)(1) of this section for receipt of the purchaser's response, the Headquarters Senior Procurement Official, at his discretion, and after consideration of the purchaser's written response, if any, may make the purchaser ineligible for future awards of SPR petroleum sales contracts. Such ineligibility shall continue for the time period determined by the Headquarters Senior Procurement Official, as appropriate under the circumstances.

(3) The purchaser shall be notified of the Headquarters Senior Procurement Official's decision.

(c) *Reconsideration.* Any purchaser who has been excluded from participating in any SPR sale under paragraph (a) may request that the Headquarters Senior Procurement Offical reconsider the purchaser's ineligibility. The Headquarters Senior Procurement Official, at his discretion, may reinstate any such purchaser to eligibility for future competitive sales.

APPENDIX A TO PART 625—STANDARD SALES PROVISIONS

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SECTION A - GENERAL PRE-SALE INFORMATION

A.1 List of acronyms:

(a) *ASO:* Apparently Successful Offeror
(b) *DLI:* Delivery Line Item
(c) *DOE:* U.S. Department of Energy
(d) *MLI:* Master Line Item
(e) *NA:* Notice of Acceptance
(f) *NS:* Notice of Sale
(g) *SSPs:* Standard Sales Provisions
(h) *SPR:* Strategic Petroleum Reserve
(i) *SPRCODR:* SPR Crude Oil Delivery Report (Exhibit J)
(j) *SPR/PMO:* Strategic Petroleum Reserve/Project Management Office

A.2 Definitions

(a) *Affiliate.* The term "affiliate" means associated business concerns or individuals if, directly or indirectly, (1) either one controls or can control the other, or (2) a third party controls or can control both.

(b) *Business Day.* The term "business day" means any day except Saturday, Sunday or a U.S. Government holiday.

(c) *Contract.* The term "contract" means the contract under which DOE sells SPR petroleum. It is composed of the NS, the NA, the successful offer, and the SSPs incorporated by reference.

(d) *Contracting Officer.* The term "Contracting Officer" means the person executing sales contracts on behalf of the Government, and any other Government employee properly designated as Contracting Officer. The term includes the authorized representative of a Contracting Officer acting within the limits of his authority.

(e) *Government.* The term "Government", unless otherwise indicated in the text, means the United States Government.

(f) *Head of the Contracting Activity.* The term "Head of the Contracting Activity" means the Manager, Oak Ridge Operations Office, DOE.

(g) *Notice of Acceptance (NA).* The term "Notice of Acceptance" means the document which is sent by DOE to accept the purchaser's offer to create a contract.

(h) *Notification of Apparently Successful Offeror (ASO).* The term "notification of apparently successful offeror" means the notice, written or oral, by the Contracting Officer to an offeror that it will be awarded a contract if it is determined to be responsible.

(i) *Notice of Sale (NS).* The term "Notice of Sale" means the document announcing the sale of SPR petroleum, the amount, characteristics and location of the petroleum being sold, the delivery period and the procedures for submitting offers. The NS will specify what contractual provisions and financial and performance responsibility measures are applicable to that particular sale of petroleum and provide other pertinent information. (*See* Exhibit B, Sample Notice of Sale)

(j) *Offeror.* The term "offeror" means any person or entity (including a government agency) which submits an offer in response to a NS.

(k) *Petroleum.* The term "petroleum" means crude oil, residual fuel oil, or any refined product (including any natural gas liquid, and any natural gas liquid product) owned or contracted for by DOE and in storage in any permanent SPR facility, temporarily stored in other storage facilities, or in transit to such facilities (including petroleum under contract but not yet delivered to a loading terminal).

(l) *Project Management Office (SPR/PMO).* The term "Project Management Office" means the DOE personnel and DOE contractors located in Louisiana and Texas responsible for the operation of the SPR.

(m) *Purchaser.* The term "purchaser" means any person or entity (including a government agency) which enters into a contract with DOE to purchase SPR petroleum.

(n) *Standard Sales Provisions (SSPs).* The term "Standard Sales Provisions" means this set of terms and conditions of sale applicable to price competitive sales of SPR petroleum. These SSPs constitute the "standard sales agreement" referenced in the Strategic Petroleum Reserve "Drawdown" (Distribution) Plan, Amendment No. 4 (December 1, 1982, DOE/EP 0073) to the SPR Plan.

(o) *Strategic Petroleum Reserve (SPR).* The term "Strategic Petroleum Reserve" means that DOE program established by Title I, Part B of the Energy Policy and Conservation Act, 42 U.S.C. Section 6201, et seq.

(p) *Vessel.* The term "vessel" means a tankship, an integrated tug barge (ITB) system, a self-propelled barge, or other barge.

A.3 Standard Sales Provisions

(a) These SSPs contain pre-sale information, sales solicitation provisions, and sales contract clauses setting forth terms and conditions of sale, including purchaser financial and performance responsibility measures, or descriptions thereof, which may be applicable to price competitive sales of petroleum from the SPR in accordance with the SPR Sales Rule, 10 CFR Part 625. The NS will specify which of these provisions shall apply to a particular sale of such petroleum, and it may specify any revisions therein and any additional provisions which shall be applicable to that sale. (*See* Exhibit B, Sample Notice of Sale)

(b) *All offerors must,* as part of their offers for SPR petroleum in response to a NS, *agree without exception to all provisions of the SSPs which the NS makes applicable to the particular sale.* Offerors shall indicate their agreement by signing the Sales Offer Form (Exhibit A). The Government will not award a contract to an offeror which has failed to so agree.

A.4 Periodic revisions of the Standard Sales Provisions

DOE will review the SSPs periodically and republish them in the Federal Register, with any revisions. When a NS is issued, it will cite the Federal Register and the Code of Federal Regulations (if any) in which the latest version of the SSPs was published. Offerors are cautioned that the Code of Federal Regulations may not contain the latest version of the SSPs published in the Federal Register. Interested persons may obtain a copy of the current SSPs by writing to the address set forth in Provision No. A.5.

A.5 Potential offerors list for sales of petroleum

(a) The SPR/PMO will maintain a list of those potential offerors which wish to receive a NS whenever such a document is issued. In order to assure that prospective offerors will receive the NS or offer forms in timely fashion, all potential offerors are encouraged to submit the information in (d) as soon as possible. *A NS may be issued with a week or less allowed for the receipt of offers.* While DOE will use its best efforts to timely supply copies of the NS to persons not on the list who request the NS at the time an SPR petroleum sale is announced, this may not always be feasible in light of the short amount of time available before offers must be received.

(b) Any firm or individual may send a written request to be on the list to the following address: U.S. Department of Energy, Strategic Petroleum Reserve, Project Management Office, Procurement and Sales Division, Mail Stop PR-651, 900 Commerce Road East, New Orleans, Louisiana 70123, Telephone Number (504) 734-4226.

The envelope should be marked "SPR Sales Mailing List."

(c) Copies of the SSPs and the NS, when one is issued, may also be obtained from this address.

(d) A request to be placed on the mailing list should be in writing and should include the following information:

Name of firm
Mailing address (Street and P.O. Box) City, State, Zip Code
Name of authorized agent and alternate authorized agent
Telephone numbers for agent and alternate including area code
Agent address, if different from firm represented
TWX number/code
Telecopier brand name and model number
Whether telecopier is automatic or operator controlled
Telephone number for telecopier transmission, including area code
Telephone number for verification of message receipt, including area code
Employer/taxpayer identification number or social security number
Dun's number

As DOE may use express mail which cannot be delivered to a Post Office Box, failure to provide a street address could result in untimely receipt of the NS and will be at the offeror's risk.

A.6 Publicizing the Notice of Sale

(a) The NS will be sent to names on the list of potential offerors referenced in Provision No. A.5. Interested persons may send a representative to the address in Provision No. A.5 to obtain a copy of the NS.

(b) In addition to those on the list of potential offerors, the NS will also be sent to anyone requesting it when a sale is announced. Firms may request the NS by telephone or in writing to the telephone number or address in Provision No. A.5 above.

(c) A DOE press release, which will include the salient features of the NS, will be made available to all news agencies.

(d) At the option of the Contracting Officer, advertisements may be placed in publications likely to reach interested parties. The advertisements will contain the salient features of the NS and a name and telephone number at the SPR/PMO to call for further information.

A.7 Penalty for false statements in offers to buy SPR petroleum

A penalty for making false statements is imposed in the False Statements Act, 18 U.S.C. Section 1001, which provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

SECTION B - SALES SOLICITATION PROVISIONS

B.1 Requirements for a valid offer - caution to offerors

A valid offer to purchase SPR petroleum must meet the following conditions:

(a) The offer guarantee (*see* Provision No. B.10) must be received no later than the time set for the receipt of offers;

(b) The offer must include a completed Sales Offer Form (Exhibit A) and signed Standard Form 33 (Exhibit C) or other forms as specified in the NS;

(c) The offer must be received no later than the time set for receipt of offers;

(d) Any amendments to the NS which explicitly require acknowledgment of receipt must be properly acknowledged as provided for on Exhibit C; and

(e) The offeror must agree without exception to all provisions of the SSPs which the NS makes applicable to a particular sale, as well as to all provisions in the NS.

B.2 Certification of independent price determination

(a) The offeror certifies that:

(1) The prices in this offer have been arrived at independently, without, for the purposes of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to: (i) those prices; (ii) the intention to submit an offer; or (iii) the methods or factors used to calculate the prices offered.

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or to any competitor before the time set for receipt of offers, unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory:

(1) Is the person within the offeror's organization responsible for determining the prices being offered, and that the signatory has not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) above; or

(2) (i) Has been authorized in writing to act as agent for the persons responsible for such decision in certifying that such persons have not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) above; (ii) as their agent does hereby so certify; and (iii) as their agent has not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) above.

(c) An offer will not be considered for award where (a)(1), (a)(3), or (b) above has been deleted or modified. If the offeror deletes or modifies (a)(2) above, the offeror must furnish with the offer a signed statement setting forth in detail the circumstances of the disclosure.

B.3 Requirements for vessels - caution to offerors

(a) The "Jones Act", 46 U.S.C. 883, prohibits the transportation of any merchandise, including SPR petroleum, by water or land and water, on penalty of forfeiture thereof, between points within the United States (including Puerto Rico, but excluding the Virgin Islands) in vessels other than vessels built in and documented under laws of the United States, and owned by United States citizens, unless the prohibition has been waived by the Secretary of Treasury. Further, certain U.S.-flag vessels built with Construction Differential Subsidies (CDS) are precluded by Section 506 of the Merchant Marine Act of of 1936 (46 U.S.C. 1156) from participating in U.S. coastwise trade, unless such prohibition has been waived by the Secretary of Transportation, the waiver being limited to a maximum of 6 months in any given year. CDS vessels may also receive Operating Differential Subsidies, requiring separate permission from the Secretary of Transportation for domestic operation, under Section 805(a) of the same statute. The NS will advise offerors of any general waivers allowing use of non-coastwise qualified vessels or vessels built with Construction Differential Subsidies for a particular sale of SPR petroleum. If there is no general waiver, purchasers may request waivers in accordance with Provision No. C.7, but remain obligated to complete performance under this contract regardless of the outcome of that waiver process.

(b) The Department of Transportation's interim rule concerning Reception Facility Requirements for Waste Materials Retained on Board (33 CFR Parts 151 and 158) implements the reception facility requirements of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78). This rule prohibits any oceangoing tankship, required to retain oil or oily mixtures on-board while at sea, from entering any port or terminal unless the port or terminal has a valid Certificate of Adequacy as to its oily waste reception facilities. SPR marine terminals (*see* Exhibit E, SPR Delivery Point Data) have Certificates of Adequacy and reception facilities for vessel sludge and oily bilge water wastes, all costs for which will be borne by the vessel. The terminals, however, may not have reception facilities for oily ballast. Accordingly, tankships without segregated ballast systems will be required to make arrangements for and be responsible for all costs associated with appropriate disposal of such ballast, or they will be denied permission to load SPR petroleum at terminals which lack reception facilities for oily ballast.

(c) By submission of this offer, the offeror certifies that it will comply with the "Jones Act" and all applicable ballast disposal requirements.

B.4 "Superfund" tax on SPR petroleum - caution to offerors

(a) Sections 4611 and 4612 of the Internal Revenue Code which imposed a tax on domestic and imported petroleum to support the Hazardous Substance Response Fund (the "Superfund") have been revised by the Superfund Amendments and Reauthorization Act of 1986, Public Law No. 99-499, and the Omnibus Budget Reconciliation Act of 1986, Public Law No. 99-509. As amended, these sections impose taxes to finance the Hazardous Substance Superfund and the Oil Spill Liability Trust Fund as of January 1, 1987 and February 1, 1987, respectively.

(b) Section 4611 imposes a tax of 8.2 cents a barrel for domestic crude oil and 11.7 cents a barrel for foreign crude oil to support the "Superfund" on (1) crude oil received at a United States refinery and (2) petroleum products (including crude oil) entered into the United States for consumption, use or warehousing. In addition, Section 4611 provides for a possible additional tax of 1.3 cents a barrel for both foreign and domestic oil to support the Oil Spill Liability Trust Fund. Section 4612 provides that no tax is imposed if it is established that a prior tax imposed by Section 4611 has already been paid with respect to a barrel of oil.

(c) DOE has already paid the "Superfund" taxes on some of the oil imported and stored in the SPR. However, no "Superfund" tax has been paid on imported oil stored prior to the effective dates of these Acts or domestic oil stored in the SPR, nor has tax been paid into the Oil Spill Liability Trust Fund for any oil. Because domestic and imported crude oil for which no tax has been paid and imported crude oils for which "Superfund" taxes have been paid at different rates have been commingled in the SPR, upon drawdown of the SPR, the NS will advise purchasers of the tax liability.

B.5 Export limitations and licensing - caution to offerors

(a) Offerors for SPR petroleum are put on notice that SPR crude oils subject to different export control laws have been commingled in storage. Export of SPR crude oil is subject to U.S. export control laws, the provisions of which differ depending on the source and destination of the crude oil proposed to be exported. For example, imported crude oil stored in the SPR may be exported pursuant to applicable Department of Commerce "Short Supply Controls," 15 C.F.R. Part 377, if: the export is part of a transaction resulting in the importation of refined products of a quantity and quality not less than would be derived from domestic refining; the products are to be sold at prices no higher than the lowest prices at which they could have been sold by the nearest capable U.S. refinery; and for compelling economic or technological reasons beyond the exporter's control, the crude oil cannot reasonably be processed in the U.S. (15 CFR 377.6(d)(1)(vii)). However, there are somewhat more stringent, independent statutory tests to be met as preconditions to the export of certain other crude oils stored in the SPR, including Alaskan North Slope (ANS) and Naval Petroleum Reserves (NPR) oil. *See* 7(d) of the Export Administration Act of 1979, 50 U.S.C App. 2406(d) (ANS oil) and 10 U.S.C. 7430(e) (NPR oil); *see also* 30 U.S.C. 185(u) (oil shipped across a Mineral Lands Leasing Act Section 28(u) right-of-way) and 43 U.S.C. 1354(a) (OCS oil).

(b) By submission of this offer, the offeror certifies that it will comply with any applicable U.S. export control laws.

B.6 Issuance of the Notice of Sale

In the event petroleum is sold from the SPR, DOE will issue a NS containing all of the pertinent information necessary for the offeror to prepare a priced offer. *A NS may be issued with a week or less allowed for the* *receipt of offers.* Offerors are expected to examine the complete NS document, and to become familiar with the SSPs cited therein. Failure to do so will be at the offeror's risk.

B.7 Submission of offers and modification of previously submitted offers

(a) Unless otherwise provided in the NS, offers must be submitted to the SPR/PMO in New Orleans, Louisiana, by mail or hand-delivery. Direct cash deposits as offer guarantees will be sent by wire in accordance with Provision No. C.24.

(b) Unless otherwise provided in the NS, offers may be modified or withdrawn by hand delivery, mail, telegram, or telex, provided that the hand delivery, mail, telegram, or telex is received at the designated office prior to the time specified for receipt of offers.

(c) Envelopes containing offers and any material related to offers shall be plainly marked on the outside; "RE: NS ____ FOR SALE OF PETROLEUM FROM STRATEGIC PETROLEUM RESERVE. OFFERS ARE DUE (insert time of opening), LOCAL NEW ORLEANS, LA TIME ON (insert date of opening). MAIL ROOM MUST MARK DATE AND TIME OF RECEIPT ON FACE OF THE ENVELOPE." Envelopes containing modified offers or any material related to supplements or modifications of offers, shall be plainly marked on the outside: "RE: NS ____FOR SALE OF PETROLEUM FROM STRATEGIC PETROLEUM RESERVE. OFFER MODIFICATION. MAIL ROOM MUST MARK DATE AND TIME OF RECEIPT ON FACE OF THE ENVELOPE."

(d) The envelope shall be marked with the full name and return address of the offeror.

(e) Offers being sent by mail and modifications being sent by hand delivery, mail, telegram, or telex must be received at the address specified in the NS.

(f) Handcarried offers brought during normal business hours on the day set for receipt of offers, or any day prior to that day, shall be taken by the offeror to the place specified in the NS. This includes mail being delivered by a delivery service. At all other times, handcarried offers shall be placed in the bid box, located as specified in the NS.

(g) Public opening of offers is not anticipated unless otherwise indicated in the NS. An abstract of offers will be prepared and posted in a prominent place at the SPR/PMO in New Orleans, Louisiana, for public viewing no later than 48 hours after the specified time and date for the receipt of offers. Persons wishing to *see* copies of the offers may contact the Contracting Officer to arrange to view the copies at the SPR/PMO.

B.8 Acknowledgment of amendments to a Notice of Sale

When an amendment to a NS requires acknowledgment of receipt, receipt by an offeror must be acknowledged (a) by signing and returning the amendment; (b) by identifying the amendment number and date in the space provided for this purpose on Standard Form 33 (Exhibit C); or (c) by letter, telegram, or telex sent to the address specified in the NS. Such acknowledgment must be received prior to the time specified for receipt of offers.

B.9 Late offers, modifications of offers, and withdrawal of offers

(a) Any offer received at the office designated in the NS after the time specified for receipt will be considered only if it is received before award is made and only under the following conditions:

(1) It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of offers (e.g., an offer submitted in response to a NS requiring receipt of offers by the 20th of the month must have been mailed by the 15th or earlier); or,

(2) It was sent by mail, telegram or telex if authorized, and it is determined by the Contracting Officer that the late receipt was due solely to mishandling by the SPR/PMO after receipt at the address specified in the NS.

(b) Any modification or withdrawal of an offer is subject to the same conditions as in (a) above, except that it shall be mailed not less than the third calendar day prior to the date specified for receipt of offers. An offer may also be withdrawn in person by an offeror or its authorized representative, provided the representative's identity is made known and the representative signs a receipt for the offer, but only if the withdrawal is made prior to the time set for receipt of offers.

(c) The only acceptable evidence to establish:

(1) the date of mailing of a late offer, modification, or withdrawal sent either by registered or certified mail is the U.S. Postal Service postmark on either (i) the envelope or wrapper, or (ii) the original receipt from the U.S. Postal Service. If neither postmark shows a legible date, the offer, modification or withdrawal shall be deemed to have been mailed late. Post mark means a printed, stamped, or otherwise placed impression, exclusive of a postage meter machine impression, that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the U.S. Postal Service. Therefore, offerors should request the postal clerk to place a hand cancellation "bull's-eye" postmark

on both the receipt and the envelope or wrapper.

(2) the time of receipt at the address specified in the NS is the time/date stamp at such address on the offer's wrapper or other documentary evidence of receipt maintained at the place of receipt.

(d) Notwithstanding (a) and (b) of this provision, a late modification of an otherwise successful offer which makes its terms more favorable to the Government will be considered at any time it is received, and may be accepted.

B.10 Offer guarantee

(a) Each offeror must submit an acceptable offer guarantee for each offer submitted. Each offer guarantee must be received at the place specified for receipt of offers no later than the time and date set for receipt of offers.

(b) An offeror's failure to submit a timely, acceptable guarantee will result in rejection of its offer.

(c) The amount of each offer guarantee is $10 million dollars or 5 percent of the maximum potential contract amount, whichever is less. The maximum potential contract amount is the sum of the products determined by multiplying the offer's maximum purchase quantity for each master line item, times the highest offer prices that the offeror would have to pay for that master line item if the offer were to be successful. To assist in this calculation, instructions and a worksheet are available at Exhibit K. Submission of the worksheet is not desired.

(d) Each offeror must submit one of the following types of offer guarantees with each offer:

(1) A certified or cashier's check payable to the U.S. Department of Energy, drawn on a U.S. Bank;

(2) A wire cash deposit to the account of the U.S. Treasury in accordance with Provision No. C.24, all wire deposit costs to be borne by the offeror; or

(3) A letter of credit from a U.S. depository institution conforming without exception to the contents required by Exhibit G, Offer Guarantee - Letter of Credit, all letter of credit costs to be borne by the offeror.

(e) If the offeror or bank forwards the offer guarantee separately from the offer, the envelope shall clearly say "OFFER GUARANTEE OF (Name of Company)" and shall be clearly marked in accordance with Provision No. B.7(c).

(f) The offeror shall be liable for any amount lost by DOE due to the difference between the offer and the resale price, and for any additional resale costs incurred by DOE in the event that the offeror:

(1) withdraws its offer within 10 days following the time set for receipt of offers;

(2) withdraws its offer after having agreed to extend its acceptance period; or

(3) having received a notification of ASO, fails to furnish an acceptable payment and performance guarantee within the time limit specified by the Contracting Officer.

The offer guarantee shall be used toward offsetting such price difference or additional resale costs. Use of the offer guarantee for such recovery shall not preclude recovery by DOE of damages in excess of the amount of the offer guarantee caused by such failure of the offeror.

(g) Letters of credit furnished as offer guarantees must be valid for at least 21 calendar days after the date set for the receipt of offers.

(h) Offer guarantees (except letters of credit) will be returned to an unsuccessful offeror 5 business days after expiration of the offeror's acceptance period or 3 business days after award of contracts for delivery line items on which the offeror submitted a price, whichever is first, except as provided in (i) below, and to a successful offeror upon receipt of a satisfactory performance and payment guarantee. Letters of credit will be returned only upon request. Where the offer guarantee was a wire cash deposit, a cashier's check or a certified check, the offeror may apply it toward advance payment.

(i) If an offeror defaults on its offer, DOE will hold the offer guarantee so that damages can be assessed against it.

B.11 Explanation requests from offerors

Offerors may request explanations regarding meaning or interpretation of the NS from the individual and telephone number indicated in the NS. On complex and/or significant questions, DOE reserves the right to have the offeror put the question in writing; explanation or instructions regarding these questions will be given as an amendment to the NS.

B.12 Currency for offers

Prices shall be stated and invoices shall be paid in U.S. dollars.

B.13 Language of offers and contracts

All offers in response to the NS and all modifications of offers shall be in English. All correspondence between offerors or purchasers and DOE shall be in English.

B.14 Proprietary data

If any information submitted in connection with a sale is considered proprietary, that information should be so marked, and an explanation provided as to the reason such data should be considered proprietary. Any final decision as to whether the material so marked is proprietary will be made by DOE. DOE's Freedom of Information Act regulations governing the release of proprietary data shall apply.

B.15 SPR crude oil streams and delivery points

(a) The geographical locations of the terminals and docks interconnected with permanent SPR storage locations, the SPR crude oil streams available at each location and the delivery points for those streams are as follows, (*see* also Exhibit D, SPR Crude Oil Stream Characteristics, and Exhibit E, SPR Delivery Point Data):

Geographical location	Delivery points	Crude oil Streams
Freeport, Texas	Philips Terminal, or Philips Terminal No. 2 Docks.	SPR Bryan Mound Sweet. SPR Bryan Mound Sour. SPR Bryan Mound Maya.
Texas City, Texas	ARCO Terminal, or ARCO Docks.	SPR Bryan Mound Sweet. SPR Bryan Mound Sour.
Nederland, Texas	Sun Terminal, or Sun Docks.	SPR West Hackberry Sweet. SPR West Hackberry Sour.
St. James, Louisiana	LOCAP Terminal, or DOE St. James Terminal Docks.	SPR Weeks Island Sour. SPR Bayou Choctaw Sweet. SPR Bayou Choctaw Sour.

(b) The NS may change delivery points and it may also include additional terminals, temporary storage facilities or systems utilized in connection with petroleum in transit to the SPR. Alternatively, DOE or its contractor may provide the transportation to the purchaser's facility, for example, when the petroleum is in transit to the SPR at time of sale.

(c) The NS may contain additional information supplementing Exhibit E, SPR Delivery Point Data.

B.16 Notice of Sale line item schedule - petroleum quantity, quality, and delivery method

(a) Unless the NS provides otherwise, the possible master line items (MLI) and delivery line items (DLI) which may be offered are as provided in Exhibit A, SPR Sales Offer Form. Currently, there are eight MLIs in Exhibit A, one for each of the eight crude oil streams that the SPR has in storage. The NS may offer fewer than the eight possible MLIs.

(b) Each MLI contains several DLIs, each of which specifies an available delivery method and the nominal delivery period. Offerors are cautioned that the NS may alter the period of time covered by each DLI. This is most likely to occur in the first sales period of a drawdown if the period of sale does not correspond to a calendar month.

(1) DLI-A covers petroleum to be transported by pipeline, either common carrier or local. The nominal delivery period is one month.

(2) DLI-B, DLI-C and DLI-D cover petroleum to be transported by tankships: DLI-B, covering tankships to be loaded from the 1st through the 10th of the month; DLI-C, tankships to be loaded from the 11th through the 20th; and DLI-D, tankships to be loaded from the 21st through the last day of the month.

(3) DLI-E, DLI-F and DLI-G cover petroleum to be transported by barges (Caution: These DLIs are currently only applicable to deliveries of West Hackberry Sweet and Sour crude oil streams from Sun Docks): DLI-E, covering barges to be loaded from the 1st through the 10th of the month; DLI-F, barges to be loaded from the 11th through the 20th; and DLI-G, barges to be loaded from the 21st through the last day of the month.

(4) Where the storage site is connected to more than one terminal or pipeline (presently this only occurs at Bryan Mound) additional DLIs will be offered. The additional DLIs will include DLI-H, covering petroleum to be transported by pipeline over the period of a month; DLI-I, covering tankships to be loaded from the 1st through the 10th; DLI-J, tankships to be loaded from the 11th through the 20th; and DLI-K, tankships to be loaded from the 21st through the last day of the month. The Notice of Sale will specify which DLIs are offered on each MLI.

(c) The NS will state the total estimated number of barrels to be sold on each MLI. An offeror may offer to buy all or part of the petroleum offered on an MLI. In making awards, the Contracting Officer shall attempt to achieve award of the exact quantities offered by the NS, but may vary the estimated MLI quantities by +/-10 percent in order to match the DLI offers received. In addition, the Contracting Officer may reduce the MLI quantity available for award by any amount and reject otherwise acceptable offers, if he determines, in his sole discretion after consideration of the offers received on all of the MLIs, that award of those quantities is not in the best interest of the Government because the prices offered for them are not reasonable.

(d) The NS will specify a minimum contract quantity for each DLI. To be responsive, an offer on a DLI must be for at least that quantity.

(e) The NS will specify the maximum quantity which could be sold on each of the DLIs. The maximum quantity is not an indication of the amount of petroleum that, in fact, will be sold on that DLI. Rather, it represents DOE's best estimate of the maximum amount of the particular SPR crude oil stream that can be moved by that transportation system over the delivery period. The total DOE estimated DLI maximums may exceed the total number of barrels to be sold on that MLI, as the NS DLI estimates represent estimated transportation capacity, not the amount of petroleum offered for sale. Where necessary to avoid an unfair competitive advantage for local pipeline owners, e.g., where there are only one or two likely offerors, the NS may omit a pipeline DLI. Where this occurs, those offerors may bid against vessel DLIs and, if successful, request a contract modification under Provision No. C.6, to permit delivery of the awarded oil to a pipeline.

(f) The NS will not specify what portion of the petroleum which DOE offers on a MLI will, in fact, be sold on any given DLI. Rather, the highest priced offers received on the MLI will determine the DLIs against which the offered petroleum is sold.

(g) DOE will not sell petroleum on a DLI in excess of the DLI maximum; however, DOE reserves the right to revise its estimates at any time and to award or modify contracts in accordance with its revised estimates. Offerors are cautioned that: DOE cannot guarantee that such transportation capacity is available; offerors should undertake their own analyses of available transportation capacity; and each purchaser is wholly responsible for arranging all transportation other than terminal arrangements at the terminals listed in Provision No. B.15, which shall be made in accordance with Provision No. C.5. A purchaser against one DLI cannot change a transportation mode without prior written permission from DOE, although such permission will be given whenever possible, in accordance with Provision No. C.6.

(h) Exhibit D, SPR Crude Oil Stream Characteristics, contains nominal characteristics for each SPR crude oil stream. Prospective offerors are cautioned that these data will likely change as more crude oil is stored in the SPR. The NS will provide, to the maximum extent practicable, the latest data on each stream offered.

B.17 Line item information to be provided in the offer

(a) Each offeror, if determined to be an ASO on a DLI, agrees to enter into a contract for the purchase of the quantity of petroleum in the offer and to take delivery of that petroleum (plus or minus 10 percent as provided for in Provision No. C.18) in accordance with the terms of that contract.

(b) An offer may be for more than one MLI. However, offerors are cautioned that alternate offers on different MLIs are not permitted. For example, an offeror may offer to purchase 1,000,000 barrels of SPR West Hackberry Sweet and 1,000,000 barrels of SPR West Hackberry Sour, but may not offer to purchase, in the alternative, either 1,000,000 barrels of sweet or 1,000,000 barrels of sour.

(c) An offeror may submit more than one offer. However, separate forms must be prepared and each offer will be evaluated on an individual basis.

(d) The following information will be provided to DOE by the offeror on the form in Exhibit A or other forms as required by the NS:

(1) MLI quantity. ("MAXQ" on the Exhibit A offer form) The offeror shall state the maximum quantity of each crude oil stream that the offeror is willing to buy.

(2) DLI quantity. ("DESQ") The offer shall state the number of barrels which the offeror will accept on each DLI, i.e., by the delivery mode and during the delivery period specified. The quantity stated on a single DLI shall not exceed the MAXQ for the MLI. The offeror shall designate a quantity on at least one DLI for the MLI, but may designate quantities on more than one DLI. If the offeror is willing to accept alternate DLIs, the total of its designated DLI quantities would exceed its maximum MLI quantity; otherwise, the total of its designated DLI quantities should equal its maximum MLI quantity.

(3) DLI unit price ("UP$$") and total price. The offer shall state the price per barrel for each DLI for which the offeror has designated a desired quantity, as well as the total price (quantity times unit price). Where offers have indicated quantities on more than one DLI with a different price on each, DOE will award the highest priced DLI first. If the offeror has the same price for two or more DLIs, it may indicate its first choice, second choice, etc., for award of those items; if the offeror does not indicate a preference, or indicates the same preference for more than one DLI, DOE may select the DLIs to be awarded at its discretion. Prices may be stated in hundredths of a cent ($0.0001). DOE shall drop from the offer and not consider any numbers of less than one one-hundredth of a cent.

(4) Minimum DLI quantity acceptable. ("MINQ") The offeror must choose whether to accept only the stated DLI quantity (DESQ) or, in the alternative, to accept any quantity awarded between the offer's stated DLI quantity and the minimum contract quantity for the DLI (indicated by the "N" and "Y" blocks respectively under "MINQ" on the offer form). However, DOE will award less than the DESQ only if the quantity available to be awarded is less than the DESQ. If the offer fails to indicate the offeror's choice, the offer will be evaluated as

though the offeror has indicated willingness to accept the minimum contract quantity.

(5) Any other data required by the NS.

B.18 Mistake in offer

(a) After opening and recording offers, the Contracting Officer shall examine all offers for mistakes. If the Contracting Officer discovers any price discrepancies or quantity discrepancies, he may obtain from the offeror oral or written verification of the offer actually intended, but in any event, he shall proceed with offer evaluation applying the following procedures:

(1) Price discrepancy: An offer for a DLI should contain the unit price per barrel being offered, the desired quantity of barrels to which the unit price applies, and an extension price which is the total of the quantity desired multiplied by the unit price offered. If there is a discrepancy between the unit price and the extension price, the unit price will govern and be recorded as the offer, unless it is clearly apparent on the face of the offer that there has been a clerical error, in which case the Contracting Officer may correct the offer.

(2) Quantity discrepancy: In case of conflict between the maximum MLI quantity and the stated DLI quantities (for example, where a single stated DLI quantity exceeds the corresponding maximum MLI quantity), the lesser quantity will govern in the evaluation of the offer. In the event that the offer fails to specify a maximum MLI quantity, the offer will be evaluated as though the largest stated DLI quantity was the offer's maximum MLI quantity.

(b) In cases where the Contracting Officer has reason to believe a mistake not covered by the procedures set forth in (a) may have been made, he shall request from the offeror a verification of the offer, calling attention to the suspected mistake. The Contracting Officer may telephone the offeror and confirm the request by telex. The Contracting Officer may set a limit of as little as 6 hours for telephone response, with any required written documentation to be received within as little as 2 business days. If no response is received, the Contracting Officer may determine that no error exists and proceed with offer evaluation.

(c) The Head of the Contracting Activity will make administrative determinations described in (1) and (2) below if an offeror alleges a mistake after opening of offers and before award.

(1) The Head of the Contracting Activity may refuse to permit the offeror to withdraw an offer, but permit correction of the offer if clear and convincing evidence establishes both the existence of a mistake and the offer actually intended. However, if such correction would result in displacing one or more higher acceptable offers, the Head of the Contracting Activity shall not so determine unless the existence of the mistake and the offer actually intended are ascertainable substantially from the NS and offer itself.

(2) The Head of the Contracting Activity may determine that an offeror shall be permitted to withdraw an offer in whole, or in part if only part of the offer is affected, without penalty under the offer guarantee, where the offeror requests permission to do so and clear and convincing evidence establishes the existence of a mistake, but not the offer actually intended.

(d) In all cases where the offeror is allowed to make verbal corrections to the original offer, confirmation of these corrections must be received in writing within the time set by the Contracting Officer or the original offer will stand as submitted.

B.19 Evaluation of offers

(a) The Contracting Officer will be the determining official as to whether an offer is responsive to the SSPs and the NS. DOE reserves the right to reject any or all offers and to waive minor informalities or irregularities in offers received.

(b) A minor informality or irregularity in an offer is an inconsequential defect the waiver or correction of which would not be prejudicial to other offerors. Such a defect or variation from the strict requirements of the NS is inconsequential when its significance as to price, quantity, quality or delivery is negligible.

B.20 Procedures for evaluation of offers

(a) Award on each DLI will be made to the highest responsible offerors which submit offers responsive to the SSPs and the NS and which have provided the required payment and performance guarantee as required by Provision No. C.19.

(b) DOE will array all price offers on an MLI from highest to lowest for award evaluation regardless of DLI. However, DOE will award against the DLIs and will not award a greater quantity on a DLI than DOE's estimate (which is subject to change at any time) of the maximum quantity that can be moved by the delivery method. Selection of the apparently successful offer involves the following steps:

(1) Any offers below the minimum acceptable price, if any minimum price has been established for the sale, will be rejected as nonresponsive.

(2) All offers on each MLI will be arrayed from highest price to lowest price.

(3) The highest offers will be reviewed for responsiveness to the NS.

(4) In the event the highest offer does not take all the crude oil available on the MLI, sequentially, the next highest offer will be selected until all of the petroleum offered

on the MLI is awarded or there are no more acceptable offers. In the event that acceptance of an offer against an MLI or a DLI would result in the sale of more petroleum on an MLI than DOE has offered or the sale of more petroleum on a DLI than DOE estimates can be delivered by the specified delivery method, DOE will not award the full amount of the offer, but rather the remaining MLI quantity or DLI capacity, provided such portion exceeds DOE's minimum contract quantity. In the event that the quantity remaining is less than the offeror is willing to accept, but more than DOE's minimum contract quantity, the Contracting Officer shall proceed to the next highest offer.

(5) In the event of tied offers and an insufficient quantity available on the MLI or insufficient capacity on the DLI to fully award all tied offers, the available MLI quantity or DLI capacity remaining will be allotted pro rata among the tied offers using the following formula:

$$\frac{\text{The quantity the offeror is willing to purchase at the tied price}}{\text{The sum of all the quantities the tied offerors are willing to purchase at the tied price}} \times \text{the quantity or capacity remaining to be allotted}$$

If after application of this formula, the pro rata share of any offeror is less than 90 percent of the quantity which the offeror is willing to accept (as indicated in the offer), the Contracting Officer in his sole discretion may do one or more of the following: (i) make additional quantity or capacity available and increase the offeror's share to its minimum acceptable quantity; (ii) contact the offeror to determine whether alternative delivery arrangements can be made, permitting the offeror to accept his prorata share; (iii) eliminate the offeror and recalculate the shares of all remaining offerors; or (iv) not award that offeror's prorata share. If any quantities remain after this process, the Contracting Officer may elect not to award those quantities, or to award those quantities in accordance with Provision No. B.22.

(6) The Contracting Officer may reduce the MLI quantity available for award by any amount and reject otherwise acceptable offers, if in his sole discretion he determines, after consideration of the offers received on all of the MLIs, that award of those quantities is not in the best interest of the Government because the prices offered for them are not reasonable.

(7) Determinations of ASO responsibility will be made by the Contracting Officer before each award. All ASOs will be notified by telephone and advised to provide to the Contracting Officer, within five business days or such other longer time as the Contracting Officer shall determine, a letter of credit (*see* Exhibit H, Payment and Performance Guarantee - Letter of Credit) or advance payment as specified in Provision No. C.19. Compliance with required payment and performance guarantees will effectively assure a finding of responsibility of offerors, except where: (i) an offeror is on either DOE's or the Federal Government's list of debarred, ineligible and suspended bidders; or (ii) evidence, with respect to an offeror, comes to the attention of the Contracting Officer of conduct or activity which represents a violation of law or regulation (including an Executive Order having the force and effect of law); or (iii) evidence is brought to the attention of the Contracting Officer of past activity or conduct of an offeror which shows a lack of integrity (including actions inimical to the welfare of the United States) or willingness to perform, so as to substantially diminish the Contracting Officer's confidence in the offeror's performance under the proposed contract.

B.21 Financial statements and other information

(a) As indicated in Provision No. B.20(b)(7) above, compliance with the required payment and performance guarantee will in most instances effectively assure a finding of responsibility. Therefore, DOE does not intend to ask for financial information from all offerors. However, after receipt of offers, but prior to making award, DOE reserves the right to ask for the audited financial statements for an offeror's most recent fiscal year and unaudited financial statements for any subsequent quarters. These financial statements must include a balance sheet and profit and loss statement for each period covered thereby. A certification by a principal accounting officer that there have been no material changes in financial condition since the date of the audited statements, and that these present the true financial condition as of the date of the offer, shall accompany the statements. If there has been a change, the amount and nature of the change must be specified and explained in the unaudited statements and a principal accounting officer shall certify that they are accurate. The Contracting Officer shall set a deadline for receipt of this information.

(b) DOE also reserves the right to require information from the offeror regarding its plans for use of the petroleum, the status of requests for export licenses, plans for complying with the Jones Act, etc. The Contracting Officer shall set a deadline for receipt of this information.

B.22 Resolicitation procedures on unsold petroleum

(a) In the event that petroleum offered on an MLI remains unsold after evaluation of all offers, the Contracting Officer, at his option, may issue an amendment to the NS, resoliciting offers from all interested parties. DOE reserves the right to alter the MLIs and/or offer different MLIs in the resolicitation.

(b) In the event that for any reason petroleum which has been awarded or allotted for award becomes available to DOE for resale, the Contracting Officer may use the following procedures:

(1) If priced offers remain valid in accordance with Provision No. B.23, the petroleum will go to the next highest ranked offer.

(2) If offers have expired in accordance with Provision No. B.23, the Contracting Officer at his option may offer the petroleum to the highest offeror for that MLI. The pertinent offeror may, at its option, accept or reject that petroleum at the price originally offered. If that offeror rejects the petroleum, it may be offered to the next highest offeror, etc.

(3) If the petroleum is not then resold, the Contracting Officer may at his option proceed to amend the NS to resolicit offers for that petroleum or add the petroleum to the next sales cycle.

B.23 Offeror's certification of acceptance period

(a) By submission of an offer, the offeror certifies that its priced offer will remain valid for 10 calendar days after the date set for the receipt of offers, and further that the successful line items of its offer will remain valid for an additional 30 calendar days should it receive a notification of ASO either by telephone or in writing during the initial 10-day period.

(b) By mutual agreement of DOE and the offeror, an individual offeror's acceptance period may be extended for a longer period.

B.24 Notification of Apparently Successful Offeror

The following information will be provided to the offeror by DOE in the notification of ASO:

(a) Identification of SPR crude oil streams to be awarded;

(b) Total quantity to be awarded on each MLI and on each DLI;

(c) Price in U.S. dollars per barrel for each DLI;

(d) Extended total price offer for each DLI;

(e) Provisional contract number;

(f) Any other data necessary.

B.25 Contract documents

If an offeror is successful, DOE will make award using a NA signed by the Contracting Officer. The NA will identify the items, quantities, prices and delivery method which DOE is accepting. Attached to the NA will be the NS and the successful offer. Provisions of the SSPs will be made applicable through incorporation by reference in the NS. The Contracting Officer also shall provide the purchaser with an information copy of the then-current SSPs as published in the FEDERAL REGISTER. If time constraints require it, DOE may accept the offeror's offer by an electronic notice, such as telegram or telex, and the contract award shall be effective upon issuance of such notice. The electronic notice will be followed by a mailing of full documentation as described above.

B.26 Purchaser's representative

As part of its offer, each offeror shall designate an agent as a point of contact for any telephone calls or correspondence from the Contracting Officer. Any such agent shall have a U.S. address and telephone number and must be conversant in English.

B.27 Procedures for selling to other U.S. Government agencies

(a) If a U.S. Government agency submits an offer for petroleum in a price competitive sale, that offer will be arrayed for award consideration in accordance with Provision No. B.20. If a U.S. Government agency is an ASO, award and payment will be made exclusively in accordance with statutory and regulatory requirements governing transactions between agencies, and the U.S. Government agency will be responsible for complying with these requirements within the time limits set by the Contracting Officer.

(b) U.S. Government agencies are exempt from all guarantee requirements, but must complete all transportation arrangements for moving the petroleum. Failure by a U.S. Government agency to comply with any of the requirements of these SSPs shall not provide a basis for challenging a contract award to that agency.

Section C - Sales Contract Provisions

C.1 Delivery of SPR petroleum

(a) The purchaser, at its expense, shall make all necessary arrangements to accept delivery of and transport the SPR petroleum, except for terminal arrangements which shall be coordinated with the SPR/PMO. The DOE will deliver and the purchaser will accept the petroleum at delivery points listed in the NS. The purchaser also shall be responsible for meeting any delivery requirements imposed at those points including complying with the rules, regulations, and procedures contained in applicable port/terminal manuals, pipeline tariffs or other applicable documents.

(b) For petroleum in the SPR's permanent storage sites, DOE shall provide, at no cost to the purchaser, transportation by pipeline from the SPR to the supporting SPR distribution terminal facility specified for the MLI and, for vessel loadings, a safe berth and loading facilities sufficient to deliver petroleum to the vessel's permanent hose connection. The purchaser agrees to assume responsibility for, to pay for, and to indemnify and hold DOE harmless for any other costs associated with terminal, port, vessel and pipeline services necessary to receive and transport the petroleum, including but not limited to demurrage charges assessed by the terminal, ballast and oily waste reception services other than those provided by DOE or its agent, mooring and line-handling services, tank storage charges and port charges incurred in the delivery of SPR petroleum to the purchaser. The purchaser also agrees to assume responsibility for, to pay for and to indemnify and hold DOE harmless for any liability, including consequential or other damages, incurred or occasioned by the purchaser, its agent, subcontractor at any tier, assignee or any subsequent purchaser, in connection with movement of petroleum sold under a contract incorporating this provision.

C.2 Compliance with the "Jones Act" and the U.S. export control laws

Failure to comply with the "Jones Act," 46 U.S.C. 883, regarding use of U.S.-flag vessels in the transportation of oil between points within the United States, and with any applicable U.S. export control laws affecting the export of SPR petroleum will be considered to be a failure to comply with the terms of any contract containing these SSPs and may result in termination for default in accordance with Provision No. C.27. Purchasers who have failed to comply with the "Jones Act" or the export control laws in SPR sales may be found to be non-responsible in the evaluation of offers under Provision No. B.20 of the SSPs. Those purchasers may also be subject to proceedings to make them ineligible for future awards in accordance with 10 CFR Part 625.

C.3 Storage of SPR petroleum

Continued storage of purchasers' oil in the SPR facilities after the end of the contract delivery periods is not permitted, unless specifically authorized by the Secretary of Energy and provided for in the NS. Allowing petroleum to remain in storage as the result of failure to complete delivery arrangements may result in assessement of liquidated damages under Provision Nos. C.27 through C.29 unless such failure is excused by those provisions.

C.4 Environmental compliance

(a) Vessels to be used for the transportation of petroleum purchased from the SPR will comply with all applicable rules and regulations, including The Ports and Waterways Safety Act, The Federal Water Pollution Control Act of 1972, The Oil Pollution Control Act of 1961, and other applicable statutes, rules and regulations, including the following: Parts 151, 153, 157, 158 and 159 of Title 33, and Parts 30-36 and 542 of Title 46 of the Code of Federal Regulations.

(b) In the event tankships are used in the performance of this contract, the purchaser will employ only tankships whose owners are parties to the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) or who carry equivalent, as determined by the Contracting Officer, liability coverage.

(c) All crude oil transfer operations in performance of the contract will be in accordance with the guidelines detailed in the International Oil Tanker Safety Guide, U.S. Coast Guard Regulations, and the "Ship to Ship Transfer Guide" of the International Chamber of Shipping Oil Companies International Marine Forum.

(d) Failure of the purchaser or the purchaser's subcontractors to comply with all applicable rules and regulations in the transportation of SPR petroleum will be considered a failure to comply with the terms of any contract containing these SSPs, and may result in termination for default, unless, in accordance with Provision No. C.27, such failure was beyond the control and without the fault or negligence of the purchaser, its affiliates, or subcontractors.

C.5 Delivery and transportation scheduling

(a) Unless otherwise instructed in the notification of ASO, each purchaser shall submit a proposed vessel lifting program and/or pipeline delivery schedule to the SPR/PMO by hand-delivery, mail, telex, or facsimile, no later than the fifteenth day prior to the earliest delivery date offered by the NS. The vessel lifting program shall specify the requested three-day loading window for each tanker and the quantity to be lifted. The pipeline schedule will specify the dates on which deliveries are to be tendered to the pipeline and the quantity to be tendered on each date. In the event conflicting requests are received, preference will be given to such requests in descending order, highest priced offer first. The SPR/PMO will respond to each purchaser no later than the tenth day prior to the start of deliveries, either confirming the schedule as originally submitted or proposing alterations. The purchaser is deemed to have received a mailed notice on the second day after its dispatch and a telex or express mail notice on the day after dispatch. The purchaser shall be deemed to have agreed to those alterations unless the purchaser requests the SPR/PMO to reconsider within two days after receipt of such alterations. The SPR/PMO will use its best efforts to accommodate such requests, but its decision following any such reconsideration shall be final and binding.

(b) Telex and facsimile telephone numbers, as well as the address to which mailed and hand-carried proposed schedules should be delivered, will be provided in the notification of ASO.

(c) Notwithstanding paragraph (a) above, ASOs and purchasers may request delivery commencing prior to the contractual delivery period. DOE will honor such requests, unless unacceptable costs might be incurred or SPR schedules might be adversely affected. Requests accepted by DOE will be handled on a first-come, first-served basis, except that where conflicting requests are received on the same day, the highest-priced offer will be given preference. Requests that include both a change in delivery method and an early delivery date may also be accommodated subject to Provision No. C.6. DOE may not be able to confirm requests for early deliveries until 24 hours prior to the load date.

C.6 Contract modification - alternate delivery line items

A purchaser may request a change in delivery method after the issuance of the NA. Such requests may be made either orally (to be confirmed in writing within 24 hours) or in writing, but will require written modification of the contract by the Contracting Officer. Such modification will be permitted by DOE if in the sole judgment of DOE the change would not interfere with the delivery plans of other purchasers, and further provided that the purchaser agrees to pay all increased costs incurred by DOE because of such modification. The NS shall establish per barrel rates for such increased costs.

C.7 Application procedures for "Jones Act" waivers

(a) Unless otherwise specified, an ASO or purchaser seeking a waiver of the "Jones Act" should submit a request by letter, telegram or telex to: U.S. Customs Service, Chief, Carrier Rulings Branch, 1301 Constitution Avenue, NW., Washington, DC 20229, Telephone No. (202) 566-5706, Telex (710) 822-9525.

Copies of the request should also be sent to:

(1) Assistant Secretary of Defense (Acquisition and Logistics), Department of Defense, Washington, DC 20301-8000;

(2) Associate Administrator for Marketing and Domestic Enterprise, Maritime Administration, Department of Transportation, Mail Stop MAR-800, Washington, DC 20590, Telex (710) 822-9426;

(3) Department of Energy, ATTN: Deputy Assistant Secretary for Petroleum Reserves/Deputy Assistant Secretary for Energy Emergencies, Mail Stop FE-40, Washington, DC 20585, Telex, (710) 822-0176.

(b) A purchaser seeking a waiver to use a vessel built with a Construction Differential Subsidy (and, if applicable, operated with Operating Differential Subsidy) should have the owner of that vessel submit a request by letter, telegram, or telex for such waiver(s) to: Maritime Administrator, Maritime Administration, U.S. Department of Transportation, Washington, DC 20590, Telex (710) 822-9426. Copies of the request shall be sent to:

(1) U.S. Department of Energy, ATTN: Deputy Assistant Secretary for Petroleum Reserves/Deputy Assistant Secretary for Energy Emergencies, Mail Stop FE-40, Washington, DC 20585, Telex (710) 822-0176.

(2) Chief, Carriers Rulings Branch, U.S. Customs Service, Department of the Treasury, Washington, DC 20229, Telex (710) 822-9525.

For speed and brevity, the request may incorporate by reference appropriate contents of any earlier "Jones Act" waiver request by the purchaser. Under Section 805(a), a hearing is also required for any intervenor, and a waiver may not be approved if it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service.

(c) Any request for waiver should include the following information:

(1) Name, address and telephone number of requestor;

(2) Purpose for which waiver is sought, e.g., to take delivery of so many barrels of

SPR crude oil, with reference to the SPR NS number and the provisional or assigned contract number;

(3) Name and flag of registery of vessel for which waiver is sought, if known at the time of waiver request, and either the scheduled 3-day delivery window(s), if available, or 10-day delivery period applicable to the contract;

(4) The intended number of voyages, including the ports for loading and discharging;

(5) Estimated period of time for which vessel will be employed; and

(6) Reason for not using qualified U.S.-flag vessel, including documentary evidence of good faith effort to obtain suitable U.S.-flag vessel and responses received from that effort. Such evidence would include copies of correspondence, telexes, telegrams, and telephone conversation summaries. Use of commercial brokers and the Transportation News Ticker (TNT) is suggested for maximum market coverage. Requests for waivers by telegram or telex may reference such documentary evidence, with copies to be provided by mail, postmarked no more than one business day after transmittal of the telegram or telex requesting the waiver.

(7) For waivers to use Construction Differential Subsidy vessels, the request must also contain a specific agreement for Construction Differential Subsidies payback pursuant to Section 506 of the Merchant Marine Act of 1936 and must be signed by an official of the vessel owner authorized to make a payback commitment.

(d) If there are shown to be "Jones Act" vessels available and in a position to meet the loading dates required, no waivers may be approved.

(e) The names of any vessel(s) to be employed under a "Jones Act" waiver must be provided to the U.S. Customs Service no later than 3 days prior to the beginning of the 3-day loading window scheduled in accordance with Provision No. C.5.

C.8 Vessel loading procedures

(a) After notification of ASO, each ASO shall arrange with the SPR/PMO a schedule of vessel loading windows in accordance with Provision No. C.5.

(b) The length of the scheduled loading window shall be 3 days. The average quantity to be lifted during a loading window will be no less than DOE's minimum contract quantity.

(c) Tankships, ITBs, and self-propelled barges shall be capable of sustaining a minimum average load rate of 15,000 barrels per hour (BPH) during loading operations. Barges with a load rate of not less than 5,000 BPH shall be permitted at the Sun Terminal barge docks. With the consent of the SPR/PMO, lower loading rates and the use of barges at the Sun and Phillips Terminals' suitably equipped tankship docks may be permitted if such do not interfere with DOE's obligations to other parties.

(d) At least 7 days in advance of the beginning of the scheduled loading window, the purchaser shall furnish the SPR/PMO with vessel nominations specifying: (i) name and size of vessel or advice that the vessel is To Be Nominated at a later date (such date to be no later than 3 days before commencement of the loading window); (ii) estimated date of arrival (to be narrowed to a firm date not later than 72 hours prior to the first day of the vessel's 3-day window, as provided in paragraph (f) below); (iii) quantity to be loaded and contract number; and (iv) other relevant information requested by the SPR/PMO. DOE will advise the purchaser, in writing, of the acceptance or rejection of the nominated vessel within 24 hours of such nomination. If no advice is furnished within 24 hours, the nomination will be firm. Once established, changes in such nomination details may be made by only mutual agreement of the parties, to be confirmed by DOE in writing. The purchaser shall be entitled to substitute another vessel of similar size for any vessel so nominated, subject to DOE's approval. DOE must be given at least 3 days notice prior to the first day of the 3-day loading window of any such substitution. DOE shall make a reasonable effort to accept any nomination for which notice has not been given in strict accordance with the above provisions.

(e) In the event the purchaser intends to use more than one vessel to take delivery of the quantity scheduled to be delivered during a loading window, the information in (d) above and (f) below shall be provided for each vessel.

(f) The vessel shall notify the SPR/PMO of the expected day of arrival 72 hours before the beginning of his scheduled 3-day loading window. This notice establishes the firm agreed-upon date of arrival which is the 1-day window for the purposes of vessel demurrage (*see* Provision No. C.9). In addition, the vessel shall notify the SPR/PMO of the expected hour of arrival 72, 48 and 24 hours in advance of arrival, and after the first notice, to advise of any variation of more than 4 hours. With the first notification of the hour of arrival, the Master shall advise the SPR/PMO: (i) quantity of oily bilge wastes or sludge requiring discharge ashore; (ii) cargo loading rate requested; (iii) number, size, and material of vessel's manifold connections; and (iv) defects in vessel or equipment affecting performance or maneuverability.

(g) Notice of Readiness shall be tendered upon arrival at berth or at customary anchorage which is deemed to be any anchorage within 6 hours vessel time to the SPR dock. The preferred anchorages are identified in Exhibit E. The Notice of Readiness shall be confirmed promptly in writing to the SPR/PMO and the terminal responsible for coordination of crude oil loading operations. Such notice shall be effective only if given during customary port operating hours. If notice is given after customary business hours of the port, it shall be effective as of the beginning of customary business hours on the next business day.

(h) DOE shall use its best efforts to berth the purchaser's vessel as soon as possible after receipt of the Notice of Readiness.

(i) Standard hose and fittings (American Standard Association standard connections) for loading shall be provided by DOE. Purchasers must arrange for line handling, deballasting, tug boat and pilot services, both for arrival and departure, through the terminal or ship's agent, and bear all costs associated with such services.

(j) Tankships, ITBs, and self-propelled barges shall be allowed berth time of 36 hours, and barges shall be allowed berth time of 24 hours, as defined below. Vessels loading cargo quantities in excess of 500,000 barrels shall be allowed berth time of 36 hours plus 1 hour for each 20,000 barrels to be loaded in excess of 500,000 barrels. Conditions below excepted, however, the vessel shall not remain at berth more than 6 hours after completion of cargo loading unless hampered by tide or weather.

(1) Berth time shall commence with the vessel's first line ashore and shall continue until loading of the vessel, or vessels in case more than one vessel is loaded, is completed and the last line is off. In addition, allowable berth time will be increased by the amount of any delay occurring subsequent to the commencement of berth time and resulting from causes due to adverse weather, labor disputes, force majeure and the like, decisions made by port authorities affecting loading operations, actions of DOE, its contractors and agents resulting in delay of loading operations (providing this action does not arise through the fault of the purchaser or purchaser's agent), and customs and immmigration clearance.The time required by the vessel to discharge oily wastes or to moor multiple vessels sequentially into berth shall count as used berth time.

(2) For all hours of berth time in excess of allowable berth time provided for above, the purchaser shall be liable for dock demurrage and also shall be subject to the conditions of Provision No. C.10.

C.9 Vessel laytime and demurrage

(a) The laytime allowed DOE for handling of the purchaser's vessel shall be 36 running hours. For vessels with cargo quantities in excess of 500,000 barrels, laytime shall be 36 running hours plus 1 hour for each 20,000 barrels of cargo to be loaded in excess of 500,000 barrels. Vessel laytime shall commence when the vessel is moored alongside or 6 hours after receipt of a Notice of Readiness, whichever occurs first. It shall continue 24 hours per day, seven days per week without interruption from its commencement until loading of the vessel is completed and cargo hoses or loading arms are disconnected. Any delay to the vessel in reaching berth caused by the fault or negligence of the vessel or purchaser, delay due to breakdown or inability of the vessel's facilities to load, decisions made by vessel owners or operators or by port authorities affecting loading operations, discharge of ballast or slops, customs and immigration clearance, weather, labor disputes, force majeure and the like shall not count as used laytime. In addition, movement in roads shall not count as used laytime.

(b) If the vessel is tendered for loading on a date earlier than the firm agreed-upon arrival date, established in accordance with Provision No. C.8, and other vessels are loading or have already been scheduled for loading prior to the purchaser's vessel, the purchaser's vessel shall await its turn and vessel laytime shall not commence until the vessel moors alongside, or at 0600 hours local time on the firm agreed-upon date of arrival, whichever occurs first. If the vessel is tendered for loading later than 2400 hours on the firm agreed-upon date of arrival, DOE will use its best efforts to have the vessel loaded as soon as possible in its proper turn with other scheduled vessels, under the circumstances prevailing at the time. In such instances, vessel laytime shall commence when the vessel moors alongside.

(c) For all hours or any part thereof of vessel laytime which elapse in excess of the allowed vessel laytime for loading provided for above, demurrage shall be paid by DOE, for U.S.-flag vessels, at the lesser of the demurrage rate in the tanker voyage or charter party agreement, or the most recently available United States Freight Rate Average (USFRA) for a hypothetical tanker with a deadweight in long tons equal to the weight in long tons of the crude oil loaded, multiplied by the most recent edition of the American Tanker Rate Schedule rate for such hypothetical tanker. For foreign flag vessels, demurrage shall be as determined above, except that the London Tanker Brokers' Panel Average Freight Rate Assessment (AFRA) and most recent edition of the Worldwide Tanker Nominal Freight Scale shall be used as appropriate, if less than the charter party rate. For all foreign flag vessel loadings that commence during a particular calendar month, the applicable AFRA shall be the one that is determined on the basis of freight assessments for the period ended on the 15th day of the preceding month. The demurrage rate for barges will be the hourly rate contained in the charter of a chartered barge, or if it is not a chartered barge, at a rate determined by DOE as a fair rate under prevailing conditions. If demurrage is incurred because of breakdown of machinery or equipment of DOE or its contractors (other than the purchaser), the rate of demurrage shall be reduced to one-half the rate stipulated herein per running hour and pro rata of such reduced rate for part of an hour for demurrage so incurred. Demurrage payable by DOE, however, shall in no event exceed the actual demurrage expense incurred by the purchaser as the result of the delay.

(d) In the event the purchaser is using more than one vessel to load the quantity scheduled to be delivered during a single loading window, the terms of this provision and the Government's liability for demurrage apply only to the first vessel presenting its Notice of Readiness in accordance with (a) above.

(e) The primary source document and official record for demurrage calculations is the SPRCODR (*see* Provision No. C.17).

C.10 Purchaser liability for excessive berth time

The Government reserves the right to direct a vessel loading SPR petroleum at a delivery point specified in the NS, to vacate its SPR berth, and absorb all costs associated with this movement, should such vessel, through its operational inability to receive oil at the average rates provided for in Provision No. C.8, cause the berth to be unavailable for an already scheduled follow-on vessel. Furthermore, should a breakdown of the vessel's propulsion system prevent its getting under way on its own power, the Government may cause the vessel to be removed from the berth with all costs to be borne by the purchaser.

C.11 Pipeline delivery procedures

(a) No later than the last day of the month preceding the month of delivery, the purchaser shall furnish the SPR/PMO with the following information: (i) confirmation of the pipeline's acceptance of the amount of the petroleum proposed to be delivered in the delivery month; (ii) an estimated schedule (consistent with the terms of the contract) for delivery of the petroleum to the pipeline; and (iii) the name and telephone number of the pipeline point of contact with whom the SPR/PMO should coordinate the petroleum delivery.

(b) Once established, the pipeline delivery schedule can only be changed with DOE's prior written consent.

C.12 Title and risk of loss

Unless otherwise provided in the NS, title to and risk of loss for SPR petroleum will pass to the purchaser at the delivery point as follows:

(a) For vessel shipment - when the petroleum passes from the dock loading equipment connections to the vessel's permanent hose connection.

(b) For pipeline shipment - when the petroleum passes the permanent flange connecting the SPR's distribution terminal to the commercially-owned pipeline, except for shipments via the LOCAP and ARCO Terminals where title and risk of loss pass when the petroleum enters the LOCAP or ARCO Terminal meter bank.

(c) For in-transit shipments - when the petroleum passes the permanent flange of the discharging vessel manifold upon discharge into the purchaser's designated marine terminal facility or vessel.

C.13 Acceptance of crude oil

(a) When practical, the NS shall update the SPR crude oil stream characteristics shown in Exhibit D, SPR Crude Oil Stream Characteristics. However, the purchaser shall accept the crude oil delivered regardless of characteristics. Except as provided below, DOE assumes no responsibility for deviations in quality.

(b) In the event that the crude oil stream delivered both has a total sulfur content (by weight) in excess of 3.5 percent if Bryan Mound Maya, 2.0 percent if any other sour crude oil stream, or 0.50 percent if a sweet crude oil stream, and, in addition, has an API gravity less than 20°API if Bryan Mound Maya, 26°API if any other sour crude oil stream, or 32°API if a sweet crude oil stream, the purchaser shall accept the crude oil delivered and either pay the contract price adjusted in accordance with Provision No. C.14, or request negotiation of the contract price. Unless the purchaser submits a written request for negotiation of the contract price to the Contracting Officer within 10 days from the date of delivery, the purchaser shall be deemed to have accepted the adjustment of the price in accordance with Provision No. C.14. Should the purchaser request a negotiation of the price and the parties be unable to agree as to that price, the dispute shall be settled in accordance with Provision No. C.34.

C.14 Price adjustments for quality differentials for crude oil

(a) The NS will specify quality price adjustments applicable to the crude oil streams offered for sale. Unless otherwise specified by the NS, price adjustments will be made solely for variations between the API gravity of the crude oil delivered and the API gravity of the crude oil stream contracted for as published in the NS. Price adjustments for SPR crude oil streams are expected to be similar to one or more commercial crude oil differential postings for equivalent quality crude oil.

(b) Price adjustments will be applied only to the amount of variation by which the API of the crude oil delivered differs by more than plus or minus five-tenths of one degree API (+/− 0.5°API) from the API gravity of the crude oil stream contracted for as published in the NS. The contract price per barrel shall be increased by that amount if the API gravity of the crude oil delivered exceeds the published API gravity by more than 0.5°API and decreased by that amount if the crude oil delivered falls below the published API gravity by more than 0.5°API.

C.15 Determination of quality of petroleum

(a) The quality of the crude oil delivered to the purchaser will be determined from samples taken from the delivery tanks in accordance with API *Manual of Petroleum Measurement Standards*, Chapter 8.1, *Manual Sampling of Petroleum and Petroleum Products* (ASTM D4057), latest edition, or from the composite sample collected by an automatic inline sampler whose performance has been verified in accordance with the sampling system proving system outlined in the API *Manual of Petroleum Measurement Standards*, Chapter 8.2, *Automatic Sampling of Petroleum and Petroleum Products* (ASTM D4177), latest edition. Preference will be given to samples collected by means of an automatic inline sampler when such a system is available and operational. Tests to be performed by DOE or its authorized contractor are:

(1) Sediment and Water

Primary methods: *API Manual of Petroleum Measurement Standards*, Chapter 10.1, *Determination of Sediment in Crude Oils and Fuel Oils by the Extraction Method* (ASTM D473) (IP53), latest edition; and API *Manual of Petroleum Measurement Standards*, Chapter 10.2, *Determination of Water in Crude Oil by Distillation* (ASTM D4006) (IP358), latest edition.

Alternate methods: *API Manual of Petroleum Measurement Standards*, Chapter 10.3, *Determination of Water and Sediment in Crude Oil by the Centrifuge Method (Laboratory Procedure)* (ASTM D4007) (IP 359), latest edition; or *API Manual of Petroleum Measurement Standards*, Chapter 10.4, *Standard Methods of Test for Water—and Sediment in Crude Oils*, (API Pub. 2542) (ASTM D96), latest edition.

(2) Sulfur

Primary method: ASTM D1552, *Sulfur in Petroleum Products (High) Temperature Method*), latest edition.

Alternate methods: ASTM D2622, *Sulfur in Petroleum Products (X-ray Spectographic Method*), latest edition; or ASTM D4294, *Sulfur in Petroleum Products by Non-Dispersive X-ray Fluorescence Spectrometry*, latest edition.

(3) API Gravity

API *Manual of Petroleum Measurement Standards*, Chapter 9.1, *Hydrometer Test Method for Density, Relative Density (Specific Gravity)*, or *API Gravity of Crude Petroleum and Liquid Petroleum Products* (ASTM D1298), latest edition; or *API Gravity of Crude Petroleum and Petroleum Products (Hydrometer Method)* (ASTM D287), latest edition.

To the maximum extent practicable, the primary methods will be used for determination of SPR crude oil quality characteristics. However, because of conditions prevailing at the time of delivery, it may be necessary to use alternate methods of test for one or more of the quality characteristics. The primary methods are binding in any dispute over quality characteristics of SPR crude oil.

(b) The purchaser may arrange for additional services to witness and verify testing simultaneously with the Government Quality Assurance Representatives. Such services, however, will be for the account of the purchaser. Any disputes will be settled in accordance with Provision No. C.34. Should the purchaser opt not to provide such additional services, then the Government findings will be binding on the purchaser.

C.16 Determination of quantity of petroleum

(a) The quantity of crude oil delivered to the purchaser will be determined from opening and closing tank gauges with adjustment for opening and closing free water and sediment and water as determined from shore tank samples where an inline sampler is not available, or delivery meter reports. All volumetric measurements made when the crude oil is at a temperature other than 60°F will be converted to Net Standard Volume in barrels at 60°F, using the *API Manual of Petroleum Measurement Standards*, Chapter 11.1, Volume 1, *Volume Correction Factors* (ASTM D1250) (IP 200); Table 5A-*Generalized Crude Oils, Correction of Observed API Gravity to API Gravity at 60°F*; Table 6A-Generalized Crude Oils, Correction of Volume to 60°*F* Against API Gravity at 60°F, latest edition, and by deducting the tanks' free water, and the entrained sediment and water as determined by the testing of composite all-levels samples taken from the delivery tanks; or by deducting the sediment and water as determined by testing a composite sample collected by a certified in-line sampler.

(b) The quantity determination shall be made and certified by the DOE contractor responsible for loading operations, and witnessed by the Government Quality Assurance Representative at the delivery point.

The purchaser shall have the right to have representatives present at the gauging/metering, sampling, and testing. Should the purchaser arrange for additional inspection services, such services will be for the account of the purchaser. Any disputes shall be settled in accordance with Provision No. C.34. Should the purchaser not arrange for additional services, then DOE's findings shall be binding on the purchaser.

C.17 Delivery documentation

The quantity and quality determination shall be documented on the SPR/PMO Crude Oil Delivery Report (SPRCODR), SPRPMO-F-6110.2-14 (*see* Exhibit J for copy of this form). The SPRCODR will be signed by the purchaser's agent to acknowledge receipt of the quantity and quality of crude oil indicated. In addition, for vessel deliveries, the time statement on the SPRCODR will be signed by the vessel's Master when loading is complete. Copies of the completed SPRCODR, with applicable supporting documentation (i.e., metering or tank gauging tickets and appropriate calculation worksheets), will be furnished to the purchaser and/or the purchaser's authorized representative after completion of delivery. They will serve as the basis for invoicing and/or reconciliation invoicing for the sale of petroleum as well as for any associated services that may be provided.

C.18 Contract amounts for crude oil

The contract quantities and dollar value stated in the NA are estimates. The per barrel unit price is subject to adjustment due to variation in the API gravity from the published characteristics. In addition, due to conditions of loading and shipping, the quantity actually delivered may vary by +/−10 percent for each DLI. However, a purchaser is not required to engage additional vessels if sufficient vessels to take delivery of at least 90 percent of the contract quantity have been engaged.

C.19 Payment

(a) Payment for oil delivered shall be due no later than 10 days after the date of delivery.

(b) Payment shall be made by the payment and performance guarantee which must be either:

(1) A letter of credit conforming without exception to requirements of Provision No. C.20, and Exhibit H, Payment and Performance Guarantee - Letter of Credit and equal to 100 percent of the contract amount; or

(2) An advance payment by cash wire deposit, made in accordance with the wire transfer instructions in Provision No. C.24 and equal to 110 percent of the contract amount.

(c) The purchaser must furnish an acceptable payment and performance guarantee before DOE will execute the NA. The Contracting Officer will inform the ASO by telephone that the guarantee is due within a period which may be as short as 5 business days. The Contracting Officer may, at his discretion, send a confirming telegram of the notification, but the timeliness of receipt for the guarantee is determined by the date of the telephone call.

(d) All wire deposit and letter of credit costs will be borne by the purchaser.

(e) The Contracting Officer (who may act through the SPR/PMO Planning and Financial Management Division) may draw against this payment and performance guarantee at any time after the first delivery for any monies due under the contract for petroleum delivered and at any time for any other monies owing to DOE under the contract, no matter how the debt arose.

C.20 Payment and performance letters of credit - general requirements

(a) Each letter of credit must conform without exception to the standard letter of credit provided as Exhibit H.

(b) DOE does not require information concerning the issuing bank's agreement with its customer. Any language in the letter of credit in addition to that specified in Exhibit H shall make the letter of credit unacceptable and shall be cause for rejection of the offer.

(c) As set forth in Exhibit H, the letter of credit provides for payment to DOE by wire transfer of funds over FEDWIRE. If a letter of credit is from a single depository institution, including a branch or an agency of a foreign bank, (hereinafter referred to as "bank") that bank must maintain an account with any Federal Reserve Bank or Branch (Fed) and be a participant in the Fed's FEDWIRE funds transfer system. If the letter of credit is issued by a syndicate of banks, only the institution acting as agent for the syndicate and responsible for honoring the drafts drawn under the letter of credit must maintain a Fed account and be a participant in FEDWIRE.

(d) DOE reserves the right to request evidence that the bank official signing the letter of credit is authorized to do so, such as a confirming telex, telephone call, or letter from another bank official, or other appropriate evidence as determined by the Contracting Officer.

C.21 Billing and payment - with purchaser's letter of credit

(a) After delivery of the SPR petroleum and completion of the delivery documentation, the Contracting Officer shall prepare an invoice in accordance with the contract and the delivery documentation.

(b) Upon completion of the invoice, the SPR/PMO Planning and Financial Management Division shall prepare a draft requesting a wire transfer of funds in accordance with the letter of credit and transmit that message to the bank issuing the letter of credit by express mail or telex, or via the FEDWIRE system. On the date specified in the draft, nominally 10 days after completion of the delivery of petroleum, the bank shall use the wire transfer procedures specified in the letter of credit to transfer the invoiced funds to the account of the U.S. Treasury. If the draft is not transmitted within 10 days of completion of delivery of the petroleum, the due date shall be the next business day after receipt of the draft.

(c) The SPR/PMO shall provide copies of the invoices to the purchaser and the bank by mail.

(d) In the event that the bank refuses to honor the draft against the letter of credit, the purchaser shall be responsible for paying any interest due (*see* Provision No. C.25) from the due date specified in the draft.

(e) Within 30 calendar days after final payment under the contract, the Contracting Officer shall authorize the cancellation of the letter of credit and shall return it to the purchaser.

C.22 Billing and payment - with purchaser's advance payment

(a) If the offeror elects to pay in advance, delivery documentation will be provided to the purchaser after each delivery. After the last delivery under the contract, a reconciliation billing will be made. If money is due from the purchaser to DOE, an invoice will be issued to the purchaser (*see* paragraph (b) below). If money is due the purchaser, a Treasury check will be issued in accordance with the Treasury Fiscal Requirements Manual.

(b) In accordance with the delivery documentation and the contract, the Contracting Officer shall determine the amount of any reconciliation invoice and transmit it to the purchaser by express mail, mail or telex. A purchaser is deemed to have received mailed invoices on the second day after their dispatch and telex and express mail invoices on the day after dispatch. Reconciliation invoices must be paid in accordance with Provision No. C.24 10 business days after the purchaser is deemed to have received them.

C.23 Replacement of funds in the payment and performance guarantee

(a) Payment and performance guarantees must be maintained in full force and effect to the Contracting Officer's satisfaction at the following minimum levels until final payment under the contract:

(1) Letter of credit at 100 percent of the contract price of the petroleum remaining to be paid for; and

(2) Advance payment at 110 percent of the contract price of the petroleum remaining to be delivered.

(b) If the Contracting Officer draws against the letter of credit, or makes charges against the advance payment, for monies owed DOE for oil delivered, for liquidated damages or for other funds due DOE, the purchaser shall be notified within 24 hours by express mail, mail or telex of the fact of such withdrawal or charge and the amount thereof. Purchaser is deemed to have received a mailed notice on the second business day after its dispatch and a telex or express mail notice the next business day after its dispatch.

(c) In the event that a draw against the payment and performance guarantee causes its amount to fall below the levels specified in (a) above, the purchaser shall, within 5 business days after it is deemed to have received notification in (b) above, replenish the payment and performance guarantee to those levels. Such replenishment shall be made either by the wire transfer of funds in accordance with Provision No. C.24, or by the provision of a new letter of credit or amendment of the old letter of credit. If such replenishment is not made within 5 business days, the Contracting Officer may, on the 6th business day, without prior notice to the purchaser withhold deliveries under the contract and/or terminate the contract in whole or in part for default under Provision No. C.27.

C.24 Method of payments - general

(a) Notwithstanding any other contract provision, DOE may invoice the purchaser at any time for payment of monies due under the contract. These would include but not be limited to, interest, liquidated damages, amounts owing for any services provided for under the contract, and the difference between the contract price and price received on the resale of undelivered petroleum as defined in Provision No. C.27. If the invoice is for delinquent payments, interest shall accrue from the date of the delinquency and not from the invoice's deemed date of receipt by purchaser.

(b) All amounts payable by the purchaser in excess of $1,000.00 shall be paid by wire transfer as a deposit to the account of the U.S. Treasury through FEDWIRE. Information which must be included on each wire transfer is specified in Exhibit I, Instruction Guide for Funds Transfer.

(c) Payments in amounts less than $1,000.00 shall be by check made out to "U.S. Department of Energy." Such payments will be sent with documentation to identify the payer and purpose of the payment to: U.S. Department of Energy, Strategic Petroleum Reserve Project Management Office, Crude Oil Sales, Planning and Financial Management Division, Mail Stop PR-652, 900 Commerce Road East, New Orleans, Louisiana 70123.

(d) DOE may designate another place, different timing, or another method of payment after reasonable written notice to the purchaser.

(e) No payment due DOE hereunder shall be subject to reduction or set-off for any claim of any kind against the United States arising independently of the contract.

(f) If a purchaser disagrees with the amounts invoiced by DOE, the purchaser immediately shall pay the amount invoiced, and notify the Contracting Officer of the basis for its disagreement. The Contracting Officer will receive and act upon any such objection asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute, and purchaser shall file a claim promptly in accordance with Provision No. C.34.

C.25 Interest

Amounts due and payable by the purchaser or its bank which are not paid in accordance with the provisions governing such payments shall bear interest from the date due until the date payment is received by the Government.

Interest shall be computed on a daily basis. The interest rate shall be in accordance with the Current Value of Funds rate as established by the Department of the Treasury in accordance with the Debt Collection Act of 1982 and published periodically in Bulletins to the Treasury Fiscal Requirements Manual and in the FEDERAL REGISTER.

C.26 Government options if payment is not received

(a) If any amount owed to DOE is not paid within the time deadlines specified by the applicable provisions, the Contracting Officer may, at his discretion, take the following actions either simultaneously or in any sequence he deems appropriate, with or without prior notice to the purchaser:

(1) Invoice the purchaser for the amount on which payment is delinquent or provide written notice that payment is delinquent;

(2) Draw against the letter of credit for all amounts due and delinquent;

(3) Apply any advance payment received against the amount due and delinquent;

(4) Withhold all or any part of future deliveries under the contract; and/or

(5) Terminate the contract, in whole or in part, for purchaser default, in accordance with Provision No. C.27.

(b) Any disputes will be settled by the Contracting Officer in accordance with Provision No. C.34.

C.27 Termination

(a) Immediate termination.

(1) The Contracting Officer may terminate this contract in whole or in part, without liability of DOE, by written notice to the purchaser effective upon its being deposited in the U.S. Postal System addressed to the purchaser as provided in Provision No. C.33 in the event that the purchaser either notifies the Contracting Officer that it will not be able to accept, or fails to accept, any delivery line item in accordance with the terms of the contract. Such notice shall invite the purchaser to submit information to the Contracting Officer as to the reasons for the failure to accept the delivery line item in accordance with the terms of the contract.

(2) Within 10 business days after the issuance of the notice of termination, the Contracting Officer may determine that such termination was a termination for default under subparagraph (b)(1)(ii) of this provision. In the absence of information which persuades the Contracting Officer that the purchaser's failure to accept the delivery line item was excusable, the fact of such failure may be the basis for the Contracting Officer determining the purchaser to be in default, without first determining under subparagraphs (b)(2) and (b)(3) whether such failure was excusable under the terms of the contract. The Contracting Officer shall promptly give the purchaser written notice of such determination.

(3) Any immediate termination other than one determined to be a termination for default in accordance with subparagraph (a)(2) and paragraph (b) of this provision shall be a termination for the convenience of DOE without liability of the Government.

(b) Termination for Default.

(1) Subject to the provisions of subparagraphs (b)(2) and (b)(3), the Contracting Officer may terminate the contract in whole or in part for purchaser default, without liability of DOE, by written notice to the purchaser, effective upon its being deposited in the U.S. Postal System, addressed to the purchaser as provided in Provision No. C.33 in the event that:

(i) The Government does not receive payment in accordance with any payment provision of the contract;

(ii) The purchaser fails to accept delivery of petroleum in accordance with the terms of the contract; or

(iii) The purchaser fails to comply with any other term or condition of the contract within 5 business days after the purchaser is deemed to have received written notice of such failure from the Contracting Officer.

(2) Except with respect to defaults of subcontractors, the purchaser shall not be determined to be in default or be charged with any liability to DOE under circumstances which prevent the purchaser's acceptance of delivery hereunder due to causes beyond the control and without the fault or negligence of the purchaser as determined by the Contracting Officer. Such causes shall include but are not limited to:

(i) Acts of God or the public enemy;

(ii) Acts of the Government acting in its sovereign or contractual capacity;

(iii) Fires, floods, earthquakes, explosions, unusually severe weather, or other catastrophes; or

(iv) Strikes.

(3) If the failure to perform is caused by the default of a subcontractor, the purchaser shall not be determined to be in default or to be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the purchaser to meet the delivery schedule, if:

(i) Such default arises out of causes beyond the control of the purchaser and its subcontractor, and without the fault or negligence of either of them; or

(ii) Such default arises out of causes within the control of a transportation subcontractor, not an affiliate of the purchaser, hired to transport the purchaser's petroleum by vessel or pipeline, and such causes are beyond the purchaser's control, without the fault or negligence of the purchaser, and notwithstanding the best efforts of the purchaser to avoid default.

(4) In the event that the contract is terminated in whole or in part for default, the purchaser shall be liable to DOE for:

(i) The difference between the contract price on the contract termination date and any lesser price the Contracting Officer obtained upon resale of the petroleum; and

(ii) Liquidated damages as specified in Provision No. C.29 as fixed, agreed, liquidated damages for each day of delay until the petroleum is delivered to a purchaser under either a resolicitation for the sale of the quantities of oil defaulted on, or a NS issued after the date of default which specifies that it is for the sale of quantities of oil defaulted on. In no event shall liquidated damages be assessed for more than 30 days.

(5) In the event that the Government exercises its right of termination for default, and it is later determined that the purchaser's failure to perform was excused in accordance with subparagraphs (2) and (3), the rights and obligations of the parties shall be the same as if such termination was a termination for convenience without liability of the Government under paragraph (c).

(c) Termination for convenience.

(1) In addition to any other right or remedy provided for in the contract, the Government may terminate this contract at any time in whole or in part whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Such termination shall be without liability of the Government if such termination arises out of causes specified in (a)(1) or (b)(1) above, acts of the Government in its sovereign capacity, or causes beyond the control and without the fault or negligence of the Government, its contractors (other than the purchaser of SPR crude oil under this contract) and agents. For any other termination for convenience, the Government shall be liable for such reasonable costs incurred by the purchaser in preparing to perform the contract, but under no circumstances shall the Government be liable for consequential damages or lost profits as the result of such termination.

(2) The purchaser will be given immediate written notice of any decrease of petroleum deliveries greater than 10 percent, or of termination, under this paragraph (c). The termination or reduction shall be effective upon its notice being deposited in the U.S. Postal System unless otherwise specified in the notice. The purchaser is deemed to have received a mailed notice on the second day after its dispatch and a telex or express mail notice on the day after dispatch.

(3) Termination for the convenience of the Government shall not excuse the purchaser from liquidated damages accruing prior to the effective date of the termination.

(d) Nothing herein contained shall limit the Government in the enforcement of any legal or equitable remedy which it might otherwise have, and a waiver of any particular cause for termination shall not prevent termination for the same cause occurring at any other time or for any other cause.

(e) In the event that the Government exercises its right of termination, as provided in paragraphs (a), (b), or (c)(1) above, the Contracting Officer may sell any undelivered petroleum under such terms and conditions as he deems appropriate.

(f) DOE's ability to deliver petroleum on the date on which the defaulted purchaser was scheduled to accept delivery, under another contract awarded prior to the date of the contractor's default, shall not excuse a purchaser that has been terminated for default from either liquidated damages or the difference between the contract price and any lesser price obtained on resale.

(g) Any disagreement with respect to the amount due the Government for either resale costs or liquidated damages shall be deemed to be a dispute and will be decided by the Contracting Officer pursuant to Provision No. C.34.

(h) The term "subcontractor" or "subcontractors" includes subcontractors at any tier.

C.28 Other Government remedies

(a) The Government's rights under this provision are in addition to any other right or remedy available to it by law or by virtue of this contract.

(b) The Government may, without liability on its part, withhold deliveries of petroleum under this contract or any other contract the purchaser may have with DOE if payment is not made in accordance with this contract.

(c) If the purchaser fails to take delivery of petroleum in accordance with the delivery schedule developed under the terms of the contract, and such tardiness is not excused under the terms of Provision No. C.27, but the Government does not elect to terminate that item for default, the purchaser nonetheless shall be liable to the Government for liquidated damages in the amount established by Provision No. C.29 for each calendar day of delay or fraction thereof until such time as it accepts delivery of the petroleum. In no event shall such damages be assessed for longer than 30 days. No purchaser that fails to perform in accordance with the terms of the contract shall be excused from liability for liquidated damages by virtue of the fact that DOE is able to deliver petroleum on the date on which the non-performing purchaser was scheduled to accept delivery, under another contract awarded prior to the date of default.

C.29 Liquidated damages

(a) In case of failure on the part of the purchaser to perform within the time fixed in the contract or any extension thereof, the purchaser shall pay to the Government liquidated damages in the amount of 1 percent of the contract price of the undelivered petroleum per calendar day of delay or fraction thereof in accordance with paragraph (b) of Provision No. C.27 and paragraph (c) of Provision No. C.28.

(b) As provided in (a) above, liquidated damages will be assessed for each day or fraction thereof a purchaser is late in accepting delivery of petroleum in accordance with this contract, unless such tardiness is excused under Provision No. C.27. For petroleum to be lifted by vessel, damages will be assessed in the event that the vessel has not commenced loading by 11:59 p.m. on the second day following the last day of the 3-day delivery window established under Provision No. C.5, unless the vessel has arrived in roads and its Master has presented a notice of readiness to the Government or its agents. Liquidated damages shall continue until the vessel presents its notice of readiness. For petroleum to be moved by pipeline, if delivery arrangements have not been made by the last day of the month prior to delivery, liquidated damages shall commence on the 3rd day of the delivery month until such delivery arrangements are completed; if delivery arrangements have been made, then liquidated damages shall begin on the 3rd day after the scheduled delivery date if delivery is not commenced and shall continue until delivery is commenced.

(c) Any disagreement with respect to the amount of liquidated damages due the Government will be deemed to be a dispute and will be decided by the Contracting Officer pursuant to Provision No. C.34.

C.30 Failure to perform under SPR contracts

In addition to the usual debarment procedures, 10 CFR 625.3 provides procedures to make purchasers that fail to perform in accordance with these provisions ineligible for future contracts.

C.31 Government options in case of impossibility of performance

(a) In the event that DOE is unable to deliver petroleum contracted for to the purchaser due either to events beyond the control of the Government, including actions of the purchaser, or to acts of the Government, its agents, its contractors or subcontractors at any tier, the Government at its option may do either of the following:

(1) Terminate for the convenience of the Government under Provision No. C.27; or

(2) Offer different SPR crude oil streams or delivery times to the purchaser in substitution for those specified in the contract.

(b) In the event that a different SPR crude oil stream than originally contracted for is offered to the purchaser, the contract price will be negotiated between the parties. In no event shall the negotiated price be less than the minimum acceptable price, if established for the same or similar crude oil streams in the most recent NS or determined after the opening of offers.

(c) DOE's obligation in such circumstances is to use its best efforts, and DOE under no circumstances shall be liable to the purchaser for damages arising from DOE's failure to offer alternate SPR crude oil streams or delivery times.

(d) If the parties are unable to reach agreement as to price, crude oil streams or delivery times, DOE may terminate the contract for the convenience of the Government under Provision No. 27.

C.32 Limitation of Government liability

DOE's obligation under these SSPs and any resultant contract is to use its best efforts to perform in accordance therewith. The Government under no circumstances shall be liable thereunder to the purchaser for the conduct of the Government's contractors or subcontractors or for indirect, consequential, or special damages arising from its conduct, except as provided herein; neither shall the Government be liable thereunder to the purchaser for any damages due in whole or in part to causes beyond the control and without the fault or negligence of the Government, including but not restricted to, acts of God or public enemy, acts of the Government acting in its sovereign capacity, fires, floods, earthquakes, explosions, unusually severe weather, other catastrophes, or strikes.

C.33 Notices

(a) Any notices required to be given by one party to the contract to the other *in writing* shall be forwarded to the addressee, prepaid, by U.S. registered, return receipt requested mail, express mail, telegram, or telex. Parties shall give each other written notice of address changes.

(b) Notices to the purchaser shall be forwarded to the purchaser's address as it appears in the offer and in the contract.

(c) Notices to the Contracting Officer shall be forwarded to the following address: U.S. Department of Energy, Strategic Petroleum Reserve, Project Management Office, Procurement and Sales Division, Mail Stop PR-651, 900 Commerce Road East, New Orleans, Louisiana 70123.

C.34 Disputes

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. Section 601 et seq.). If a dispute arises relating to the contract, the purchaser may submit a claim to the Contracting Officer, who shall issue a written decision on the dispute in the manner specified in 48 CFR 1-33.211.

(b) "Claim" means:

(1) A written request submitted to the Contracting Officer;

(2) For payment of money, adjustment of contract terms, or other relief;

(3) Which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) For which a Contracting Officer's decision is demanded.

(c) In the case of dispute requests or amendments to such requests for payment exceeding $50,000, the purchaser shall certify at the time of submission as a claim, as follows:

I certify that the claim is made in good faith, that the supporting data are current, accurate and complete to the best of my knowledge and belief and that the amount requested accurately reflects the contract adjustment for which the purchaser believes the Government is liable.

Purchaser's name ——————————

Signature ——————————

Title ——————————

(d) The Government shall pay to the purchaser, interest on the amount found due to the purchaser on claims submitted under this provision at the rate established by the Department of the Treasury from the date the amount is due until the Government makes payment. The Contract Disputes Act of 1978 and the Prompt Payment Act adopt the interest rate established by the Secretary of the Treasury under the Renegotiation Act as the basis for computing interest on money owed by the Government. This rate is published semi-annually in the Federal Register.

(e) The purchaser shall pay to DOE, interest on the amount found due to the Government and unpaid on claims submitted under this provision at the rate specified in Provision No. C.25 from the date the amount is due until the purchaser makes payment.

(f) The decision of the Contracting Officer shall be final and conclusive and shall not be subject to review by any forum, tribunal, or Government agency unless an appeal or action is commenced within the times specified by the Contract Disputes Act of 1978.

(g) The purchaser shall comply with any decision of the Contracting Officer and at the direction of the Contracting Officer shall proceed diligently with performance of this contract pending final resolution of any request for relief, claim, appeal, or action related to this contract.

C.35 Assignment

The purchaser shall not make or attempt to make any assignment of a contract which incorporates these SSPs or any interest therein contrary to the provisions of Federal law, including the Anti-Assignment Act (41 U.S.C. 15), which provides:

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

C.36 Order of precedence

In the event of an inconsistency between the terms of the various parts of this contract, the inconsistency shall be resolved by giving precedence in the following order:

(a) The NA and written modifications thereto;

(b) The NS;

(c) Those provisions of the SSPs (as published in the FEDERAL REGISTER), made applicable to the contract by the NS;

(d) The instructions to the SPR Sales Offer Form; and

(e) The successful offer.

C.37 Gratuities

(a) The Government, by written notice to the purchaser, may terminate the right of the purchaser to proceed under this contract if it is found, after notice and hearing, by the Secretary of Energy or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered by or given by the purchaser, or any agent or representative of the purchaser, to any officer or employee of the Government, with a view toward securing a contract or securing favorable treatment with respect to the awarding, amending, or making of any determinations with respect to the performing of such contract; provided, that the existence of the facts upon which the Secretary of Energy or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event that this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (1) to pursue the same remedies against the purchaser as it could pursue in the event of a breach of the contract by purchaser, and (2) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary of Energy or his duly authorized representative) which shall not be less than three nor more than 10 times the cost incurred by the purchaser in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

C.38 Officials not to benefit

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

EXHIBITS:

A - SPR Sales Offer Form
B - Sample Notice of Sale
C - Solicitation, Offer and Award - Standard Form 33
D - SPR Crude Oil Stream Characteristics
E - SPR Delivery Point Data
F - Reserved
G - Offer Guarantee - Letter of Credit
H - Payment and Performance Guarantee - Letter of Credit
I - Instruction Guide for Funds Transfer Messages to Treasury
J - Form SPRPMO-F-6110.2-14 - SPR Crude Oil Delivery Report
K - Offer Guarantee Calculation Worksheet

EXHIBIT A

Social Security Number or Employer/Taxpayer ID

STRATEGIC PETROLEUM RESERVE SALES OFFER FORM

NOTICE OF SALE NUMBER

OFFEROR INFORMATION

NAME

ADDRESS

CITY STATE ZIP CODE -

COUNTRY TELEPHONE - - BOND (Instruction 10) $

AGENT INFORMATION

NAME

ADDRESS

CITY STATE ZIP CODE -

COUNTRY USA TELEPHONE - -

INSTRUCTIONS

1. **Identification Number**

Individuals enter social security number. Businesses enter employer/taxpayer ID. Include dashes.

2. **Master Line Item (MLI)**

Offerors may bid on one or more MLIs, but may not make alternate bids on separate master line items (i.e., the offer may not state 1,000,000 barrels from either MLI 001, or MLI 002).

3. **Maximum MLI Quantity (MAXQ)**

For each MLI offered against, offers shall state here, in thousands of barrels, the number of barrels which the offeror seeks to purchase on the MLI, regardless of delivery method. The maximum MLI quantity shall be not less than the DOE's minimum quantity as stated in the Notice of Sale (NS).

4. **Delivery Line Items (DLI)**

Applicable DLI delivery methods are as follows:

DLI A	Pipeline delivery from first terminal
DLI B,C,D	Tanker delivery from first terminal
DLI E,F,G	Barge delivery from first terminal
DLI H	Pipeline delivery from second terminal
DLI I,J,K	Tanker delivery from second terminal

DLI A and H nominally have a 30-day delivery period. Vessel DLIs B,E and I have ten day delivery periods nominally from the 1st to the 10th, C, F and J cover the 11th to the 20th, and D, G and K cover the 21st to the last day of the period of sale. Not all DLIs may be available on a particular MLI. For example, barges are allowed only at the Sun Terminal barge docks (with certain limited exceptions, see SSP No. C.8). Therefore, only MLI 004 and MLI 005 have DLIs E, F and G. Buyers are cautioned to read the NS carefully as it may alter the period of time covered by each DLI if the period of sale does not correspond to a calendar month. This is most likely to occur in the first sales cycle of a drawdown. For example, the NS may alter DLIs B, C, D, E, F, G, I, J and K to cover approximately 15 days instead of 10, or if the period of sale runs from the middle of one month to the middle of the next, DLIs B, E and I may be designated as covering the 15th to 25th of the first month, etc.

5. **Unit Price (UP$$)**

The offer shall state the offered price per barrel on each DLI for which the offer indicates a desired DLI quantity. The offer may state either the same unit price for different DLIs or different unit prices. DOE will award the highest price first. Prices may be stated to one-hundredths of a cent ($0.0001), but in no smaller fraction thereof.

6. **Delivery Preference (P)**

Where the offer has the same unit price for two or more DLIs, the offer may indicate the offeror's order of preference for delivery method and period (1st, 2nd, 3rd, etc.). If the offer does not indicate a preference, DOE will select the DLI(s) to be awarded at its discretion.

7. **Desired DLI Quantity (DESQ)**

Offers must indicate at least one desired DLI, stating(in thousands of barrels) the number of barrels which the offeror will accept by the delivery method and during the delivery period established for that DLI. An offeror may indicate a willingness to accept alternate delivery methods or delivery periods. An offeror may request all, part or none of the offer's maximum MLI quantity on any particular DLI. A total of all the offeror's desired DLI quantities should total at least the maximum MLI quantity, but could exceed the maximum MLI quantity if the offeror is willing to accept alternate delivery methods or periods. For example, the offer could state:

MLI: 001
Maximum MLI Quantity: 1,000
Desired DLI Quantities:
DLI 001B: 1,000
DLI 001C: 1,000
DLI 001D: 1,000

This would indicate the offeror would be willing to accept one million barrels of Bryan Mound sweet to be delivered to its vessels either from the 1st through the 10th, the 11th through the 20th, or 21st through the end of the month.

8. **Minimum Contract Quantity (MINQ)**

For each DLI on which an offer is made, the offeror should indicate his willingness to accept as little as DOE's specified minimum contract quantity for that DLI by marking the 'Y' block, or unwillingness to accept less than the DESQ for that DLI by marking the 'N' block. If neither 'Y' or 'N' is indicated, the offer will be evaluated as though the offeror had indicated a 'Y'. DOE only will award less than the offeror's desired DLI quantity if an offer is otherwise successful, but the quantity which DOE has available for award is less than said desired DLI quantity or award of the desired quantity would cause the offeror's MAXQ on the MLI to be exceeded.

9. **Total Price**

The offer shall calculate the total price (desired DLI quantity times unit price) for each DLI on which an offer is made. The offeror is reminded that DESQ is stated in thousands of barrels.

10. **Offer Guarantee**

The amount of the offer guarantee is $10 million dollars or 5 percent of the maximum potential contract amount, whichever is less. The maximum potential contract amount is the sum of the products determined by multiplying the offer's maximum purchase quantity for each MLI times the highest offer prices that the offeror would have to pay for that MLI if the offer is successful. To assist in this calculation, instructions and a worksheet are available at Exhibit K. Submission of the worksheet is not mandatory.

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☐☐☐☐☐☐☐☐☐☐ Social Security Number or Employer/Taxpayer ID

OFFER

NOTICE OF SALE NUMBER ☐☐☐☐☐

MLI = MASTER LINE ITEM NUMBER (INSTRUCTION 2)
DLI = DELIVERY LINE ITEM (INSTRUCTIONS 4 AND 7)
UP$$ = UNIT PRICE (U.S. $/BBL (INSTRUCTION 5)
P = PREFERENCE (INSTRUCTION 6)

MAXQ = MAXIMUM MLI QUANTITY (1000 BBL) (INSTRUCTION 3)
DESQ = DESIRED DLI QUANTITY (1000 BBL) (INSTRUCTION 7)
MINQ = MINIMUM CONTRACT QUANTITY (INSTRUCTION 8)

MLI 001 BRYAN MOUND SWEET

MAXQ ☐☐☐☐☐☐

DLI	P	UP$$	DESQ	MINQ Y N	TOTAL PRICE (UP$$xDESQ)
A		▲		☐ ☐	$
B		▲		☐ ☐	$
C		▲		☐ ☐	$
D		▲		☐ ☐	$
H		▲		☐ ☐	$
I		▲		☐ ☐	$
J		▲		☐ ☐	$
K		▲		☐ ☐	$

MLI 002 BRYAN MOUND SOUR

MAXQ ☐☐☐☐☐☐

DLI	P	UP$$	DESQ	MINQ Y N	TOTAL PRICE (UP$$xDESQ)
A		▲		☐ ☐	$
B		▲		☐ ☐	$
C		▲		☐ ☐	$
D		▲		☐ ☐	$
H		▲		☐ ☐	$
I		▲		☐ ☐	$
J		▲		☐ ☐	$
K		▲		☐ ☐	$

MLI 003 BRYAN MOUND MAYA

MAXQ ☐☐☐☐☐☐

DLI	P	UP$$	DESQ	MINQ Y N	TOTAL PRICE (UP$$xDESQ)
A		▲		☐ ☐	$
B		▲		☐ ☐	$
C		▲		☐ ☐	$
D		▲		☐ ☐	$

MLI 004 WEST HACKBERRY SWEET

MAXQ ☐☐☐☐☐☐

DLI	P	UP$$	DESQ	MINQ Y N	TOTAL PRICE (UP$$xDESQ)
A		▲		☐ ☐	$
B		▲		☐ ☐	$
C		▲		☐ ☐	$
D		▲		☐ ☐	$
E		▲		☐ ☐	$
F		▲		☐ ☐	$
G		▲		☐ ☐	$

PAGE 2 OF 2

☐☐☐☐☐☐☐☐☐☐☐ Social Security Number or Employer/Taxpayer ID

OFFER

NOTICE OF SALE NUMBER ☐☐☐☐☐

MLI = MASTER LINE ITEM NUMBER (INSTRUCTION 2)
DLI = DELIVERY LINE ITEM (INSTRUCTIONS 4 AND 7)
UP$$ = UNIT PRICE (U.S. $/BBL (INSTRUCTION 5)
P = PREFERENCE (INSTRUCTION 6)

MAXQ = MAXIMUM MLI QUANTITY (1000 BBL) (INSTRUCTION 3)
DESQ = DESIRED DLI QUANTITY (1000 BBL) (INSTRUCTION 7)
MINQ = MINIMUM CONTRACT QUANTITY (INSTRUCTION 8)

MLI 005 WEST HACKBERRY SOUR

MAXQ ☐☐☐☐☐☐

DLI	P	UP$$	DESQ	MINQ Y N	TOTAL PRICE (UP$$xDESQ)
A		.			$
B		.			$
C		.			$
D		.			$
E		.			$
F		.			$
G		.			$

MLI 006 WEEKS ISLAND SOUR

MAXQ ☐☐☐☐☐☐

DLI	P	UP$$	DESQ	MINQ Y N	TOTAL PRICE (UP$$xDESQ)
A		.			$
B		.			$
C		.			$
D		.			$

MLI 007 BAYOU CHOCTAW SWEET

MAXQ ☐☐☐☐☐☐

DLI	P	UP$$	DESQ	MINQ Y N	TOTAL PRICE (UP$$xDESQ)
A		.			$
B		.			$
C		.			$
D		.			$

MLI 008 BAYOU CHOCTAW SOUR

MAXQ ☐☐☐☐☐☐

DLI	P	UP$$	DESQ	MINQ Y N	TOTAL PRICE (UP$$xDESQ)
A		.			$
B		.			$
C		.			$
D		.			$

By signing below the offeror certifies agreement without exception to all terms and conditions applicable to this sale and that the maximum potential contract amount (Instruction 10) is $

SIGNATURE OFFEROR or AGENT

COMPANY NAME

Exhibit B—Sample Notice of Sale (NS)

1. NS No. DE-NS-96-84P010001 is issued (date) for sale of Strategic Petroleum Reserve (SPR) crude oil. All references to "Provision No." refer to the Standard Sales Provisions (SSPs) published in the Federal Register (date). All provisions are applicable to this sale except that provision No(s). (give number or numbers) are changed to read: (give changes). Additional provisions are hereby added (give new numbers which do not duplicate others in SSPs) which read: (give text).

NOTE: Should the SSPs be extensively changed, the Notice of Sale (NS) may include, for information purposes only, a complete text of the SSPs as modified for the sale. Offerors are cautioned, however, that these complete text SSPs have *no* contractual status and that in the event of any inconsistencies, the published SSPs and the NS shall establish the terms and conditions for the sale.

2. Offers and offer guarantees must be received by 1:00 p.m. local time on (date) at addresses for mailed and handcarried offers given in SSPs.

3. Offerors must give names, addresses and telephone numbers, including area codes, for authorized representative of the offeror with whom the Government may conduct any necessary discussions.

4. Direct questions regarding NS to (name of individual), telephone (504) 734-4226. Collect calls will not be accepted.

5. Master Line Item (MLI) numbers given herein refer to those schedules attached as Exhibit A of the SSPs. The quantities for each MLI offered for sale are as follows: MLI 001: ______ bbls; MLI 002 not offered this sale; MLI 003: ______ bbls; MLI 004 :______ bbls; MLI 005 not offered this sale; MLI 006: not offered this sale; MLI 007: ______ bbls; MLI 008: ______ bbls.

6. Offered delivery line items (DLI) and their maximums, i.e., offered DLIs and the Department of Energy's best estimates of the maximum amount of petroleum that can be moved by each delivery line item transportation system over the delivery period, are as follows (*see* provision No. B.16 of the SSPs):

7. Minimum quantities which will be awarded for each delivery line item (DLI) are as follows:

8. Delivery line item A, for pipeline delivery, is not offered under MLI 001. Offerors wishing to take delivery of MLI 001 by pipeline should offer to purchase quantities under delivery line items B, C, and D. If successful, purchasers may modify delivery method under Provision No. C.6.

9. Consideration to be paid for alteration of contract delivery modes in accordance with provision No. C.6 is as follows:

10. Applicable quality differentials are plus or minus ______ ¢ per degree API gravity, or part thereof, for sweet crude oil streams, and plus or minus ______ ¢ per one-tenth degree API gravity for sour crude oil streams.

11. Refinery recipients' "Superfund" tax liability is as follows:

EXHIBIT C

OMB Approved No. 9000-0008

SOLICITATION, OFFER AND AWARD	1. [illegible] ▶	RATING	PAGE OF PAGES
2. CONTRACT NO	3. SOLICITATION NO	4. TYPE OF SOLICITATION ☐ SEALED BID (IFB) ☐ NEGOTIATED (RFP)	5. DATE ISSUED
6. REQUISITION PURCHASE NO			
7. ISSUED BY CODE		8. ADDRESS OFFER TO *(If other than Item 7)*	

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder"

SOLICITATION

9. Sealed offers in original and ________ copies for furnishing the supplies or services in the Schedule will be received at the place specified in Item 8, or if handcarried, in the depository located in ________________ until ______ *(Hour)* local time ________ *(Date)*

CAUTION — LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-10. All offers are subject to all terms and conditions contained in this solicitation.

10. FOR INFORMATION CALL ▶	A. NAME	B. TELEPHONE NO. *(Include area code)* *(NO COLLECT CALLS)*

11. TABLE OF CONTENTS

(✓)	SEC	DESCRIPTION	PAGE(S)	(✓)	SEC	DESCRIPTION	PAGE(S)
		PART I — THE SCHEDULE				PART II — CONTRACT CLAUSES	
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS				PART III — LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH	
	C	DESCRIPTION/SPECS./WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING				PART IV — REPRESENTATIONS AND INSTRUCTIONS	
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE					
	G	CONTRACT ADMINISTRATION DATA			L	INSTRS., CONDS., AND NOTICES TO OFFERORS	
	H	SPECIAL CONTRACT REQUIREMENTS			M	EVALUATION FACTORS FOR AWARD	

OFFER *(Must be fully completed by offeror)*

NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.

12. In compliance with the above, the undersigned agrees, if this offer is accepted within ________ calendar days *(60 calendar days unless a different period is inserted by the offeror)* from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated point(s), within the time specified in the schedule.

13. DISCOUNT FOR PROMPT PAYMENT *(See Section I, Clause No. 52.232-8)* ▶	10 CALENDAR DAYS %	20 CALENDAR DAYS %	30 CALENDAR DAYS %	CALENDAR DAYS %
14. ACKNOWLEDGMENT OF AMENDMENTS *(The offeror acknowledges receipt of amendments to the SOLICITATION for offerors and related documents numbered and dated:*	AMENDMENT NO	DATE	AMENDMENT NO	DATE

15A. NAME AND ADDRESS OF OFFEROR	CODE FACILITY	16. NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER *(Type or print)*	
15B. TELEPHONE NO. *(Include area code)*	☐ 15C. CHECK IF REMITTANCE ADDRESS IS DIFFERENT FROM ABOVE. ENTER SUCH ADDRESS IN SCHEDULE	17. SIGNATURE	18. OFFER DATE

AWARD *(To be completed by Government)*

19. ACCEPTED AS TO ITEMS NUMBERED	20. AMOUNT	21. ACCOUNTING AND APPROPRIATION
22. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION ☐ 10 U.S.C. 2304(c)( ) ☐ 41 U.S.C. 253(c)( )		23. SUBMIT INVOICES TO ADDRESS SHOWN IN *(4 copies unless otherwise specified)* ▶ ITEM
24. ADMINISTERED BY *(If other than Item 7)* CODE		25. PAYMENT WILL BE MADE BY CODE
26. NAME OF CONTRACTING OFFICER *(Type or print)*	27. UNITED STATES OF AMERICA *(Signature of Contracting Officer)*	28. AWARD DATE

IMPORTANT — Award will be made on this Form, or on Standard Form 26, or by other authorized official written notice.

NSN 7540-01-152-8064
PREVIOUS EDITION NOT USABLE

33-134

STANDARD FORM 33 (REV. 4-85)
Prescribed by GSA
FAR (48 CFR) 53.214(c)

☆ GPO : 1985 O - 491-248 (20232)

Exhibit D—SPR Crude Oil Stream Characteristics

U.S. DEPARTMENT OF ENERGY, STRATEGIC PETROLEUM RESERVE

CRUDE OIL ANALYSIS

Stream SPP Bryan Mound Sweet

Terminals Phillips Terminal, Freeport, TX
ARCO Terminal, Texas City, TX

Crude

Specific Gravity	0.8449	Ni, ppm	5.1(5.3)*	ERVP, psia @ 100° F	5.60
API Gravity	36.0	V, ppm	2.4(3.2)*	Neutralization No.	0.06
Sulfur, Wt. %	0.32	Fe, ppm	4.3(4.1)*	H_2S, ppm (c)*	8.4
Nitrogen, Wt. %	0.122	Org. Cl, ppm (c)*	0.7	Mercaptans, ppm (c)*	0.4
Con. Car. Res., Wt. % (c)*	2.20	O.D. Color	11,450	Viscosity: 77° F	7.93 cSt 51.7 SUS
Pour Point, °F	40	UOP "K"	12.00	100° F	4.89 cSt 42.0 SUS

Fraction		1	2	3	4	5	6	7
Cut Temp.	C_3-C_4	C5-175° F	175°-250° F	250°-375° F	375°-530° F	530°-850° F	850°-1035 °F	Residuum
Vol. - mls	106.2	159.2	291.0	452.7	586.6	455.5	1020.1	416.2
Vol. %	3.0	4.6	8.3	13.0	16.8	13.0	29.2	11.9
Vol. Sum %	3.0	7.6	15.9	28.9	45.7	58.7	87.9	99.8
Wt. - grams	63.7	108.8	214.2	350.9	484.0	389.0	927.4	412.0
Wt. %	2.2	3.7	7.3	11.9	16.4	13.2	31.4	14.0
Specific Gravity	0.6	0.6635	0.7362	0.7752	0.8251	0.8540	0.9091	0.990
API Gravity		75.5	60.7	51.0	40.0	34.2	24.1	11.4
Sulfur, Wt. %		0.003	0.002	0.016	0.08	0.26	0.54	1.02
Mercaptans, ppm		9.9	<1	<1	<1			
H_2S, ppm		<1	10.6	27.1	26.9			
Organic Cl, ppm		2.2	3.8	3.2				
Aniline Point, °F				127.4	145.4	166.4	192.9	
Neutralization No.					0.04	0.09		
Cetane Index					47.09	52.72		
Naphthalenes, vol. %					4.51	8.74		
Smoke point					16.8	14.7		
Nitrogen, Wt. %					0.0004	0.007	0.142	0.668
Viscosity								
cSt (SUS) 77° F					7.40(50.0)			
100° F					1.85(32.1)	4.93(42.2)		
130° F						3.37(37.3)	25.07(119.9)	
180° F							10.03(59.3)	
210° F								884.6(4126)
250° F								247.3(1156)
Freezing Point, °F					-31.0			
Cloud Point, °F						26	118	
Pour Point, °F						25	100	
Ni, ppm							Not Detectable	37.6
V, ppm							Not Detectable	23.0
Fe, ppm							Not Detectable	28.9
Con. Car. Res., Wt. %							--	15.7

* (c) calculated from fraction results

	C_5-175°F	C_5-375°F
Research Octane Number:	70.9	52.6
Motor Octane Number:	67.2	48.6

Whole crude lead content: 0.006 ppm.

Data current as of September 19, 1986, but subject to change.

Gas Chromatographic Analysis

SPR BRYAN MOUND SWEET

		Distillate fractions, ASTM D 2892			
		C_5-175° F Vol. %	175-250° F Vol. %	250-375° F Vol. %	375-420° F Vol. %
* Total **Paraffins**		**43.1**	**23.6**	**26.0**	**30.8**
Total **Iso-paraffins**		**36.0**	**25.5**	**22.6**	**0.6**
Total **Aromatics**		**2.4**	**5.8**	**21.7**	**33.8**
Total **Naphthenes**		**18.5**	**45.1**	**25.9**	**2.1**
Total Olefins		0.0	0.0	0.0	0.0
Total Unknowns		0.0	0.0	**3.7**	**32.6**
Paraffins:	C1	0.0	0.0	0.0	0.0
	C2	0.0	0.0	0.0	0.0
	C3	0.0	0.0	0.0	0.0
	C4	**1.4**	**0.1**	0.0	0.0
	C5	**18.5**	**0.4**	0.0	0.0
	C6	**22.4**	**4.2**	0.0	0.0
	C7	**0.8**	**14.4**	**0.5**	0.0
	C8	0.0	**4.6**	**6.6**	0.0
	C9	0.0	0.0	**8.9**	**0.1**
	C10	0.0	0.0	**7.6**	**1.8**
	C11	0.0	0.0	**2.4**	**12.5**
	C12	0.0	0.0	**0.1**	**16.7**
Iso-paraffins:	C4	0.0	0.0	0.0	0.0
	C5	**8.9**	**0.2**	0.0	0.0
	C6	**24.2**	**2.1**	0.0	0.0
	C7	**2.9**	**12.7**	**0.2**	0.0
	C8	0.0	**10.5**	**3.2**	0.0
	C9	0.0	0.0	**10.6**	0.0
	C10	0.0	0.0	**8.4**	**0.4**
	C11	0.0	0.0	**0.2**	**0.2**
Aromatics:	C6	**2.0**	**0.7**	0.0	0.0
	C7	**0.4**	**4.3**	**0.8**	**0.1**
	C8	0.0	**0.7**	**7.4**	0.0
	C9	0.0	0.0	**8.4**	**0.7**
	C10	0.0	0.0	**4.7**	**12.7**
	C11	0.0	0.0	**0.5**	**16.7**
	C12	0.0	0.0	0.0	**3.7**
Naphthenes:	C5	**2.1**	**0.1**	0.0	0.0
	C6	**14.3**	**8.2**	**0.1**	0.0
	C7	**2.1**	**24.7**	**1.8**	0.0
	C8	0.0	**12.0**	**11.5**	0.0
	C9	0.0	0.0	**7.1**	**0.1**
	C10	0.0	0.0	**5.5**	**1.8**
	C11	0.0	0.0	**0.1**	**0.1**
	C12	0.0	0.0	0.0	0.0
Olefins:	C4	0.0	0.0	0.0	0.0
	C5	0.0	0.0	0.0	0.0
	C6	0.0	0.0	0.0	0.0
	C7	0.0	0.0	0.0	0.0
	C8	0.0	0.0	0.0	0.0

Debutanization Fraction	
Component	Vol. %
Methane	0.0
Ethane	0.0
Propane	13.8
i-Butane	11.9
n-Butane	39.4
i-Pentane	18.0
n-Pentane	15.1
C_6+	1.8

Whole Crude B-T-X

Component	Vol. %
Benzene	0.150
Toluene	0.375
Ethylbenzene	0.020
Xylenes	0.034

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* The gas chromatographic PIANO method used provides for elution and identification of components up to a nominal n-C_{12} (420° F).

U.S. DEPARTMENT OF ENERGY, STRATEGIC PETROLEUM RESERVE

CRUDE OIL ANALYSIS

Stream SPR Bryan Mound Sour

Terminals Phillips Terminal, Freeport, TX
ARCO Terminal, Texas City, TX

Crude

Specific Gravity	0.8683	Ni, ppm	11.3(15.4)*	ERVP, psia @ 100° F	3.40
API Gravity	31.5	V, ppm	50.9(60.6)*	Neutralization No.	0.08
Sulfur, Wt. %	1.60	Fe, ppm	Not Detectable	H_2S, ppm (c)*	0.8
Nitrogen, Wt. %	0.149	Org. Cl, ppm (c)*	1.1	Mercaptans, ppm (c)*	12.1
Con. Car. Res., Wt. % (c)*	4.81	O.D. Color	25,540	Viscosity: 77° F	11.4 cSt 63.7 SUS
Pour Point, °F	0	UOP "K"	11.85	100° F	7.44 cSt 50.2 SUS

Fraction		1	2	3	4	5	6	7
Cut Temp.	C_4-C_5	C5-175° F	175°-250° F	250°-375° F	375°-530° F	530°-650° F	650°-1061 °F	Residuum
Vol. - mls	23.8	133.6	271.6	522.8	634.3	459.2	1160.7	597.4
Vol. %	0.6	3.5	7.0	13.6	16.5	11.9	30.1	15.5
Vol. Sum %	0.6	4.1	11.1	24.7	41.2	53.1	83.2	98.7
Wt. - grams	14.3	90.1	197.0	403.6	516.8	395.1	1074.0	618.9
Wt. %	0.4	2.7	5.9	12.1	15.5	11.8	32.1	18.5
Specific Gravity	0.6	0.6743	0.7254	0.7720	0.8179	0.8605	0.9253	1.036
API Gravity		78.4	63.6	51.8	41.5	32.9	21.4	5.1
Sulfur, Wt. %		0.002	0.005	0.046	0.42	1.14	2.06	3.88
Mercaptans, ppm		24.4	41.3	74.2	<1			
H_2S, ppm		2.1	2.3	5.4	10.9			
Organic Cl, ppm		1.6	4.7	6.2				
Aniline Point, °F				126.7	144.9	160.4	176.9	
Neutralization No.					0.02	0.01		
Cetane Index					49.81	50.63		
Naphthalenes, vol. %					3.95	11.02		
Smoke point					16.6	14.2		
Nitrogen, Wt. %					0.0009	0.017	0.166	0.696
Viscosity:								
cSt (SUS) 77° F					2.26(33.4)			
100° F					1.79 (<32.0)	4.80(41.8)		
130° F						3.20(37.0)	29.30(138.7)	
180° F							11.05(62.9)	
210° F								9002(41,985)
250° F								1737(8120)
Freezing Point, °F					-31.0			
Cloud Point, °F						24	112	
Pour Point, °F						20	93	
Ni, ppm							Not Detectable	83.3
V, ppm							Not Detectable	328
Fe, ppm							Not Detectable	Not Detectable
Con. Car. Res., Wt. %							--	26.0

* (c), calculated from fraction results

	C_5-175°F	C_5-375°F
Research Octane Number:	64.6	41.8
Motor Octane Number:	60.7	40.5

Whole crude lead content: 0.002 ppm.

Data current as of September 19, 1986 but subject to change.

Gas Chromatographic Analysis

SPR BRYAN MOUND SOUR

		Distillate fractions, ASTM D 2892			
		C_5-175° F Vol. %	175-250° F Vol. %	250-375° F Vol. %	375-420° F Vol. %
[1] Total Paraffins		45.8	34.3	30.3	33.6
Total Iso-paraffins		39.4	31.6	25.2	0.5
Total Aromatics		2.7	7.9	24.3	36.4
Total Naphthenes		12.0	26.2	16.6	1.6
Total Olefins		0.0	0.0	0.0	0.0
Total Unknowns		0.0	0.0	3.5	27.9
Paraffins:	C1	0.0	0.0	0.0	0.0
	C2	0.0	0.0	0.0	0.0
	C3	0.0	0.0	0.0	0.0
	C4	0.3	0.0	0.0	0.0
	C5	17.2	0.4	0.0	0.0
	C6	26.9	5.8	0.1	0.0
	C7	1.4	19.5	0.9	0.0
	C8	0.0	8.6	7.2	0.0
	C9	0.0	0.0	10.5	0.1
	C10	0.0	0.0	8.8	2.1
	C11	0.0	0.0	2.8	13.7
	C12	0.0	0.0	0.1	17.8
Iso-paraffins:	C4	0.0	0.0	0.0	0.0
	C5	6.7	0.2	0.0	0.0
	C6	27.6	2.6	0.0	0.0
	C7	5.1	15.2	0.4	0.0
	C8	0.0	13.2	3.5	0.0
	C9	0.0	0.4	12.2	0.0
	C10	0.0	0.0	9.0	0.4
	C11	0.0	0.0	0.1	0.1
Aromatics:	C6	1.9	0.8	0.0	0.0
	C7	0.8	5.6	0.9	0.1
	C8	0.0	1.5	7.1	0.0
	C9	0.0	0.0	10.5	1.3
	C10	0.0	0.0	5.0	13.0
	C11	0.0	0.0	0.9	17.5
	C12	0.0	0.0	0.0	4.4
Naphthenes:	C5	2.0	0.1	0.0	0.0
	C6	8.5	4.8	0.0	0.0
	C7	1.5	13.2	1.1	0.0
	C8	0.0	8.1	6.0	0.0
	C9	0.0	0.0	4.8	0.1
	C10	0.0	0.0	4.7	1.5
	C11	0.0	0.0	0.1	0.1
	C12	0.0	0.0	0.0	0.0
Olefins:	C4	0.0	0.0	0.0	0.0
	C5	0.0	0.0	0.0	0.0
	C6	0.0	0.0	0.0	0.0
	C7	0.0	0.0	0.0	0.0
	C8	0.0	0.0	0.0	0.0

Debutanization Fraction	
Component	Vol. %
Methane	0.0
Ethane	0.0
Propane	6.8
i-Butane	7.8
n-Butane	32.7
i-Pentane	22.6
n-Pentane	24.0
C_6+	6.0

Whole Crude B-T-X

Component	Vol. %
Benzene	0.123
Toluene	0.420
Ethylbenzene	0.035
Xylenes	0.071

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[1] The gas chromatographic PIANO method used provides for elution and identification of components up to a nominal n-C_{12} (420° F).

U.S. DEPARTMENT OF ENERGY, STRATEGIC PETROLEUM RESERVE

CRUDE OIL ANALYSIS

Stream SPR Bryan Mound Maya Terminals Phillips Terminal, Freeport, TX

Crude

Specific Gravity	0.9166	Ni, ppm	58.4(62.4)*	ERVP, psia @ 100° F	5.15
API Gravity	22.9	V, ppm	263 (263)*	Neutralization No.	0.22
Sulfur, Wt. %	3.13	Fe, ppm	2.9 (0.9)*	H_2S, ppm (c)*	1.1
Nitrogen, Wt. %	0.356	Org. Cl, ppm (c)*	0.3	Mercaptans, ppm (c)*	17.7
Con. Car. Res., Wt. % (c)*	11.19	O.D. Color	69.450	Viscosity: 77° F 128.11 cSt	593 SUS
Pour Point, °F	0	UOP "K"	11.75	100° F 61.78 cSt	287 SUS

Fraction		1	2	3	4	5	6	7
Cut Temp.	C_1-C_4	C5-175° F	175°-250° F	250°-375° F	375°-530° F	530°-650° F	650°-1014° F	Residuum
Vol. - mls	71.0	140.3	220.2	421.6	473.8	404.2	1104.7	1317.2
Vol. %	1.7	3.4	5.3	10.2	11.4	9.7	26.6	31.7
Vol. Sum %	1.7	5.1	10.4	20.6	32.0	41.7	68.3	100.0
Wt. - grams	42.6	94.8	159.9	325.4	390.9	351.4	1034.7	1405.5
Wt. %	1.1	2.5	4.2	8.5	10.3	9.2	27.2	36.9
Specific Gravity	0.6	0.6755	0.7263	0.7719	0.8251	0.8693	0.9366	1.067
API Gravity		78.0	63.3	51.8	40.0	31.3	19.6	1.1
Sulfur, Wt. %		0.010	0.018	0.291	0.95	2.00	2.97	5.52
Mercaptans, ppm		82.0	113.6	127.6	<1			
H_2S, ppm		2.9	2.4	5.3	5.0			
Organic Cl, ppm		1.8	1.9	1.8				
Aniline Point, °F				128.7	141.7	151.9	163.4	
Neutralization No.					0.03	0.06		
Cetane Index					47.09	48.14		
Naphthalenes, vol. %					4.16	10.98		
Smoke point					16.0	13.3		
Nitrogen, Wt. %					0.0016	0.030	0.232	0.786
Viscosity:								
cSt (SUS) 77° F					2.33(33.7)			
100° F					1.86(32.1)	4.92(42.1)		
130° F						3.32(37.1)	33.89(159.3)	
180° F							12.23(67.1)	
210° F								495874(2.31×10^6)
250° F								42772 (199962)
Freezing Point, °F					-31.9			
Cloud Point, °F						24	106	
Pour Point, °F						20	90	
Ni, ppm							Not Detectable	169
V, ppm							Not Detectable	711
Fe, ppm							Not Detectable	2.4
Con. Car. Res., Wt. %							0.45	30.0

* (c), calculated from fraction results

	C_5-175°F	C_5-375°F
Research Octane Number:	64.4	41.5
Motor Octane Number:	60.7	41.3

Whole crude lead content: 0.008 ppm.

Data current as of September 19, 1986, but subject to change.

Gas Chromatographic Analysis

SPR BRYAN MOUND MAYA

		Distillate fractions, ASTM D 2892			
		C_5-175° F Vol. %	175-250° F Vol. %	250-375° F Vol. %	375-420° F Vol. %
* Total Paraffins		**48.0**	**33.5**	**30.8**	**34.2**
Total Iso-paraffins		**37.2**	**31.9**	**22.1**	**0.5**
Total Aromatics		**3.1**	**7.6**	**25.0**	**36.4**
Total Naphthenes		**11.7**	**27.0**	**17.0**	**1.3**
Total Olefins		0.0	0.0	0.0	0.0
Total Unknowns		0.0	0.0	**5.1**	**27.6**
Paraffins:	C1	0.0	0.0	0.0	0.0
	C2	0.0	0.0	0.0	0.0
	C3	**0.1**	0.0	0.0	0.0
	C4	**1.1**	0.0	0.0	0.0
	C5	**20.2**	**0.7**	0.0	0.0
	C6	**25.4**	**4.5**	**0.1**	0.0
	C7	**1.3**	**19.0**	**0.9**	0.0
	C8	0.0	**9.1**	**6.2**	0.0
	C9	0.0	**0.1**	**10.2**	**0.1**
	C10	0.0	0.0	**8.7**	**1.5**
	C11	0.0	0.0	**4.5**	**11.1**
	C12	0.0	0.0	**0.2**	**21.4**
Iso-paraffins:	C4	**0.2**	0.0	0.0	0.0
	C5	**8.5**	**0.3**	0.0	0.0
	C6	**24.0**	**2.5**	0.0	0.0
	C7	**4.5**	**14.2**	**0.4**	0.0
	C8	0.0	**13.5**	**3.0**	0.0
	C9	0.0	**1.4**	**9.9**	0.0
	C10	0.0	0.0	**8.8**	**0.5**
	C11	0.0	0.0	0.0	0.0
Aromatics:	C6	**2.0**	**0.8**	0.0	0.0
	C7	**1.1**	**5.2**	**0.9**	**0.1**
	C8	0.0	**1.6**	**7.8**	**0.1**
	C9	0.0	0.0	**9.3**	**1.3**
	C10	0.0	0.0	**5.7**	**10.9**
	C11	0.0	0.0	**1.3**	**18.9**
	C12	0.0	0.0	0.0	**5.2**
Naphthenes:	C5	**2.0**	**0.2**	0.0	0.0
	C6	**8.4**	**4.3**	**0.1**	0.0
	C7	**1.4**	**13.1**	**1.1**	0.0
	C8	0.0	**9.4**	**6.7**	0.0
	C9	0.0	0.0	**4.3**	**0.1**
	C10	0.0	0.0	**4.8**	**1.1**
	C11	0.0	0.0	**0.1**	0.0
	C12	0.0	0.0	0.0	0.0
Olefins:	C4	0.0	0.0	0.0	0.0
	C5	0.0	0.0	0.0	0.0
	C6	0.0	0.0	0.0	0.0
	C7	0.0	0.0	0.0	0.0
	C8	0.0	0.0	0.0	0.0

Debutanization Fraction	
Component	Vol. %
Methane	0.0
Ethane	0.1
Propane	13.0
i-Butane	8.9
n-Butane	40.8
i-Pentane	15.0
n-Pentane	16.6
C_6+	5.6

Whole Crude B-T-X

Component	Vol. %
Benzene	0.110
Toluene	0.313
Ethylbenzene	0.029
Xylenes	0.057

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* The gas chromatographic PIANO method used provides for elution and identification of components up to a nominal n-C_{12} (420° F).

U.S. DEPARTMENT OF ENERGY, STRATEGIC PETROLEUM RESERVE

CRUDE OIL ANALYSIS

Stream SPR West Hackberry Sweet

Terminal Sun Marine Terminal, Nederland, TX

Crude

Specific Gravity 0.8343
API Gravity 38.1
Sulfur, Wt. % 0.28
Nitrogen, Wt. % 0.090
Con. Car. Res., Wt. % (c)* 1.81
Pour Point, °F 25

Ni, ppm 1.6(1.8)*
V, ppm 2.7(3.4)*
Fe, ppm 2.6(3.4)*
Org. Cl, ppm (c)* 0.9
O.D. Color 8,240
UOP "K" 12.00

ERVP, psia @ 100° F 4.15
Neutralization No. 0.14
H_2S, ppm (c)* 0.5
Mercaptans, ppm (c)* 0.7
Viscosity: 77° F 4.88 cSt 41.9 SUS
100° F 3.60 cSt 37.9 SU

Fraction		1	2	3	4	5	6	7
Cut Temp.	C_4-C_4	C5-175° F	175°-250° F	250°-375° F	375°-530° F	530°-650° F	650°-1050° F	Residuum
Vol. - mls	191.8	253.7	379.5	546.8	664.2	499.5	1131.5	382.1
Vol. %	4.7	6.3	9.4	13.5	16.4	12.3	27.9	9.4
Vol. Sum %	4.7	11.0	20.4	33.9	50.3	62.6	90.5	99.9
Wt. - grams	115.1	173.0	280.8	424.9	548.4	427.4	1028.5	378.7
Wt. %	3.4	5.1	8.3	12.6	16.2	12.6	30.4	11.2
Specific Gravity	0.6	0.6819	0.7400	0.7770	0.8256	0.8556	0.9090	0.991
API Gravity		76.0	59.7	50.6	39.9	33.9	24.2	11.3
Sulfur, Wt. %		0.020	0.001	0.004	0.04	0.23	0.53	1.09
Mercaptans, ppm		<1	<1	<1	4.5			
H_2S, ppm		<1	2.4	2.4	<1			
Organic Cl, ppm		1.5	4.0	4.1				
Aniline Point, °F				122.9	142.9	164.5	192.4	
Neutralization No.					0.05	0.10		
Cetane Index					46.91	52.23		
Naphthalenes, vol. %					4.96	9.52		
Smoke point					16.8	15.8		
Nitrogen, Wt. %					0.0005	0.007	0.130	0.604
Viscosity:								
cSt (SUS) 77° F					2.33(33.6)			
100° F					1.85(32.1)	4.95(42.2)		
130° F						3.37(37.3)	25.96(123.7)	
180° F							10.38(60.5)	
210° F								701.9(3274)
250° F								204.96(958)
Freezing Point, °F					-32.8			
Cloud Point, °F						22	120	
Pour Point, °F						20	100	
Ni, ppm							Not Detectable	16.2
V, ppm							Not Detectable	30.3
Fe, ppm							Not Detectable	30.4
Con. Car. Res., Wt. %							--	16.2

* (c), calculated from fraction results.

	C_5-175°F	C_5-375°F
Research Octane Number:	68.5	53.3
Motor Octane Number:	63.9	30.8

Whole crude lead content: 0.004 ppm.

Data current as of September 19, 1986, but subject to change.

Gas Chromatographic Analysis

SPR WEST HACKBERRY SWEET

		Distillate fractions, ASTM D 2892			
		C_5-175° F Vol. %	175-250° F Vol. %	250-375° F Vol. %	375-420° F Vol. %
[1] Total Paraffins		43.9	24.9	26.1	30.1
Total Iso-paraffins		35.1	24.4	20.7	0.7
Total Aromatics		3.6	8.9	24.2	35.1
Total Naphthenes		17.5	41.5	24.4	2.3
Total Olefins		0.0	0.0	0.0	0.0
Total Unknowns		0.0	0.0	4.6	31.7
Paraffins:	C1	0.0	0.0	0.0	0.0
	C2	0.0	0.0	0.0	0.0
	C3	0.0	0.0	0.0	0.0
	C4	1.7	0.0	0.0	0.0
	C5	20.3	0.3	0.0	0.0
	C6	21.3	4.1	0.0	0.0
	C7	0.6	14.9	0.5	0.0
	C8	0.0	5.6	6.7	0.0
	C9	0.0	0.0	8.9	0.1
	C10	0.0	0.0	7.3	2.2
	C11	0.0	0.0	2.5	11.7
	C12	0.0	0.0	0.1	16.1
Iso-paraffins:	C4	0.2	0.0	0.0	0.0
	C5	9.5	0.1	0.0	0.0
	C6	22.5	1.7	0.0	0.0
	C7	2.9	12.3	0.1	0.0
	C8	0.0	9.4	2.8	0.0
	C9	0.0	0.9	9.1	0.0
	C10	0.0	0.0	8.5	0.5
	C11	0.0	0.0	0.1	0.2
Aromatics:	C6	3.1	1.2	0.0	0.0
	C7	0.5	6.6	1.0	0.1
	C8	0.0	1.0	9.0	0.0
	C9	0.0	0.0	8.9	1.3
	C10	0.0	0.0	4.6	13.9
	C11	0.0	0.0	0.7	16.4
	C12	0.0	0.0	0.0	2.4
Naphthenes:	C5	2.9	0.1	0.0	0.0
	C6	13.1	8.6	0.1	0.0
	C7	1.5	22.8	1.6	0.0
	C8	0.0	10.0	10.4	0.0
	C9	0.0	0.0	7.4	0.2
	C10	0.0	0.0	4.8	2.1
	C11	0.0	0.0	0.1	0.1
	C12	0.0	0.0	0.0	0.0
Olefins:	C4	0.0	0.0	0.0	0.0
	C5	0.0	0.0	0.0	0.0
	C6	0.0	0.0	0.0	0.0
	C7	0.0	0.0	0.0	0.0
	C8	0.0	0.0	0.0	0.0

Debutanization Fraction	
Component	Vol. %
Methane	0.0
Ethane	0.0
Propane	9.7
i-Butane	7.8
n-Butane	35.4
i-Pentane	17.4
n-Pentane	21.5
C_6+	8.2

Whole Crude B-T-X

Component	Vol. %
Benzene	0.308
Toluene	0.652
Ethylbenzene	0.025
Xylenes	0.051

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[1] The gas chromatographic PIANO method used provides for elution and identification of components up to a nominal n-C_{12} (420° F).

U.S. DEPARTMENT OF ENERGY, STRATEGIC PETROLEUM RESERVE

CRUDE OIL ANALYSIS

Stream SPR West Hackberry Sour

Terminal Sun Marine Terminal, Nederland, TX

Crude

Specific Gravity	0.8599	Ni, ppm	6.5(6.6)*	ERVP, psia @ 100° F	4.10
API Gravity	33.1	V, ppm	25.9(24.7)*	Neutralization No.	0.12
Sulfur, Wt. %	1.40	Fe, ppm	5.8(6.1)*	H_2S, ppm (c)*	1.2
Nitrogen, Wt. %	0.140	Org. Cl, ppm (c)*	0.4	Mercaptans, ppm (c)*	23.7
Con. Car. Res., Wt. % (c)*	3.75	O.D. Color	18,300	Viscosity: 77° F	8.88 cSt 54.9 SUS
Pour Point, °F	<-5	UOP "K"	11.90	100° F	6.27 cSt 46.4 SUS

Fraction		1	2	3	4	5	6	7
Cut Temp.	C_4-C_5	C5-175° F	175°-250° F	250°-375° F	375°-530° F	530°-650° F	650°-1050° F	Residuum
Vol. - mls	128.5	192.7	324.5	591.7	709.0	523.3	1265.3	635.9
Vol. %	2.9	4.4	7.4	13.6	16.3	12.0	29.0	14.6
Vol. Sum %	2.9	7.3	14.7	28.3	44.6	56.6	85.6	100.2
Wt. - grams	77.1	130.4	235.2	455.4	579.0	449.6	1166.5	646.7
Wt. %	2.1	3.5	6.3	12.1	15.4	12.0	31.1	17.2
Specific Gravity	0.6	0.6766	0.7249	0.7696	0.8167	0.8591	0.9219	1.017
API Gravity		77.6	63.7	52.4	41.8	33.2	22.0	7.6
Sulfur, Wt. %		0.020	0.010	0.040	0.32	1.02	1.96	3.48
Mercaptans, ppm		<1	43.1	120.4	41.4			
H_2S, ppm		16.8	3.7	3.2	<1			
Organic Cl, ppm		1.9	1.6	1.7				
Aniline Point, °F				128.0	145.8	162.5	180.5	
Neutralization No.					0.04	0.07		
Cetane Index					50.36	51.11		
Naphthalenes, vol. %					3.97	11.49		
Smoke point					20.1	15.3		
Nitrogen, Wt. %					0.0005	0.013	0.146	0.558
Viscosity:								
cSt (SUS) 77° F					2.24(33.4)			
100° F					1.78 (<32.0)	4.87(42.0)		
130° F						3.32(37.1)	27.65(131.3)	
180° F							10.82(62.0)	
210° F								2210(10309)
250° F								529.6(2476)
Freezing Point, °F					-31.9			
Cloud Point, °F						22	104	
Pour Point, °F						20	50	
Ni, ppm							Not Detectable	38.2
V, ppm							Not Detectable	143
Fe, ppm							Not Detectable	35.2
Con. Car. Res., Wt. %							--	21.8

* (c), calculated from fraction results

	C_5-175°F	C_5-375°F
Research Octane Number:	62.9	43.6
Motor Octane Number:	59.6	40.9

Whole crude lead content: 0.025 ppm.

Data current as of September 19, 1986, but subject to change.

Gas Chromatographic Analysis

SPR WEST HACKBERRY SOUR

		Distillate fractions, ASTM D 2892			
		C_5-175° F Vol. %	175-250° F Vol. %	250-375° F Vol. %	375-420° F Vol. %
* Total Paraffins		46.7	34.0	30.2	37.2
Total Iso-paraffins		38.1	32.5	23.2	0.5
Total Aromatics		2.9	7.5	25.3	36.2
Total Naphthenes		11.3	25.9	16.8	1.7
Total Olefins		0.0	0.0	0.0	0.0
Total Unknowns		0.0	0.1	4.4	24.3
Paraffins:	C1	0.0	0.0	0.0	0.0
	C2	0.0	0.0	0.0	0.0
	C3	0.0	0.0	0.0	0.0
	C4	0.5	0.0	0.0	0.0
	C5	17.2	0.3	0.0	0.0
	C6	28.0	5.4	0.0	0.0
	C7	0.8	20.5	0.7	0.0
	C8	0.0	7.8	7.4	0.0
	C9	0.0	0.0	10.4	0.1
	C10	0.0	0.0	8.4	2.8
	C11	0.0	0.0	3.2	14.1
	C12	0.0	0.0	0.1	20.3
Iso-paraffins:	C4	0.0	0.0	0.0	0.0
	C5	5.4	0.1	0.0	0.0
	C6	28.3	2.4	0.0	0.0
	C7	4.3	16.1	0.2	0.0
	C8	0.0	13.2	3.5	0.0
	C9	0.0	0.8	10.7	0.0
	C10	0.0	0.0	8.8	0.5
	C11	0.0	0.0	0.1	0.0
Aromatics:	C6	2.0	0.8	0.0	0.0
	C7	0.9	5.6	0.8	0.1
	C8	0.0	1.1	8.3	0.0
	C9	0.0	0.0	10.0	1.6
	C10	0.0	0.0	5.3	12.5
	C11	0.0	0.0	0.9	17.8
	C12	0.0	0.0	0.0	4.2
Naphthenes:	C5	2.9	0.1	0.0	0.0
	C6	8.3	4.7	0.1	0.0
	C7	1.1	13.2	0.8	0.0
	C8	0.0	7.9	6.4	0.0
	C9	0.0	0.0	4.7	0.1
	C10	0.0	0.0	4.8	1.6
	C11	0.0	0.0	0.0	0.0
	C12	0.0	0.0	0.0	0.0
Olefins:	C4	0.0	0.0	0.0	0.0
	C5	0.0	0.0	0.0	0.0
	C6	0.0	0.0	0.0	0.0
	C7	0.0	0.0	0.0	0.0
	C8	0.0	0.0	0.0	0.0

Debutanization Fraction	
Component	Vol. %
Methane	0.0
Ethane	0.2
Propane	9.0
i-Butane	7.6
n-Butane	34.6
i-Pentane	20.6
n-Pentane	24.6
C_6+	3.4

Whole Crude B-T-X

Component	Vol. %
Benzene	0.147
Toluene	0.454
Ethylbenzene	0.034
Xylenes	0.051

* The gas chromatographic PIANO method used provides for elution and identification of components up to a nominal n-C_{12} (420° F).

U.S. DEPARTMENT OF ENERGY, STRATEGIC PETROLEUM RESERVE

CRUDE OIL ANALYSIS

Stream SPR Weeks Island Sour

Terminals DOE St. James Terminal, St. James, LA

LOCAP Terminal, St. James, LA

Crude

Specific Gravity	0.8821	Ni, ppm	14.0(15.6)*	ERVP, psia @ 100° F	4.85
API Gravity	28.9	V, ppm	39.2(42.5)*	Neutralization No.	0.19
Sulfur, Wt. %	1.32	Fe, ppm	0.7 (1.5)*	H_2S, ppm (c)*	0.3
Nitrogen, Wt. %	0.216	Org. Cl, ppm (c)*	0.3	Mercaptans, ppm (c)*	6.3
Con. Car. Res., Wt. % (c)*	4.97	O.D. Color	25,150	Viscosity: 77° F	18.02 cSt 89.5 SUS
Pour Point, °F	15	UOP "K"	11.85	100° F	11.43 cSt 63.9 SUS

Fraction		1	2	3	4	5	6	7
Cut Temp.	C_1-C_4	C5-175° F	175°-250° F	250°-375° F	375°-530° F	530°-650° F	650°-1029° F	Residuum
Vol. - mls	117.7	132.0	252.0	455.6	642.3	526.7	1330.0	835.3
Vol. %	2.7	3.1	5.9	10.6	15.0	12.3	31.0	19.5
Vol. Sum %	2.7	5.8	11.7	22.3	37.3	49.6	80.6	100.1
Wt. - grams	70.6	91.3	185.7	354.3	533.0	458.2	1233.7	855.3
Wt. %	1.9	2.4	4.9	9.3	14.1	12.1	32.6	22.6
Specific Gravity	0.6	0.6918	0.7370	0.7777	0.8298	0.8699	0.9276	1.024
API Gravity		73.0	60.5	50.4	39.0	31.2	21.0	6.7
Sulfur, Wt. %		0.054	0.004	0.043	0.29	0.85	1.58	3.00
Mercaptans, ppm		10.2	17.4	41.8	9.0			
H_2S, ppm		<1	2.5	2.3	<1			
Organic Cl, ppm		2.8	2.1	1.7				
Aniline Point, °F				119.6	137.4	152.9	173.3	
Neutralization No.					0.06	0.07		
Cetane Index					45.31	47.98		
Naphthalenes, vol. %					4.75	11.77		
Smoke point					15.5	12.7		
Nitrogen, Wt. %					0.0006	0.013	0.173	0.692
Viscosity								
cSt (SUS) 77° F					2.31(33.7)			
100° F					1.85(32.1)	5.17(42.9)		
130° F						3.48(37.6)	30.96(146.1)	
180° F							11.58(64.8)	
210° F								4201(19592)
250° F								935.8(4375)
Freezing Point, °F					-33.7			
Cloud Point, °F						20	104	
Pour Point, °F						20	90	
Ni, ppm							Not Detectable	69.8
V, ppm							Not Detectable	188
Fe, ppm							Not Detectable	6.5
Con. Car. Res., Wt. %							0.34	21.5

* (c), calculated from fraction results.

	C_5-175°F	C_5-375°F
Research Octane Number:	65.8	50.0
Motor Octane Number:	62.4	47.8

Whole crude lead content: 0.014 ppm.

Data current as of September 19, 1986, but subject to change.

Gas Chromatographic Analysis

SPR WEEKS ISLAND SOUR

		Distillate fractions, ASTM D 2892			
		C_5-175° F Vol. %	175-250° F Vol. %	250-375° F Vol. %	375-420° F Vol. %
* Total **Paraffins**		41.0	27.7	26.5	29.7
Total **Iso-paraffins**		36.6	27.5	21.7	0.6
Total **Aromatics**		4.4	10.0	27.3	36.5
Total **Naphthenes**		18.0	34.7	20.9	1.7
Total **Olefins**		0.0	0.0	0.0	0.0
Total Unknowns		0.0	0.0	3.5	31.5
Paraffins:	C1	0.0	0.0	0.0	0.0
	C2	0.0	0.0	0.0	0.0
	C3	0.0	0.0	0.0	0.0
	C4	0.2	0.0	0.0	0.0
	C5	14.4	0.3	0.0	0.0
	C6	25.4	4.7	0.0	0.0
	C7	1.1	16.3	0.7	0.0
	C8	0.0	6.4	6.5	0.0
	C9	0.0	0.0	9.0	0.1
	C10	0.0	0.0	7.8	1.7
	C11	0.0	0.0	2.4	12.2
	C12	0.0	0.0	0.1	15.7
Iso-paraffins:	C4	0.0	0.0	0.0	0.0
	C5	5.0	0.1	0.0	0.0
	C6	26.9	2.0	0.0	0.0
	C7	4.8	13.3	0.2	0.0
	C8	0.0	11.2	3.1	0.0
	C9	0.0	0.9	10.0	0.0
	C10	0.0	0.0	8.3	0.4
	C11	0.0	0.0	0.1	0.2
Aromatics:	C6	3.7	1.4	0.0	0.0
	C7	0.7	7.4	1.2	0.1
	C8	0.0	1.2	9.8	0.1
	C9	0.0	0.0	10.1	1.5
	C10	0.0	0.0	5.5	13.0
	C11	0.0	0.0	0.8	17.7
	C12	0.0	0.0	0.0	4.3
Naphthenes:	C5	2.9	0.1	0.0	0.0
	C6	13.1	7.3	0.1	0.0
	C7	2.0	18.8	1.6	0.0
	C8	0.0	8.5	9.2	0.0
	C9	0.0	0.0	5.7	0.2
	C10	0.0	0.0	4.2	1.5
	C11	0.0	0.0	0.1	0.1
	C12	0.0	0.0	0.0	0.0
Olefins:	C4	0.0	0.0	0.0	0.0
	C5	0.0	0.0	0.0	0.0
	C6	0.0	0.0	0.0	0.0
	C7	0.0	0.0	0.0	0.0
	C8	0.0	0.0	0.0	0.0

Debutanization Fraction	
Component	Vol. %
Methane	0.0
Ethane	0.2
Propane	13.2
i-Butane	8.0
n-Butane	32.4
i-Pentane	17.9
n-Pentane	21.6
C_6+	6.6

Whole Crude B-T-X

Component	Vol. %
Benzene	0.197
Toluene	0.458
Ethylbenzene	0.025
Xylenes	0.048

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* The gas chromatographic PIANO method used provides for elution and identification of components up to a nominal n-C_{12} (420° F).

U.S. DEPARTMENT OF ENERGY, STRATEGIC PETROLEUM RESERVE

CRUDE OIL ANALYSIS

Stream SPR Bayou Choctaw Sweet

Terminals DOE St. James Terminal, St. James, LA
LOCAP Terminal, St. James, LA

Crude

Specific Gravity	0.8424	Ni, ppm	4.4(4.4)*	ERVP, psia @ 100° F	8.10
API Gravity	36.5	V, ppm	7.0(7.4)*	Neutralization No.	0.12
Sulfur, Wt. %	0.40	Fe, ppm	2.1(3.3)*	H_2S, ppm (c)*	2.2
Nitrogen, Wt. %	0.127	Org. Cl, ppm (c)*	0.4	Mercaptans, ppm (c)*	3.8
Con. Car. Res., Wt. % (c)*	2.53	O.D. Color	14,000	Viscosity: 77° F	6.86 cSt 48.2 SUS
Pour Point, °F	30	UOP "K"	12.05	100° F	4.90 cSt 42.1 SUS

Fraction		1	2	3	4	5	6	7
Cut Temp.	C_2-C_4	C5-175° F	175°-250° F	250°-375° F	375°-530° F	530°-650° F	650°-1051 °F	Residuum
Vol. - mls	259.0	236.7	403.7	600.9	755.8	565.4	1456.9	570.0
Vol. %	5.3	4.9	8.3	12.4	15.6	11.7	30.1	11.8
Vol. Sum %	5.3	10.2	18.5	30.9	46.5	58.2	88.3	100.1
Wt. - grams	155.4	161.6	298.0	466.2	622.4	482.2	1322.0	568.9
Wt. %	3.8	4.0	7.3	11.4	15.3	11.8	32.4	13.9
Specific Gravity	0.6	0.6826	0.7382	0.7759	0.8235	0.8528	0.9074	0.998
API Gravity		75.8	60.2	50.9	40.3	34.4	24.4	10.3
Sulfur, Wt. %		0.004	0.002	0.011	0.06	0.26	0.54	1.26
Mercaptans, ppm		8.0	<1	<1	23.0			
H_2S, ppm		<1	6.3	15.4	<1			
Organic Cl, ppm		2.9	1.8	1.3				
Aniline Point, °F				126.0	144.8	167.3	195.4	
Neutralization No.					0.04	0.08		
Cetane Index					47.62	53.05		
Naphthalenes, vol. %					4.40	9.12		
Smoke point					18.6	16.6		
Nitrogen, Wt. %					0.0003	0.006	0.136	0.630
Viscosity:								
cSt (SUS) 77° F					2.33(33.7)			
100° F					1.85(32.1)	4.89(42.0)		
130° F						3.33(37.1)	25.93(123.6)	
180° F							10.42(60.6)	
210° F								1227.9(5727)
250° F								326.4 (1526)
Freezing Point, °F					-31.9			
Cloud Point, °F						28	114	
Pour Point, °F						25	100	
Ni, ppm							Not Detectable	31.9
V, ppm							Not Detectable	53.3
Fe, ppm							Not Detectable	23.6
Con. Car. Res., Wt. %							--	18.2

* (c), calculated from fraction results.

	C_5-175°F	C_5-375°F
Research Octane Number:	68.4	51.7
Motor Octane Number:	64.1	48.2

Whole crude lead content: 0.006 ppm.

Data current as of September 19, 1986, but subject to change.

Gas Chromatographic Analysis

SPR BAYOU CHOCTAW SWEET

		Distillate fractions, ASTM D 2892			
		C_5-175° F Vol. %	175-250° F Vol. %	250-375° F Vol. %	375-420° F Vol. %
* Total **Paraffins**		**41.6**	**25.4**	**27.0**	**30.9**
Total **Iso-paraffins**		**36.4**	**24.7**	**21.6**	**0.9**
Total **Aromatics**		**3.1**	**7.7**	**23.2**	**34.3**
Total **Naphthenes**		**18.9**	**42.0**	**24.2**	**2.6**
Total **Olefins**		0.0	0.0	0.0	0.0
Total **Unknowns**		0.0	**0.1**	**4.1**	**31.4**
Paraffins	C1	0.0	0.0	0.0	0.0
	C2	0.0	0.0	0.0	0.0
	C3	0.0	0.0	0.0	0.0
	C4	**1.2**	0.0	0.0	0.0
	C5	**17.3**	**0.3**	0.0	0.0
	C6	**22.4**	**4.1**	0.0	0.0
	C7	**0.7**	**14.6**	**0.5**	0.0
	C8	0.0	**6.4**	**6.2**	0.0
	C9	0.0	0.0	**9.1**	**0.1**
	C10	0.0	0.0	**7.8**	**2.4**
	C11	0.0	0.0	**3.2**	**11.5**
	C12	0.0	0.0	**0.1**	**16.8**
Iso-paraffins	C4	**0.1**	0.0	0.0	0.0
	C5	**8.1**	**0.1**	0.0	0.0
	C6	**24.5**	**2.0**	0.0	0.0
	C7	**3.6**	**12.2**	**0.2**	0.0
	C8	0.0	**9.4**	**2.7**	0.0
	C9	0.0	**0.9**	**10.1**	**0.1**
	C10	0.0	0.0	**8.5**	**0.6**
	C11	0.0	0.0	**0.1**	**0.2**
Aromatics	C6	**2.6**	**0.9**	0.0	0.0
	C7	**0.6**	**5.6**	**0.8**	**0.1**
	C8	0.0	**1.2**	**7.8**	0.0
	C9	0.0	0.0	**8.7**	**1.4**
	C10	0.0	0.0	**4.9**	**13.2**
	C11	0.0	0.0	**0.9**	**16.2**
	C12	0.0	0.0	0.0	**3.4**
Naphthenes	C5	**2.7**	**0.2**	0.0	0.0
	C6	**14.2**	**8.3**	**0.1**	0.0
	C7	**2.0**	**23.0**	**1.8**	0.0
	C8	0.0	**10.5**	**10.3**	0.0
	C9	0.0	**0.1**	**6.7**	**0.2**
	C10	0.0	0.0	**5.3**	**2.3**
	C11	0.0	0.0	**0.1**	**0.1**
	C12	0.0	0.0	0.0	0.0
Olefins	C4	0.0	0.0	0.0	0.0
	C5	0.0	0.0	0.0	0.0
	C6	0.0	0.0	0.0	0.0
	C7	0.0	0.0	0.0	0.0
	C8	0.0	0.0	0.0	0.0

Debutanization Fraction	
Component	Vol. %
Methane	0.0
Ethane	0.0
Propane	11.6
i-Butane	8.8
n-Butane	36.5
i-Pentane	18.1
n-Pentane	20.3
C_6+	4.6

Whole Crude B-T-X

Component	Vol. %
Benzene	0.202
Toluene	0.494
Ethylbenzene	0.033
Xylenes	0.064

* The gas chromatographic PIANO method used provides for elution and identification of components up to a nominal n-C_{12} (420° F).

U.S. DEPARTMENT OF ENERGY, STRATEGIC PETROLEUM RESERVE

CRUDE OIL ANALYSIS

Stream SPR Bayou Choctaw Sour

Terminals DOE St. James Terminal, St. James, LA
LOCAP Terminal, St. James, LA

Crude					
Specific Gravity	0.8573	Ni, ppm	8.0(7.5)*	ERVP, psia @ 100° F	5.80
API Gravity	33.6	V, ppm	27.7(27.6)*	Neutralization No.	0.15
Sulfur, Wt. %	1.41	Fe, ppm	Not Detectable (1.5)*	H_2S, ppm (c)*	5.1
Nitrogen, Wt. %	0.144	Org. Cl, ppm (c)*	0.4	Mercaptans, ppm (c)*	4.2
Con. Car. Res., Wt. % (c)*	3.64	O.D. Color	15,900	Viscosity: 77° F	8.38 cSt 53.2 SUS
Pour Point, °F	5	UOP "K"	11.90	100° F	5.88 cSt 45.2 SUS

Fraction		1	2	3	4	5	6	7
Cut Temp.	C[illegible]- C[illegible]	C5- 175° F	175°- 250° F	250°- 375° F	375°- 530° F	530°- 650° F	650°- 1055° F	Residuum
Vol. - mls	180.5	184.6	329.3	585.5	731.4	535.9	1311.8	611.0
Vol. %	4.0	4.1	7.4	13.1	16.4	12.0	29.4	13.7
Vol. Sum %	4.0	8.1	15.5	28.6	45.0	57.0	86.4	100.1
Wt. - grams	108.3	124.8	238.9	451.5	598.6	461.0	1213.4	626.9
Wt. %	2.8	3.3	6.2	11.8	15.6	12.0	31.7	16.4
Specific Gravity	0.6	0.6761	0.7255	0.7712	0.8184	0.8603	0.9250	1.026
API Gravity		77.8	63.5	52.0	41.4	33.0	21.5	8.2
Sulfur, Wt. %		0.010	0.010	0.039	0.32	1.01	2.10	3.57
Mercaptans, ppm		<1	50.3	<1	7.1			
H_2S, ppm		31.3	3.8	32.4	<1			
Organic Cl, ppm		1.7	1.7	2.1				
Aniline Point, °F				125.8	144.3	160.5	179.4	
Neutralization No.					0.04	0.07		
Cetane Index					49.62	50.79		
Naphthalenes, vol. %					4.06	11.37		
Smoke point					19.1	14.0		
Nitrogen, Wt. %					0.0006	0.013	0.[illegible]4	0.582
Viscosity:								
cSt (SUS) 77° F					2.25(33.5)			
100° F					1.79 (<32.0)	4.85(41.9)		
130° F						3.32(37.1)	29.45(139.4)	
180° F							11.30(63.7)	2864(13359)
210° F								665.9(3113)
250° F								
Freezing Point, °F					-31.9			
Cloud Point, °F						22	106	
Pour Point, °F						20	90	
Ni, ppm							Not Detectable	45.6
V, ppm							Not Detectable	168
Fe, ppm							Not Detectable	8.9
Con. Car. Res., Wt. %							--	22.2

* (c), calculated from fraction results.

	C_5-175°F	C_5-375°F
Research Octane Number:	63.5	44.6
Motor Octane Number:	59.4	42.5

Whole crude lead content: 0.022 ppm.

Data current as of September 19, 1986, but subject to change.

Gas Chromatographic Analysis

SPR BAYOU CHOCTAW SOUR

		Distillate fractions, ASTM D 2892			
		C_5-175° F Vol. %	175-250° F Vol. %	250-375° F Vol. %	375-420° F Vol. %
* Total **Paraffins**		**45.0**	**33.4**	**29.5**	**36.1**
Total **Iso-paraffins**		**40.3**	**33.5**	**23.1**	**0.6**
Total **Aromatics**		**2.5**	**7.6**	**26.6**	**36.6**
Total **Naphthenes**		**12.2**	**25.5**	**16.3**	**1.8**
Total **Olefins**		0.0	0.0	0.0	0.0
Total Unknowns		0.0	0.0	**4.5**	**24.8**
Paraffins:	C1	0.0	0.0	0.0	0.0
	C2	0.0	0.0	0.0	0.0
	C3	0.0	0.0	0.0	0.0
	C4	**0.4**	0.0	0.0	0.0
	C5	**15.0**	**0.4**	0.0	0.0
	C6	**28.6**	**5.6**	0.0	0.0
	C7	**1.0**	**19.4**	**0.7**	0.0
	C8	0.0	**7.9**	**6.9**	0.0
	C9	0.0	0.0	**10.2**	**0.2**
	C10	0.0	0.0	**8.5**	**2.6**
	C11	0.0	0.0	**3.1**	**14.1**
	C12	0.0	0.0	**0.1**	**19.2**
Iso-paraffins:	C4	0.0	0.0	0.0	0.0
	C5	**5.7**	**0.1**	0.0	0.0
	C6	**29.8**	**2.7**	0.0	0.0
	C7	**4.8**	**16.0**	**0.3**	0.0
	C8	0.0	**13.7**	**3.4**	0.0
	C9	0.0	**1.1**	**10.9**	0.0
	C10	0.0	0.0	**8.4**	**0.6**
	C11	0.0	0.0	**0.1**	0.0
Aromatics:	C6	**2.0**	**0.7**	**0.0**	0.0
	C7	**0.5**	**5.5**	**0.9**	**0.1**
	C8	0.0	**1.4**	**8.6**	**0.1**
	C9	0.0	0.0	**10.5**	**1.8**
	C10	0.0	0.0	**5.6**	**12.8**
	C11	0.0	0.0	**1.0**	**17.8**
	C12	0.0	0.0	0.0	**4.1**
Naphthenes:	C5	**2.0**	**0.1**	0.0	0.0
	C6	**9.0**	**4.8**	**0.1**	0.0
	C7	**1.2**	**13.4**	**1.0**	0.0
	C8	0.0	**7.1**	**6.0**	0.0
	C9	0.0	0.0	**4.3**	**0.1**
	C10	0.0	0.0	**4.9**	**1.7**
	C11	0.0	0.0	0.0	0.0
	C12	0.0	0.0	0.0	0.0
Olefins:	C4	0.0	0.0	0.0	0.0
	C5	0.0	0.0	0.0	0.0
	C6	0.0	0.0	0.0	0.0
	C7	0.0	0.0	0.0	0.0
	C8	0.0	0.0	0.0	0.0

Debutanization Fraction	
Component	Vol. %
Methane	0.0
Ethane	0.1
Propane	10.8
i-Butane	7.7
n-Butane	31.5
i-Pentane	19.8
n-Pentane	24.2
C_6^+	5.9

Whole Crude B-T-X

Component	Vol. %
Benzene	0.134
Toluene	0.428
Ethylbenzene	0.037
Xylenes	0.064

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* The gas chromatographic PIANO method used provides for elution and identification of components up to a nominal n-C_{12} (420° F).

EXHIBIT E--SPR DELIVERY POINT DATA

Phillips Terminal (Formerly Seaway Terminal)

(Data as of December 31, 1986)

Location: Brazoria County, Texas (three miles southwest of Freeport, Texas on the Old Brazos River, four miles from the sea buoy)

Crude Oil Streams: Bryan Mound Sweet, Bryan Mound Sour, and Bryan Mound Maya

Delivery Points: Phillips Terminal marine dock facility number 2

Marine Dock Facilities and Vessel Restrictions:

Tankship Docks: 3 Docks: Nos. 1, 2 and 3

Maximum Length Overall (LOA): 750 feet during daylight and 615 feet during hours of darkness

Maximum Beam: 107 feet

Maximum Draft: 37.5 feet; subject to change due to the weather and silting conditions

Maximum Air Draft: None

Maximum Deadweight Tons (DWT): Maximum DWT at Dock No. 1 is 50,000 DWT. Dock Nos. 2 an 3 can accommodate up to 80,000 DWT. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

Barge Loading Capability: Dock No. 1 has the capability to load barges of a minimum 30,000-barrel capacity. Its use, however, is contingent upon the consent of the Government and non-interference with the Government's obligations to other parties.

Oily Waste Reception Facilities: Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing costs associated with such arrangements.

Customary Anchorage: Freeport Harbor sea bouy approximately 4.5 miles from the terminal.

ARCO Pipeline Company, Texas City Terminal

(Data as of December 31, 1986)

Location: Docks 11 and 12, Texas City Harbor, Galveston County, Texas

Crude Oil Streams: Bryan Mound Sweet and Bryan Mound Sour

Delivery Points: ARCO Pipe Line Company Marine Docks (11 and 12) and connections to local commercial pipelines

Marine Dock Facilities and Vessel Restrictions:

Tankship Docks: 2 Docks; Nos. 11 and 12

Maximum Length Overall (LOA): 1,020 feet. Maximum bow to manifold centerline distance is 468 feet.

Maximum Beam: Dock 11-108 feet; Dock 12-220 feet

Maximum Draft: 39.6 feet; subject to change due to weather and silting conditions

Maximum Air Draft: None

Maximum Deadweight Tons (DWT): 150, 000 DWT each. Terminal permission is required for less than 30,000 DWT or greater than 150,000 DWT. Vessels larger than 120,000 DWT are restricted to daylight transit. Purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

Barge Loading Capability: None

Oily Waste Reception Facilities: Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing all costs associated with such arrangements.

Customary Anchorage: Bolivar Roads (breakwater) or Galveston sea buoy.

Sun Terminal

(Data as of December 31, 1986)

Location: Nederland, Texas (on the Neches River at Smiths Bluff in southwest Texas, 47.6 nautical miles from the bar)

Crude Oil Streams: West Hackberry Sweet, West Hackberry Sour

Delivery Points: Sun Terminal marine dock facility and Sun Terminal connections to local commercial pipelines

Marine Dock Facilities and Vessel Restrictions:

Tankship Docks: 5 Docks: Nos. 1, 2, 3, 4 and 5

Maximum Length Overall (LOA): 1000 feet

Maximum Beam: 145 feet

Maximum Draft: 40 feet fresh water

Maximum Air Draft: 136 feet

Maximum Deadweight Tons (DWT): Maximum DWT at Dock No. 1 is 85,000 DWT. Dock Nos. 2, 3, 4 and 5 can accommodate up to 130,000 DWT. Vessels larger than 85,000 DWT are restricted to daylight transit. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

Barge Loading Capability: 3 Barge Docks: A, B and C. Each capable of handling barges up to 25,000 barrels capacity. Tankship Dock No. 1 has barge loading capability. Its use, however, is contingent upon the consent of the Government and non-interference with the Government's obligations to other parties.

Oily Waste Reception Facilities: Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing costs associated with such arrangements.

Customary Anchorage: South of Sabine Bar Buoy, also at Sabine Bar for vessels with draft of 39 feet or less. Short-term anchorage for vessels of less than 40 foot draft in turning basin.

DOE St. James Terminal

(Data as of December 31, 1986)

Location: St. James Parish, Louisiana (30 miles southwest of Baton Rouge on the west bank of the Mississippi River at mile-marker 158.3)

Crude Oil Streams: Bayou Choctaw Sweet, Bayou Choctaw Sour, Weeks Island Sour

Delivery Points: St. James Terminal marine dock facility and LOCAP Terminal (connections to Capline interstate pipeline system and local commercial pipelines)

Marine Dock Facilities and Vessel Restrictions:

Tankship Docks: 2 Docks: Nos. 1 and 2

Maximum Length Overall (LOA): 940 feet

Maximum Beam: None

Maximum Draft: 45 feet

Maximum Air Draft: 153 feet less the river stage

Maximum DWT: 100,000 DWT. Maximum DWT is theoretical berth handling capability; however, purchasers are cautioned that varying harbor and channel physical constraints are the controlling factors as to vessel size, and they are responsible for confirming that proposed vessels can be accommodated.

Barge Loading Capability: None

Oily Waste Reception Facilities: Facilities are available for oily bilge water and sludge wastes. Purchasers are responsible for making arrangements with the terminal and for bearing all costs associated with such arrangements. Terminal can provide suitable contacts.

Customary Anchorage: Grandview Reach approximately 11 miles from the terminal.

EXHIBIT F—[RESERVED]

EXHIBIT G—OFFER GUARANTEE—LETTER OF CREDIT

Procurement and Sales Division, Mail Stop PR-651, Project Management Office, Strategic Petroleum Reserve, U.S. Department of Energy, 900 Commerce Road East, New Orleans, Louisiana 70123

To the Strategic Petroleum Reserve Sales Contracting Officer:

By order of our customer

____

(name and address of offeror)
we hereby establish in the U.S. Department of Energy's favor an irrevocable Letter of Credit, Numbered _____, for an amount not to exceed U.S. $_____, effective immediately as an offer guarantee for the offer of our customer dated _____ in response to the U.S. Department of Energy's Notice of Sale dated _____ for the sale of Strategic Petroleum Reserve petroleum. Liability under this Letter of Credit shall commence upon the date set by the Notice of Sale, including any amendments thereto, for receipt of offers and expires on the twenty-first day thereafter. We agree that our obligation shall not be impaired by any extensions of the date set for receipt of offers, notice of such extension being hereby waived; provided, that such waiver of notice shall not apply to extensions extending more than thirty (30) calendar days beyond the period originally established for receipt of offers.

Funds under this Letter of Credit are available to the U.S. Department of Energy by its draft or drafts drawn on ourselves and accompanied by a manually signed statement of a duly authorized official of the U.S. Department of Energy stating the following:

This drawing of U.S. $_____ — (U.S. dollar amount expressed in word form)

____

against your Letter of Credit Numbered _____, dated _____ is due the U.S. Government because of the failure of

____

(name of offeror)
to honor its offer to enter into a contract for the purchase of petroleum from the Strategic Petroleum Reserve, in accordance with the U.S. Government's Notice of Sale dated _____ and the applicable Standard Sales Provisions (10 CFR Part 625, Appendix A). Upon receipt of the U.S. Department of Energy's draft and accompanying statement, either by hand or mail, at our office located at _____, we will honor the draft

and make payment by 3 p.m. Eastern Standard Time of the next business day following receipt of the draft by wire transfer to the account of the U.S. Treasury through the Federal Reserve Communications System. Each wire transfer shall be formatted in accordance with prescribed Treasury requirements as shown in Exhibit I of the Standard Sales Provisions, 10 CFR Part 625, Appendix A.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (1983 Revision, International Chamber of Commerce Publication No. 400) and except as may be inconsistent therewith, to the Uniform Commercial Code in effect on the date of issuance of this Letter of Credit in the state in which the issuer's head office within the United States is located.

Address all communications regarding
this Letter of Credit
to ______________________________
(address and any applicable reference)

____

______________________________.

Yours Truly,

____

Authorized Signature.

Exhibit H

Payment and Performance Guarantee—Letter of Credit

Procurement and Sales Division, Mail Stop PR-651, Project Management Office, Strategic Petroleum Reserve, U.S. Department of Energy, 900 Commerce Road East, New Orleans, Louisiana 70123

To the Strategic Petroleum Reserve Sales Contracting Officer:

By order of our customer

____

(name and address)

we hereby establish in the U.S. Department of Energy's favor an irrevocable Letter of Credit, Numbered _____, for about U.S. $_____ — _____ (the U.S. dollar amount expressed in word form)

effective immediately and expiring at our office located at ______________________________

____

(address)

one hundred and twenty (120) days from the date of issuance of this Letter of Credit, relative to an offer by our customer dated _____, to purchase Strategic Petroleum Reserve petroleum.

Funds under this Letter of Credit are available to the U.S. Department of Energy by its draft or drafts drawn on ourselves. Such draft or drafts may be transmitted by telex or U.S. Mail and shall contain either a statement that:

This drawing is due to the U.S. Department of Energy under your letter of Credit number _____ for

____

(customer's name). Payment of U.S. $_____ to be made by wire transfer to U.S. Department of Energy on

____

(date)

under contract number DE-SC96-_____, SPRCODR No. _____ for delivery of _____ barrels of oil at U.S. $_____ per barrel, plus/minus $_____ per barrel gravity adjustment. The wire draft should include our FEDWIRE number and other pertinent wire information as follows: Transfer to TREAS Code 021030004 TREAS NYC/(89000201) Dept of Energy (SPRO) U.S. $_____ payment for the sale of crude oil under contract No. DE-SC96- _____. SPRCODR No. _____. Deposit Account 89X0233.91.

or a statement that:

This drawing is due the U.S. Department of Energy under your letter of Credit number _____ for

____

(customer's name).

Payment of U.S. $_____ to be made by wire transfer to U.S. Department of Energy because of failure of company to accept delivery of petroleum under contract number DE-SC96- _____ at the time specified in the contract resulting in damages due under the contract in that amount. The wire draft should include our FEDWIRE number and other pertinent wire information as follows: Transfer to TREAS Code 021030004 TREAS NYC/(89000201) DEPT OF ENERGY (SPRO) U.S. $_____ payment for damages incurred by failure to accept delivery under contract number DE-SC96- _____. Deposit Account 89X0233.91.

or both.

We also will honor drafts presented over the Federal Reserve Bank's FEDWIRE system, provided that each such draft contains either a statement that:

Third Party sender, re your LOC#

____

(Letter of Credit No.)

for

____

(customer name)

Third Party receiver, Transfer to TREAS Code 021030004 TREAS NYC (89000201)

Dept of Energy (SPRO) $______ payment due on

(date)

for sale of oil under contract No. ______. SPRCODR No. ______ for ______ bls @ $______/bl ± ______ degrees at $0.______ gravity adjustment and $______ for delivery damages. Deposit Account 89X0233.91.

or a statement that:

Third Party sender, re your

LOC#

(Letter of Credit No.)

for ______________________________

(customer name)

Third Party receiver, Transfer to TREAS Code 021030004 TREAS NYC/89000201) DEPT OF ENERGY (SPRO) $______ payment due for damages from failure to perform in accordance with contract No. ______. Deposit Account 89X0233.91

or other wire message containing the relevant information. The wire draft should include our FEDWIRE number and other information pertinent to a request for a wire transfer of funds over FEDWIRE, as follows:

For drafts presented by telex or FEDWIRE, the U.S. Government's invoice (including supporting documents) shall be forwarded to us by regular mail.

The U.S. Department of Energy may make multiple drawings totalling up to the amount of funds indicated in the first paragraph as available under this Letter of Credit.

Upon receipt of the U.S. Department of Energy's draft and accompanying statement, we will honor the draft and make payment by 3 p.m. Eastern Standard Time on the date stated in the draft (or the next business day if the stated date does not fall on a regular business day), by wire transfer of funds over FEDWIRE to account number 021030004 of the U.S. Treasury through the Federal Reserve Communications System. Each wire transfer of funds shall be formatted in accordance with prescribed U.S. Treasury requirements as shown in Exhibit I of the Standard Sales Provisions, 10 CFR Part 625, Appendix A.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (1983 Revision, International Chamber of Commerce Publication No. 400) and except as may be inconsistent therewith, to the Uniform Commercial Code in effect on the date of issuance of this Letter of Credit in the state in which the issuer's head office within the United States is located.

Address all communications regarding this Letter of Credit

to ______________________________

(address and any applicable reference)

Yours truly,

____

Authorized signature.

EXHIBIT I—INSTRUCTION GUIDE FOR FUNDS TRANSFER MESSAGES TO TREASURY

The following instructions provide specific information which is required so that a funds (wire) transfer message can be transmitted to the Department of Treasury. The funds transfer message format is shown in Attachment 1. A narrative description of each item on the funds transfer message follows:

Line 1

Item 1—*Priority Code*—The priority code will be provided by the sending bank. (Note: Some Federal Reserve District banks may not require this item.).

Line 2

Item 2—*Treasury Department Code*—The 9-digit identifier "021030004" is the routing symbol of the Treasury. This item is a constant and is required for all funds transfer messages sent to Treasury.

Item 3—*Type Code*—The type code will be provided by the sending bank (will be a 10 or 12).

Line 3

Item 4—*Sending Bank Code*—This 9-digit identifier will be provided by the sending bank.

Item 5—*Class*—The class field may be used at the option of the sending bank. (Note: Some Federal Reserve Districts prohibit use of this field.)

Item 6—*Reference Number*—The reference number will be inserted by the sending bank to identify the transaction.

Item 7—*Amount*—The amount must include the dollar sign and the appropriate punctuation including cents digits. This item will be inserted by the sending bank.

Line 4

Item 8—*Sending Bank Name*—The telegraphic abbreviation which corresponds to Item 4 will be provided by the sending bank.

Line 5

Items 9, 10, and 11—*Treasury Department, Name, Agency Location Code, Agency Number*—This item is of critical importance. It must appear on the funds transfer message in the precise manner as stated to allow for the automated processing and classification of funds transfer message to

Treasury for credit to the Department of Energy. This item is comprised of a rigidly formatted, left justified, nonvariable sequence of characters as follows:

TRES NYC/(89000201) Dept. of Energy (SPRO).

Item 12—*Payment Identification*—The payment identification should be furnished by the remitter in the following manner:

Lines 6 and 7

For contracts payments, either the constant "Payment for the Sale of Crude Oil Under Contract #_____. SPRCODR #_____" or "Payment for Damages Incurred by Failure to Accept Delivery Under Contract #_____" will be inserted. For offer guarantees, the constant "Offer Guarantee for the Sale of Crude Oil Under NS #_____" for (*Name*), (*Taxpayer ID or Social Security Number*) will be inserted.

Line 8

The constant "Deposit Account 89X0233" will be inserted.

Important Note; Line Nos. 2 and 5 are edited by the Federal Reserve Bank. If the wire transfer message is not formatted as prescribed above, the message will be rejected by the FED Bank and returned to the sending bank.

SAMPLE OF FUNDS TRANSFER MESSAGE FORMAT FOR SPR OIL SALE

02			
To 021030004	Type 10		
From 011000390	Class	Ref 0650	Amount $500,000.00

Ordering Bank and Related Data

FIRST BOS

TREAS NYC/(89000201) DEPT OF ENERGY (SPRO)

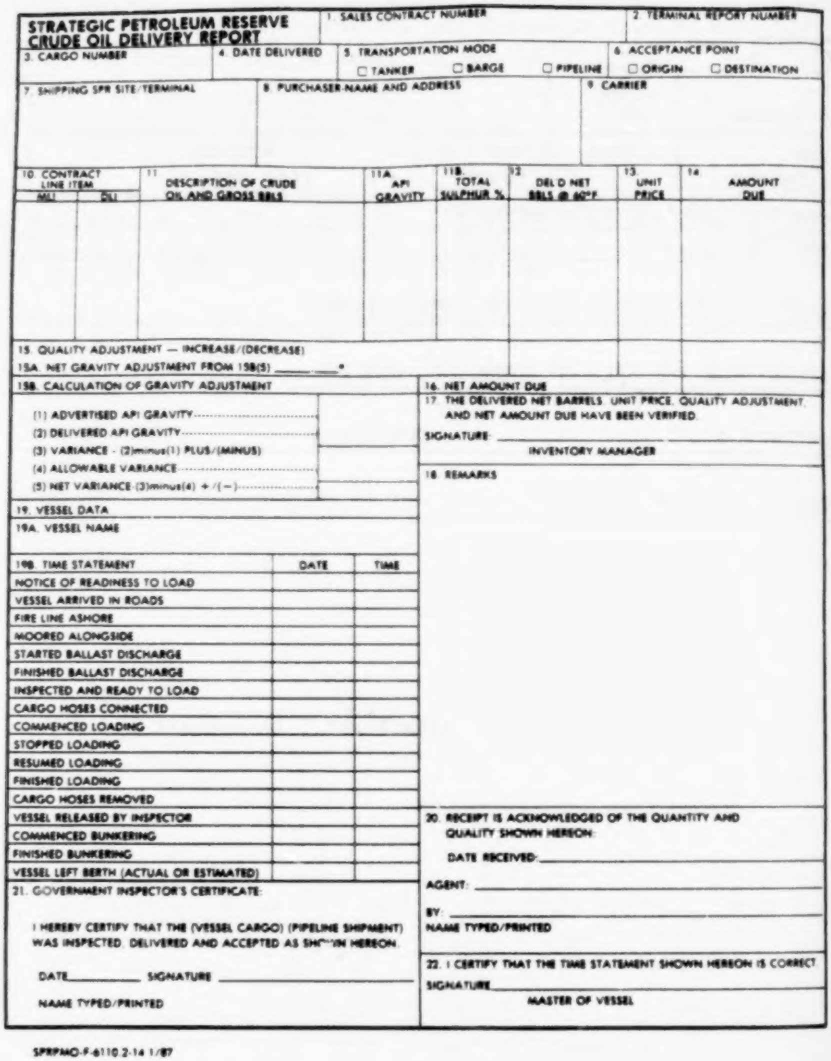
PAYMENT FOR THE SALE OF CRUDE OIL UNDER

CONTRACT # SPRCODR #

DEPOSIT ACCOUNT 89X0233

Attachment 1 to Exhibit I

EXHIBIT J



STRATEGIC PETROLEUM RESERVE CRUDE OIL DELIVERY REPORT

1. SALES CONTRACT NUMBER
2. TERMINAL REPORT NUMBER
3. CARGO NUMBER
4. DATE DELIVERED
5. TRANSPORTATION MODE ☐ TANKER ☐ BARGE ☐ PIPELINE
6. ACCEPTANCE POINT ☐ ORIGIN ☐ DESTINATION
7. SHIPPING SPR SITE/TERMINAL
8. PURCHASER-NAME AND ADDRESS
9. CARRIER

10. CONTRACT LINE ITEM MLI	10. CONTRACT LINE ITEM DLI	11 DESCRIPTION OF CRUDE OIL AND GROSS BBLS	11A API GRAVITY	11B. TOTAL SULPHUR %	12 DEL'D NET BBLS @ 60°F	13. UNIT PRICE	14 AMOUNT DUE

15. QUALITY ADJUSTMENT — INCREASE/(DECREASE)

15A. NET GRAVITY ADJUSTMENT FROM 15B(5) ____.___°

15B. CALCULATION OF GRAVITY ADJUSTMENT

(1) ADVERTISED API GRAVITY..........

(2) DELIVERED API GRAVITY..........

(3) VARIANCE - (2)minus(1) PLUS/(MINUS)

(4) ALLOWABLE VARIANCE..........

(5) NET VARIANCE (3)minus(4) + /(−)..........

16. NET AMOUNT DUE

17. THE DELIVERED NET BARRELS, UNIT PRICE, QUALITY ADJUSTMENT, AND NET AMOUNT DUE HAVE BEEN VERIFIED.

SIGNATURE: ________________

INVENTORY MANAGER

18. REMARKS

19. VESSEL DATA

19A. VESSEL NAME

19B. TIME STATEMENT	DATE	TIME
NOTICE OF READINESS TO LOAD		
VESSEL ARRIVED IN ROADS		
FIRE LINE ASHORE		
MOORED ALONGSIDE		
STARTED BALLAST DISCHARGE		
FINISHED BALLAST DISCHARGE		
INSPECTED AND READY TO LOAD		
CARGO HOSES CONNECTED		
COMMENCED LOADING		
STOPPED LOADING		
RESUMED LOADING		
FINISHED LOADING		
CARGO HOSES REMOVED		
VESSEL RELEASED BY INSPECTOR		
COMMENCED BUNKERING		
FINISHED BUNKERING		
VESSEL LEFT BERTH (ACTUAL OR ESTIMATED)		

20. RECEIPT IS ACKNOWLEDGED OF THE QUANTITY AND QUALITY SHOWN HEREON:

DATE RECEIVED: ________________

AGENT: ________________

BY: ________________

NAME TYPED/PRINTED

21. GOVERNMENT INSPECTOR'S CERTIFICATE:

I HEREBY CERTIFY THAT THE (VESSEL CARGO) (PIPELINE SHIPMENT) WAS INSPECTED, DELIVERED AND ACCEPTED AS SHOWN HEREON.

DATE________ SIGNATURE ________________

NAME TYPED/PRINTED

22. I CERTIFY THAT THE TIME STATEMENT SHOWN HEREON IS CORRECT.

SIGNATURE________________

MASTER OF VESSEL

SPRPMO-F-6110.2-14 1/87

EXHIBIT K—OFFER GUARANTEE CALCULATION WORKSHEET

MLI: ____________

Column	MAXQ (thousands/ bbls) (A)	Unit price (dollars) (B)	DLI (C)	DESQ (thousands/ bbls) (D)	MINQ (thousands/ bbls) (E)	Total DLI price (thousands/ dollars) (F)	Bond factor (G)	Product (dollars) (H)
Row:								
1							x50	
2							x50	
3							x50	
4							x50	
5							x50	
6							x50	
7							x50	
Total								

1. Using separate worksheet for each MLI offered against, from the SPR Sales Offer Form, enter the MLI maximum quantity offered on (expressed in thousands of barrels) in Column (A), Row 1.

2. Starting with the highest DLI unit price offered on the MLI from the SPR Sales Offer Form (and the highest preference if the unit prices of two or more DLIs are the same) enter the unit price in Row 1, Column (B); the DLI letter in Row 1, Column (C); the DLI desired quantity is Row 1, Column (D) (in thousands of barrels) and the minimum quantity in Row 1, Column (E). (The minimum quantity is either the Government's minimum contract quantity, if the offer indicates the offeror will accept as little as that amount, or the desired quantity, if the offeror indicates he will accept no less than that amount. *see* instructions for the SPR Sales Offer Form.)

3. If either the desired quantity in Column (D), or the minimum quantity in Column (E) exceeds the maximum quantity in Column (A), you have made an error either on this form or the offer form and should recheck your figures.

4. Multiply the price in Row 1, Column (B) times the desired quantity in Column (D) (as expressed in thousands) and enter the total DLI price in Column (F).

5. Multiply the total DLI price in Column (F) times the factor in Column (G) and enter the product in Column (H). The factor is 5% of 1000.

6. Subtract the DLI desired quantity in Row 1, Column (D) from the maximum quantity in Row 1, Column (A). Enter the result in Row 2, Column (A). If the result is zero, go to step 11.

7. Enter the next highest unit price for the MLI from the offer form in Row 2, Column (B). Enter the DLI letter, desired quantity, and minimum quantity in their respective columns. If there is a maximum quantity remaining in Row 2, Column (A), but no more DLI offers, or the minimum quantity in Row 2, Column (E) exceeds the maximum quantity, you may have made an error and should recheck your figures.

8. Multiply the lesser of the remaining maximum quantity in Column (A), or the desired quantity in Column (D) times the unit price (even if this quantity is less than MINQ) and enter the resulting total DLI price in Column (F).

9. Multiply Column (F) times the factor in Column (G) and enter the product in Column (H).

10. Repeat steps 6–9 for the next higher unit price until maximum quantity remaining is zero, then go to step 11.

11. Sum the amounts in Column (H) and enter the total in Row 8, Column (H). Sum this amount for all the worksheets. If the sum of all the worksheets is less than $10,000,000, enter the sum in the spaces marked offer bond on the SPR Sales Offer Form. If the sum exceeds $10,000,000, then enter $10,000,000 on the offer form. Obtain an offer guarantee in the amount indicated on the offer form and submit with the offer. These worksheets need not be submitted with the offer and should be retained for your files.

[53 FR 20511, June 3, 1988]

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PART 703—CONTRACT APPEALS

Subpart A—Rules of the Board of Contract Appeals

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Subpart B—Rules of the Contract Adjustment Board [Reserved]

APPENDIX A—ORGANIZATION AND FUNCTIONS, DOE MANUAL, CHAPTER 0114, OFFICE OF THE BOARD OF CONTRACT APPEALS

AUTHORITY: Sec. 105, Pub. L. 93-438, 88 Stat. 1238, 42 U.S.C. 5815; sec. 161, Pub. L. 83-703, 68 Stat. 948, 42 U.S.C. 2201; sec. 3, Pub. L. 85-804, 72 Stat. 972, 50 U.S.C. 1433.

SOURCE: 41 FR 12215, Mar. 24, 1976, unless otherwise noted.

Subpart A—Rules of the Board of Contract Appeals

§ 703.1 Scope and purpose.

(a) The establishment of the Department of Energy (DOE) and the transfer to it of functions previously assigned to other agencies, including those discharged by the Board of Contract Appeals of the Atomic Energy Commission, led to a newly reorganized Board of Contract Appeals in DOE. All decisions rendered by this Board become the final decisions of the Agency.

(b) The reorganization of the Board, its scope of functions and authorities, including the authority to establish and issue rules of procedure not inconsistent with its charter and the change in organization from one composed of two full-time, permanent members augmented by a panel of part-time "consultant" members, to its present composition of three full-time, permanent, lawyer members, is more fully set forth in DOE Manual Chapter 0114; published for convenience as Appendix A to this part.

(c) Several factors were taken into consideration in reorganizing the Board, primary of which was the desire to establish an organization more like that of other agency boards, and to establish procedures that would conform to a more common practice

best copy available

before boards of contract appeals. This was in keeping with the recommendation of the Commission on Government Procurement and the Office of Federal Procurement Policy, and with the need of DOE for prompt, fair, and inexpensive resolution of contract disputes as part of an effective agency-contractor relationship.

(d) Consistent with this policy, the Uniform Rules of Practice of Boards of Contract Appeals, as proposed by the National Conference of Boards of Contract Appeals Members, have been adopted herein in major part. However, some provisions differ from the uniform rules, particularly in those areas in which earlier Agency practice had proven successful in expediting the appeal process. For example, the new rules call for the filing of a notice of appeal directly with the contracting officer, and that officer is then required to ascertain identification shown by experience to be effective in expediting the appeal process. Another rule with a similar purpose permits direct appeal by a subcontractor in disputes arising under a subcontract entered into by a cost-type prime contractor in which a dispute provision has been included. The earlier practice of providing for direct service of pleadings and papers between parties, simultaneously with their filing before the Board, similarly expedites the appeal and is adopted.

(e) The new rules also require that items in the appeal file be offered into evidence rather than the entire appeal file automatically becoming part of the evidence, subject to objection, at the time the appeal file is transmitted. This practice encourages the submission of relevant documentation only. The provisions in the uniform rules relating to depositions and discovery are consolidated and amended to clarify the use of depositions as one form of discovery, and to provide for apportionment of expenses within the discretion of the Board in cases of hardship associated with discovery.

(f) The use of the optional accelerated procedure is expanded beyond that contemplated in the uniform rules to recognize equitable considerations as well as a monetary ceiling for purposes of greater flexibility as reflected in earlier Agency practice. Thus, accelerated procedure is made available, in the sound discretion of the Board, in certain cases additional to those meeting a monetary limitation. The provision for final decision to be rendered by the entire Board in every case, including those processed under accelerated procedure, complements this practice.

(g) Some provisions have no corresponding basis in the uniform rules. For example, the revised rules include provisions for the use of subpoenas, and for security requirements, as provided by the enabling authorization; the Board is authorized to decide applications for extraordinary relief involving contractual fairness sitting as the Contract Adjustment Board. However, as to the later provisions, it should be noted that each case brought before the Contract Adjustment Board is judged solely on its merits under the criteria of Pub. L. 85-804 and Executive Order 10789, as amended, and decisions made pursuant thereto may not be cited as precedent in other matters brought before the Board.

(h) Throughout the revised rules emphasis is placed on flexibility and the exercise of broad discretion as primary means of effecting the resolution of appeals in an orderly, impartial and expeditious manner. Emphasis is likewise placed upon the sound administration of these rules in as informal a manner as possible, consistent with the need to provide due process and to develop an adequate record for Board action and judicial review.

PREFACE TO THE RULES

§ 703.11 Jurisdiction for considering appeals.

The Department of Energy Board of Contract Appeals (Board) is the authorized representative of the Administrator to consider and determine appeals from decisions of contracting officers arising under contracts which contain provisions for resolving such disputes. The Board is also designated and authorized to function as the Contract Adjustment Board in applications for extraordinary relief pursuant to Pub. L. 85-804.

§ 703.12 Organization and location of Board.

(a) The Board is located in Washington, D.C. and its mailing address is:

The Board of Contract Appeals, U.S. Department of Energy, Washington, D.C. 20545.

(b) The Board consists of a chairman and two other members all of whom shall be attorneys at law duly licensed by any State or the District of Columbia. The decision of a majority of the Board constitutes the decision of the Board. Board members are designated as Administrative Judges and the chairman is designated as Chief Administrative Judge.

§ 703.13 Decisions on questions of law.

When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board, may, in its discretion, hear, consider, and decide all questions of law necessary for the complete adjudication of the issue. In the consideration of an appeal, should it appear that a claim is involved which is not cognizable under the terms of the contract, the Board may make findings of fact with respect to such a claim without expressing an opinion on the question of liability.

§ 703.14 Contract appeals procedure.

(a) *Rules.* Appeals referred to the Board are handled in accordance with the rules of the Board.

(b) *Administration and interpretation of rules.* Emphasis is placed upon the sound administration of these rules in specific cases, because it is impracticable to articulate a rule to fit every possible circumstance which may be encountered. These rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay.

(c) *Preliminary procedures.* Preliminary procedures are available to encourage full disclosure of relevant and material facts, and to discourage unwarranted surprise.

PRELIMINARY PROCEDURES

§ 703.101 Appeals, how taken.

An appeal from a decision of a contracting officer shall be taken by notice of appeal, in writing, addressed to the Board, and shall be mailed to, or filed with, the contracting officer, within the time allowed by the contract or applicable provision of directive or law.

§ 703.102 Notice of appeal, contents of.

(a) The notice of appeal shall identify the contract by number, and shall specify the portion of the decision from which the appeal is taken, and the reasons why the decision of the contracting officer is deemed erroneous. It shall include a request for application of the accelerated procedure, if such is desired under § 703.112. All papers filed after the notice of appeal should be sent directly to the Board, with concurrent service upon the other party or parties.

(b) The notice of appeal should be signed personally by the appellant (the contractor taking the appeal, or a subcontractor under a cost-type prime contract which contains a dispute provision), or by an officer of the appellant corporation or member of the appellant firm, or by the contractor's duly authorized representative or attorney. The complaint referred to in § 703.106 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of § 703.106 for a complaint.

§ 703.103 Forwarding of appeals.

When a notice of appeal has been received by the contracting officer, he shall, within 10 days, endorse thereon the date of mailing (or date of receipt, if otherwise conveyed) and shall forward said notice of appeal to the Board. In so notifying the Board, the contracting officer shall include the following information: date of receipt by the appellant of the contracting officer's decision; date of receipt by the contracting officer of the appellant's notice of appeal; amount of the claim; whether appellant is a small business;

whether accelerated procedure has been requested, and if so, the names, addresses, and telephone numbers if known, of any attorney or attorneys representing the appellant, the contracting officer and any other parties to the appeal. Following receipt by the Board of the original notice of an appeal, the same will be docketed and the appellant and contracting officer so advised.

§ 703.104 Preparation, contents, organization, forwarding, and status of appeal file.

(a) *Duties of Contracting Officer.* Within 30 days of receipt of an appeal, the contracting officer shall assemble and transmit to the Board an appeal file consisting of all documents pertinent to the appeal, including:

(1) The contracting officer's decision and findings of fact from which appeal is taken;

(2) The contract including specifications and pertinent amendments, plans and drawings;

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which decision was issued;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent.

Within the same time above specified the contracting officer shall furnish the appellant a copy of each document he transmits to the Board, except those stated in § 703.104(a) (1), (2) and (3) (as to which a list furnished appellant of all such documents transmitted will suffice), and those stated in paragraph (d) of this section.

(b) *Duties of the appellant.* Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant shall supplement the same by transmitting to the Board any documents not contained therein which he considers pertinent to the appeal, and shall furnish one copy of any such document to the contracting officer.

(c) *Organization or appeal file.* Documents in the appeal file may be originals or legible facsimile or authenticated copies thereof, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

(d) *Lengthy documents.* The Board may waive the requirement of furnishing to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when a party has shown that doing so would impose an undue burden. At the time a party files with the Board a document as to which such a waiver has been granted, it shall notify the other party that the same or a copy is available for inspection at the offices of the Board or of the party filing same.

(e) *Status of documents in the appeal file and supplements.* Documents contained in the appeal file are considered as part of the record, and may be offered into evidence at any time prior to or during the hearing.

§ 703.105 Dismissal for lack of jurisdiction.

Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party, unless the Board determines that its decision on the motion will be deferred pending hearing on both the merits of the appeal, and the motion. The Board shall have the right at any time and on its own motion to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

§ 703.106 Pleadings.

(a) *Appellant.* Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of appellant's claims, alleging the basis, with appropriate reference to contract provisions, for each claim, and the dollar amount claimed. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form or formality is required. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth his complaint and the respondent shall be so notified.

(b) *Respondent.* Within 30 days from receipt of said complaint, or the aforesaid notice from the Board, respondent shall prepare and file an answer thereto, setting forth simple, concise, and direct statements of respondent's defenses to each claim asserted by appellant. This pleading shall fulfill the generally recognized requirements of an answer, and shall set forth any affirmative defenses or counter-claims as appropriate. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.

§ 703.107 Amendments of pleadings or record.

(a) The Board upon its own initiative or upon application by a party may, in its discretion, order a party to make a more definite statement of the complaint or answer, or to reply to an answer.

(b) The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleading upon conditions just to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable that party to meet such evidence.

§ 703.108 Hearing election.

Upon receipt of respondent's answer or the notice referred to in the last sentence of § 703.106(b), appellant shall advise whether a hearing is desired as prescribed in §§ 703.117 through 703.125, or whether, in the alternative, the case will be submitted on the record without a hearing, as prescribed in § 703.111. In appropriate cases, the appellant may also elect the optional accelerated procedure prescribed in § 703.112.

§ 703.109 Prehearing briefs.

Based on an examination of the pleadings, and a determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to § 703.108. In the absence of a Board requirement therefor, either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party as previously arranged.

§ 703.110 Prehearing or presubmission conference.

(a) Whether the case is to be submitted pursuant to § 703.111 or heard pursuant to §§ 703.117 through 703.126, the Board may upon its own initiative or upon the application of either party, call upon the parties to appear before the Board or an Administrative Judge thereof for a conference to consider:

(1) The simplification or clarification of the issues;

(2) The possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements which will avoid unnecessary proof;

(3) The limitation of the number of expert witnesses, or avoidance of simi-

lar cumulative evidence, if the case is to be heard;

(4) The possibility of agreement disposing of all or any of the issues in dispute;

(5) The scope of testimony, including a possible request by the Board for the introduction of any fact or expert testimony desired; and

(6) Such other matters as may aid in the disposition of the appeal.

(b) A transcript of the conference shall be made and a copy shall be available for public inspection. Following the conference, the Board may enter an order setting forth the results of the conference which shall thereafter constitute a part of the record.

§ 703.111 Submission without a hearing.

Either party may elect to waive a hearing and to submit his case upon the record before the Board, as settled pursuant to § 703.113. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit or require such submission to be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with § 703.123.

§ 703.112 Optional accelerated procedure.

(a) In appeals involving $25,000 or less, either party may elect, in its notice of appeal, complaint, answer, or by separate correspondence or statement prior to commencement of hearing or settlement of the record, to have the appeal processed under a shortened and accelerated procedure. For application of this rule the amount in controversy will be determined by the sum of the amounts claimed by either party against the other in the appeal proceeding. If no specific amount is claimed, a case will be considered to fall within this rule if the sum of the amounts which each party represents in writing that it could recover as a result of a Board decision favorable to it does not exceed $25,000. In addition, such optional accelerated procedure, at the discretion of the Board, may be employed regardless of the amount involved for other reasons, such as financial hardship, status as small business, location of appellant in an area of concentrated unemployment or underemployment or in an area of substantial or persistent labor surplus. An accelerated case shall be processed under this rule unless the other party objects and shows good cause why the substantive nature of the dispute requires processing under the Board's regular procedures and the Board sustains such objection. In accelerated cases proceeding under this rule, parties are encouraged, to the extent possible consistent with adequate presentation of their factual and legal positions, to waive pleadings, discovery, and briefs.

(b) Written decision by the Board in cases proceeding under this rule normally will be short and contain summary findings of fact and conclusions only. The Board will endeavor to render such decisions within 30 days after the appeal is ready for decision. Such decisions will be rendered for the Board by a single Administrative Judge with the concurrence of the Chairman or other designated member.

(c) Except as herein modified, these rules otherwise apply to accelerated cases in all respects.

§ 703.113 Settling the record.

(a) The record upon which the Board's decision will be rendered consists of the pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, oral and written testimony, transcripts of conferences and hearings, hearing exhibits, posthearing briefs, and documents which the Board has specifically designated be made a part of the record. The record will at all reasonable times be available for inspection by the parties at the office of the Board, or such other place as the Board may designate.

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require any party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

§ 703.114 Discovery.

(a) *General policy and protective orders.* The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, and those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting classified or privileged information or documents.

(b) *Depositions.* After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party and for good cause shown, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(1) *Orders on Depositions.* The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of the Board.

(2) *Use as Evidence.* No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal unless and until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent is present and can testify personally at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the witness given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions as evidence in supplementation of that record.

(c) *Interrogatories to parties.* After an appeal has been filed with the Board, a party may serve on the other party written interrogatories to be answered separately in writing, signed under oath and returned within 30 days. Upon timely objection by a party, the Board will determine the extent to which the interrogatories will be permitted.

(d) *Admission of facts.* After an appeal has been filed with the Board, a party may serve upon the other party a request for the admission of specified facts. Within 30 days after service, the party served shall answer each requested fact or file objections thereto. The factual propositions set out in the request shall be deemed admitted upon the failure of a party to respond to the request for admissions.

(e) *Production and inspection of documents.* Upon motion of any party showing good cause therefor, and upon notice, the Board may order the other party to produce and permit the inspection and copying or photographing of any designated documents or objects, not privileged, specifically identified, and their relevance and materiality to the cause or causes in issue explained, which are reasonably calculated to lead to the discovery of admissible evidence. If the parties cannot themselves agree thereon, the Board shall specify just terms and conditions in making the inspection and taking the copies and photographs.

(f) *Expenses.* Each party shall bear its own expenses associated with discovery, unless for purposes of hardship or other reasons in the sound discretion of the Board, the expenses should be apportioned otherwise.

§ 703.115 Subpoenas.

On application by a party, the Chairman of the Board, or other Board member, may, upon a showing of general relevance, issue subpoenas requiring the attendance and testimony of witnesses or the production of documents, or other things. An application for subpoena shall identify the name, title, and address of the person to whom the subpoena is to be directed, and the time and place where that person is to appear to give testimony or to produce specified documents or other things.

§ 703.116 Service of papers, and time computation.

(a) A copy of all pleadings, briefs, or other papers shall be served on the other party or parties, and four copies simultaneously filed with the Board at the Department of Energy, Washington, D.C. 20545. Service shall be made by delivery of a copy, or by mailing the same, addressed to the party upon whom service is to be made or his attorney.

(b) For purposes of time, computation, and extensions:

(1) All time limitations specified for various procedural actions are computed as maximums, and are not to be fully exhausted if the action described can be accomplished in a lesser period. These time limitations are similarly eligible for extension in appropriate circumstances, on good cause shown;

(2) Except as otherwise provided by law, in computing any period of time prescribed by these rules or by any order of the Board, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day; and

(3) Requests for extensions of time from either party shall be made in writing and state good cause therefor.

HEARINGS

§ 703.117 Where and when held.

Hearings will ordinarily be held in the Washington, D.C. area, except that upon request reasonably made and upon good cause shown, the Board may set the hearing at another location. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals and other pertinent factors. On request or motion by either party and upon good cause shown, the Board may, in its discretion, advance or extend a hearing.

§ 703.118 Notice of hearings.

The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will give due regard to the desires of the parties and to the requirement for just and inexpensive determination of appeals without unnecessary delay.

§ 703.119 Unexcused absence of a party.

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in § 703.111.

§ 703.120 Nature of hearings.

(a) Hearings shall be as informal as the Board may consider to be reasonable and appropriate under the circumstances. Appellant and respondent may offer at a hearing on the merits such relevant evidence as each deems appropriate and as would be admissible under the Federal Rules of Evidence (Pub. L. 93-595, 88 Stat. 1926, January 2, 1975), subject, however, to the sound discretion of the Board, or presiding administrative judge in supervising the extent and manner of presentation of such evidence. In general, admissibility will hinge on relevancy and materiality. Letters or copies thereof, affidavits, or other evidence not ordinarily admissible under the generally accepted rules of evidence, may be admitted in the discretion of the presiding member.

(b) The weight to be attached to evidence presented in any particular form will be within the discretion of the Board, taking into consideration all the circumstances of the particular case. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may in any case require evidence in addition to that offered by the parties.

§ 703.121 Examination of witnesses.

Witnesses before the Board will be examined orally under oath or affirmation, unless the facts are stipulated, or the Board shall otherwise order. If the testimony of a witness is not given under oath, the Board shall invite the attention of the witness to the provisions of Title 18, U.S.C. 287 and 1001.

§ 703.122 Copies of papers.

When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.

§ 703.123 Posthearing briefs.

Posthearing briefs may be submitted upon such terms as may be agreed upon by the parties and the presiding member at the conclusion of the hearing. Ordinarily, they will be simultaneous briefs, exchanged within 30 days after receipt of transcript.

§ 703.124 Transcript of proceedings.

Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Transcripts or copies of the proceedings shall be supplied to the parties on their request at such rates as may be fixed.

§ 703.125 Withdrawal of exhibits.

After final decision, the Board may, upon request and after notice to the other parties, in its discretion, permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

REPRESENTATION

§ 703.126 The appellant.

An individual appellant may appear before the Board in person, a corporation by an officer thereof, a partnership or joint venture by a member thereof, or any of these by an attorney at law duly licensed in any state, commonwealth, territory, or in the District of Columbia. An attorney representing an appellant shall file a written notice of appearance with the Board.

§ 703.127 The respondent.

Government counsel may, in accordance with their authority, represent the interest of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given appellant or its attorney in the form specified by the Board from time to time.

DECISIONS

§ 703.128 Written decisions.

Decisions of the Board shall be made in writing and served simultaneously to all parties. The rules of the Board and all final orders and decisions shall be open for public inspection at the offices of the Board, and the DOE public document room in Washington, D.C. Decisions of the Board will be made solely upon the record, as described in § 703.113.

MOTION FOR RECONSIDERATION

§ 703.129 Motion for reconsideration.

A motion for reconsideration, if filed by a party, shall set forth specifically the ground or grounds relied upon to sustain the motion, and shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

DISMISSALS

§ 703.130 Dismissal without prejudice.

In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. In any such case where the suspension has continued, or it appears that it will continue for an inordinate length of time, the Board may, in its discretion, dismiss such appeal from its docket without prejudice to its restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

§ 703.131 Dismissal for failure to prosecute.

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be either dismissed or granted, as appropriate. If the offending party shall fail to show such cause, the Board may take such action as it deems reasonable and proper under the circumstances.

EX PARTE COMMUNICATIONS

§ 703.132 Ex Parte conduct.

No member of the Board, or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members nor to requests for information concerning the Board's administrative functions or procedures.

SANCTIONS

§ 703.133 Sanctions.

If any party fails or refuses to obey an order issued by the Board, the Board may make such order in regard to the failure as it considers necessary to the just and expeditious conduct of the appeal.

SECURITY

§ 703.134 Security requirements.

All proceedings shall be so conducted and the Board shall take such steps as necessary to insure compliance with the security regulations and requirements of the Agency.

Subpart B—Rules of the Contract Adjustment Board [Reserved]

APPENDIX A—ORGANIZATION AND FUNCTIONS, DOE MANUAL, CHAPTER 0114, OFFICE OF THE BOARD OF CONTRACT APPEALS

0114-01 SUPERVISION

Under the supervision of a Chairman, who is appointed by and reports to the Administrator.

0114-02 FUNCTIONS AND AUTHORITY

Acts for the Administrator to provide for the orderly, impartial, fair, and expeditious handling of contract appeals, applications for extraordinary relief under Pub. L. 85-804, and such other matters as may be referred to the Board by the Administrator. Specifically:

021 The Board, both when acting as the Board of Contract Appeals and as the Contract Adjustment Board, acts for and exercises the full authority of the Administrator in hearing, considering, and deciding all proceedings within the scope of this chapter.

022 The Board shall have all powers necessary for the performance of its duties, including but not limited to the authority to conduct hearings, call witnesses, dismiss appeals with or without prejudice, order the production of documents and other evidence, administer oaths and affirmations, issue subpoenas, order depositions to be taken, take official notice of facts within general knowledge, and decide all questions of fact and law. Decisions rendered by the Board are final decisions of the Administrator. All such decisions will be by a majority of the Board. Decisions on questions of law are subject to 68 Stat. 81 (1954), 41 U.S.C. sections 321 and 322 (1970 ed.) relating to finality.

023 Members of the Board are designated as Administrative Judges and the Chairman is designated Chief Administrative Judge.

024 Board members may perform such other quasi-judicial functions as are assigned by the Administrator.

025 The Board shall establish and issue rules of procedure not inconsistent with this chapter.

026 When acting as the Board of Contract Appeals, the Board shall:

a. Consider and decide appeals from decisions of DOE contracting officers in disputes arising under:

(1) Any DOE prime contract containing a dispute provision requiring an DOE contracting officer's decision and providing for

an appeal therefrom to the Administrator, and

(2) Any subcontract entered into by a cost-type prime contractor in which such a dispute provision has been included in accordance with DOE Procurement Regulations.

b. Assess liquidated damages pursuant to section 104(c) of the Contract Work Hours and Safety Standards Act (40 U.S.C. sections 327-332).

c. Conduct hearings and decide proceedings for debarment of contractors.

027 When acting as the Contract Adjustment Board, the Board shall:

a. Exercise the authority of the Administrator with respect to contractual fairness cases and such other matters as may be referred to the Board by the Administrator or his designee in accordance with the provisions of 41 CFR 9-17, "Extraordinary Contractual Actions to Facilitate the National Defense." When so designated, and functioning as the Contract Adjustment Board, it shall proceed in the same general manner as when it presides as the Board of Contract Appeals. However, decisions of the Contract Adjustment Board will not be cited as precedent on other matters brought to the Contract Adjustment Board.

b. Hear and decide a case as the Contract Adjustment Board when such a case is otherwise before it as the Board of Contract Appeals under 10 CFR Part 703 and the case appears to be one of contractual fairness.

0114-03 BOARD MEMBERSHIP

The Board shall consist of three members appointed by Administrator, who shall be qualified attorneys admitted to practice before the highest court of any State or the District of Columbia. The Administrator shall designate one of the members as Chairman. The Chairman shall designate a member of the Board to be Vice Chairman. In the absence of the Chairman, the Vice Chairman shall act for the Chairman. A single member may be assigned by the Chairman to conduct hearings and to develop the record including deciding any motion which is not dispositive of the appeal.

0114-04 RESPONSIBILITIES OF THE CHAIRMAN

041 The Chairman shall preside over the Board's activities and shall be responsible for:

a. The administration of the Board;

b. Delegation of functions and responsibilities to Board members;

c. The receipt and custody of all papers and material relating to contract appeals; and

d. The submission of a report, not less often than annually, to the Administrator on the status of the Board's activities.

PART 706—SECURITY POLICIES AND PRACTICES RELATING TO LABOR-MANAGEMENT RELATIONS

GENERAL

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706.1 Purpose.
706.2 Basis and scope.

SECURITY POLICIES AND PROCEDURES IN NATIONAL LABOR RELATIONS BOARD PROCEEDINGS

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706.11 Consent elections.
706.12 Administrative Law Judges.
706.13 Clearance of counsel.
706.14 DOE's role in proceedings.

LOYALTY OF PARTICIPANTS

706.20 Policy.

CONTRACT NEGOTIATION AND ADMINISTRATION

706.30 Clearance of certain local union representatives.
706.31 Clearance of conciliators and arbitrators.
706.32 Security indoctrination of non-employee representatives.
706.40 Final responsibility of DOE in security matters.

AUTHORITY: Sec. 161, 68 Stat. 948, as amended; 42 U.S.C. 2201.

SOURCE: 41 FR 56776, Dec. 30, 1976, unless otherwise noted.

GENERAL

§ 706.1 Purpose.

The purpose of this part is to set forth Department of Energy, hereinafter "DOE," security policies and practices in the area of labor-management relations.

§ 706.2 Basis and scope.

The specific policies contained in this part are worked out within the framework of DOE's general objectives for labor-management relations in the DOE program, namely:

(a) Wholehearted acceptance by contractors and by labor and its representatives of the moral responsibility inherent in participation in the DOE program;

(b) Development of procedures to assure (1) that all participants in the program are loyal to the United States including those whose participation involves the exercise of negotiating and disciplinary authority over bargaining units, and (2) that determination of unit, jurisdiction, and similar questions will not breach security;

(c) Continuity of production at vital DOE installations;

(d) Consistent with DOE's responsibility under the law, the least possible governmental interference with the efficient management expected from DOE contractors;

(e) Minimum interference with the traditional rights and privileges of American labor.

SECURITY POLICIES AND PROCEDURES IN NATIONAL LABOR RELATIONS BOARD PROCEEDINGS

§ 706.10 Policy.

It is policy of DOE that NLRB cases falling within the scope of the Labor Management Relations Act at the various DOE installations should be conducted in normal fashion whereever possible, on the basis of open hearings, unclassified records and published decisions. This policy does not preclude adoption of special arrangements which may be required for reasons of program security at any stage of the proceedings in particular areas.

§ 706.11 Consent elections.

In accordance with the recommendation of the President's Commission on Labor Relations in the Atomic Energy Installations, it is the policy of DOE to encourage every effort by management and labor at DOE installations to determine bargaining units and representatives by agreement and consent elections in preference to contested proceedings before the National Labor Relations Board.

§ 706.12 Administrative Law Judges.

By agreement with the National Labor Relations Board, a panel of cleared NLRB administrative law judges is maintained to facilitate resolution of questions as to the materiality of classified information in NLRB hearings and to facilitate preparation of an unclassified record. The assignment of individual administrative law judges to DOE cases remains a matter within the discretion of the National Labor Relations Board.

§ 706.13 Clearance of counsel.

It is recognized that clearance of counsel for the parties is sometimes desirable for proper preparation of a case even though the record is to be unclassified. Clearance of counsel makes possible their participation in any closed discussions needed preparatory to making an unclassified record. Each party is responsible for requesting clearance of its counsel well in advance so that clearance requirements will not delay the proceeding. The clearance of temporary special counsel will be terminated on completion of the proceeding.

§ 706.14 DOE's role in proceedings.

If controversies within the scope of the Labor Management Relations Act arise which cannot be adjusted by mutual agreement, and contested proceedings before NLRB result, each party to such proceedings will present his own position and the evidence in support thereof with due regard for existing security rules. DOE will be continuously informed of the progress of such proceedings and will act as may appear desirable (a) to assure the protection of classified information; (b) to assure that material and relevant information is not withheld from the record on grounds of security if such information can be supplied in unclassified form; and (c) to assist in determining appropriate action where a decision may turn on data which can be expressed only in classified form.

LOYALTY OF PARTICIPANTS

§ 706.20 Policy.

Loyalty to the United States is a paramount factor applicable to all participants in DOE program including those whose participation (although not requiring access to restricted data) involves the exercise of administrative, negotiating and disciplinary authority over bargaining units composed of employees engaged on classified work. Individuals involved in questions of loyalty will be given full opportunity to explore the questions with DOE. DOE will take such further steps as may be appropriate in the circumstances.

CONTRACT NEGOTIATION AND ADMINISTRATION

§ 706.30 Clearance of certain local union representatives.

It is recognized that security clearance of certain union representatives may be necessary to assure opportunity for effective representation of employees in collective bargaining relationships with DOE contractors. Accordingly, DOE managers may authorize investigation for "Q" clearance of union officials whose functions as representatives of employees may reasonably be expected to require access to Restricted Data under NLRB and other procedures according to applicable law (LMRA, 1947); to effectively perform their representation functions in the resolution of grievances and in other collective bargaining relationships with contractors; to effectuate the recommendation of the President's Commission on Labor Relations in the Atomic Energy Installations in respect to integration of the union into the plant organization "as to two-way channel of communication and a medium of understanding between management and workers".

(a) In the pre-contract stage of union-management relations, the requirements of the Labor Management Relations Act normally will be the applicable criteria for determining which bargaining representatives, if any, will need access to classified material in the exercise of their functions as employee representatives.

(b) After a bargaining relationship has been established between the contractor and the representatives of its employees the nature of this relationship and the procedures followed in it normally will be the controlling criteria for determination of the access to be granted to particular persons in carrying out their functions as employee representatives. For example, many contract grievance procedures designate by title certain union and management officials who are to have definite roles in the resolution of grievances under the procedure. Investigation for "Q" clearance will normally be in order for such officials, both company and union, employee, and non-employee. In addition, persons not so designated may be investigated for clearance where the company and the union advise DOE manager that their established relationships contemplate access for such persons.

§ 706.31 Clearance of conciliators and arbitrators.

Conciliators and arbitrators who are regularly assigned to DOE cases may be processed for "Q" clearance at the discretion of the local DOE manager, either on the manager's initiative or at the request of a contractor.

§ 706.32 Security indoctrination of non-employee representatives.

All collective bargaining representatives, company and union, who are to have access to Restricted Data, will be given appropriate security indoctrination.

§ 706.40 Final responsibility of DOE in security matters.

On all matters of security at all Government-owned, privately operated DOE installations, DOE retains absolute and final authority, and neither the security rules nor their administration are matters for collective bargaining between management and labor, insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible DOE will consult with representatives of management and labor in formulating security rules and regulations that affect the collective bargaining process.

PART 710—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER OR SIGNIFICANT QUANTITIES OF SPECIAL NUCLEAR MATERIAL

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710.38 Washington Area cases.
710.39 Time frames.
Appendix A—Selected Provisions of the Atomic Energy Act of 1954, as Amended, Sec. 141 (42 U.S.C. 2161), Sec. 145 (42 U.S.C. 2165), Sec. 161 (42 U.S.C. 2201)

Authority: Sec. 145, 68 Stat. 942, as amended (42 U.S.C. 2165); sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201), E.O. 10450, 3 CFR 1949-1953 comp., p. 936, as amended; E.O. 10865, 3 CFR 1959-1963 comp., p. 398, as amended, 3 CFR, Chap. IV; sec. 104(c), 38 Stat. 1237 (42 U.S.C. 5814); sec. 105(a), 88 Stat. 1238 (42 U.S.C. 5815).

Source: 42 FR 52382, Sept. 30, 1977, unless otherwise noted.

Editorial Note: Nomenclature changes affecting Part 710 appear at 46 FR 18170, Mar. 23, 1981.

General Provisions

§ 710.1 Purpose.

(a) This part establishes the criteria, procedures and methods for resolving questions concerning the eligibility of individuals who are employed by or applicants for employment with DOE contractors, agents, and access permittees of the DOE, individuals who are DOE employees or applicants for DOE employment, and other persons designated by the Secretary of the DOE, for access to Restricted Data or significant quantities of special nuclear material; pursuant to the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974 or for access to national security information.

(b) This part is published to implement Executive Orders 10865, 25 FR 1583 (February 24, 1960) and 10450, 18 FR 2489 (April 27, 1954), both as amended.

§ 710.2 Scope.

The criteria and procedures outlined in this part shall be used in those cases in which there are questions of eligibility for DOE access authorization involving:

(a) Those employees (including consultants) of, and those applicants for employment with, contractors and agents of the DOE.

(b) Access permittees of the DOE and there employees (including consultants) and applicants for employment;

(c) Employees (including consultants) of, and applicants for employment with, the DOE; and

(d) Those other persons designated by the Administrator of the DOE.

§ 710.3 Reference.

The pertinent sections of the Atomic Energy Act of 1954, as amended, which remain in effect are set forth in Appendix A.

§ 710.4 Policy.

(a) It is the policy of DOE to carry out its responsibility for the security of the energy research and development programs in a manner consistent with traditional American concepts of justice. To this end, the Secretary has established criteria for determining eligibility for access authorization and will afford those individuals described in § 710.2 the opportunity for administrative review of questions concerning their eligibility for access authorization.

(b) In instances where the individual has been convicted of a felony crime, and is currently serving court ordered probation or parole, the DOE may withhold processing applications for security clearance or access authorization until such time as the individual completes serving the probation parole.

[48 FR 46500, Oct. 13, 1983]

§ 710.5 Definitions.

As used in this part:

(a) "Access authorization" means an administrative determination that an individual (including a consultant) who is employed by, or is an applicant for employment with DOE contractors, agents, and access permittees of DOE is eligible for access to Restricted Data or national security information or is eligible for access to, or control over, significant quantities of special nuclear material; and an individual (including a consultant) who is a DOE employee or applicant for DOE employment or otherwise designated by the Secretary of DOE is eligible for security clearance.

(b) For the purposes of this regulation, "significant quantities of special nuclear material" means unclassified special nuclear material, not subject to a Nuclear Regulatory Commission (NRC) license, in one facility or one shipment in the following quantities:

(1) Uranium 235 (contained in uranium enriched 20 percent or more in the Uranium 235 isotope) alone, or in combination with Plutonium and/or Uranium 233 when (multiplying the Plutonium and/or Uranium 233 content by 2½) the total is 1,000 grams or more.

(2) Plutonium and/or Uranium 233 when the Plutonium and/or Uranium 233 content is 400 grams or more.

(3) Special nuclear material in lesser quantities but which is located in the same area or shipment with other special nuclear material with which it could be selectively combined to produce the equivalent quantities in paragraph (b)(1) or (2) of this section.

(c) "DOE Personnel Security Review Examination" means a review process as described in § 710.31, in which the designated DOE Personnel Security Review Examiners individually and independently review questions concerning the eligibility or continued eligibility of those individuals described in § 710.2, and offer findings and recommendations to the DOE Assistant Secretary for Defense Programs.

(d) "DOE Personnel Security Review Examiners" are persons appointed by the DOE Assistant Secretary for Defense Programs who are designated to review questions concerning the eligibility or continued eligibility of those individuals described in § 710.2. Examiners shall be U.S. citizens and have a DOE "Q" clearance and shall not otherwise be in the employ of the DOE.

(e) "Hearing Counsel" means a DOE attorney assigned to prepare and conduct hearings as provided in §§ 710.26 and 710.27.

(f) "Manager of Operations" means the Manager of a DOE Operations Office, the Manager of Pittsburgh Naval Reactors Office, the Manager of Schenectady Naval Reactors Office (and at Headquarters, the Director, Office of Safeguards and Security—see § 710.38).

(g) "Hearing Officer" is an individual appointed by the Manager of Operations who, upon considering the evidence at a hearing, makes specific findings as to the truth of the derogatory information, and determines whether to recommend to the Manager of Operations the granting, denial, or revocation of an individual's access authorization. Hearing Officers shall be U.S. citizens and have a DOE "Q" clearance.

(h) "Secretary" means the head of the Department of Energy as provided by section 201 of the Department of Energy Organization Act.

(i) Throughout this part the use of the male gender shall include the female gender.

[46 FR 18170, Mar. 23, 1981 and 48 FR 46500, Oct. 13, 1983]

Criteria for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material

§ 710.10 Application of the criteria.

(a) The decision as to access authorization is a comprehensive, commonsense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would endanger the common defense and security and would be clearly consistent with the national interest.

(b) To assist in making these determinations, on the basis of all the information in a particular case, there are set forth in this part a number of specific types of derogatory information. These criteria are not exhaustive but contain the principal types of derogatory information which create a question as to the individual's eligibility for access authorization. While there must necessarily be adherence to such criteria, DOE is not limited thereto, nor precluded from exercising its judgment that information or facts in a case under its cognizance are derogatory although at variance with, or outside the scope of, the stated categories. These criteria are subject to continuing review and may be revised from time to time as experience and circumstances may make desirable.

(c) When the reports of investigation of an individual contain information reasonably tending to establish the truth of one or more of the items in the criteria, such information shall be regarded as substantially derogatory and create a question as to the individual's eligibility for access authorization. The Manager of Operations may authorize an interview with the individual, or other investigation as deemed appropriate, and on the basis of such interview and/or investigation, may authorize the granting of access authorization. If the question as to the individual's eligibility is not resolved through interview, additional investigation, or when applicable, through a psychiatric evaluation, the Manager of Operations will forward the individual's case to the Director, Office of Safeguards and Security, DOE. The Director, Office of Safeguards and Security, DOE, may authorize: (1) The granting of access authorization, (2) such other investigation as the Director deems appropriate, or (3) the institution of the procedures set forth in § 710.20 et seq. The Director, Office of Safeguards and Security, must authorize one of these options within 30 days from the receipt of the case from the Manager of Operations, unless an extension is made by the Deputy Assistant Secretary for Security Affairs.

(d) In resolving a question concerning the eligibility or continued eligibility of an individual for access authorization, the DOE Hearing Officer shall consider the extent of activities, the period in which such activities occurred, the length of time which has since elapsed, and the attitudes and convictions of the individual in determining whether the recommendation will be adverse or favorable.

[40 FR 36302, Aug. 20, 1975, as amended at 47 FR 30718, July 15, 1982; 48 FR 46500, Oct. 13, 1983]

§ 710.11 Criteria.

Derogatory information included, but not limited to, those cases in which the individual has:

(a) Committed, prepared or attempted to commit, or aided, abetted or conspired with another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(b) Knowingly established or continued a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, espionage agent, or representative of a foreign nation whose interests are inimical to the interests of the United States, or with any person advocating the use of force or violence to overthrow the Government of the United States by unconstitutional means.

(c) Knowingly held membership in or had a knowing affiliation with, or has taken action which evidences a sympathetic association with the intent of furthering the aims of, or adherence to, and active participation in any foreign or domestic organization, association, movement, group, or combination of persons which advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or Laws of the United States or any state or subdivision thereof by unlawful means.

(d) Publicly or privately advocates, or participates in the activities of a group or organization, which has as its goal, revolution by force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means with the knowledge that it will further those goals.

(e) Parent(s), brother(s), sister(s), spouse, or offspring residing in a nation whose interests may be inimical to the interests of the United States, or in satellites or occupied areas thereof (to be evaluated in the light of the risk that pressure applied through such relatives could force the individual to act contrary to national security).

(f) Has deliberately misrepresented, falsified or omitted significant information from a Personnel Security Questionnaire, a personnel qualifications statement, or a personnel security interview.

(g) Has failed to protect classified information, or safeguard special nuclear material; or has willfully violated or disregarded security or safeguards regulations to a degree which would endanger the common defense and security or has intentionally disclosed classified information to a person unauthorized to receive such information.

(h) Has an illness or mental condition of a nature which in the opinion of competent medical authority causes, or may cause, significant defect in the judgment or reliability of the individual, or has refused to be examined by a psychiatrist.

(i) Has refused to testify before a Congressional Committee, Federal or state court, or Federal administrative body, regarding charges relevant to eligibility for DOE access authorization.

(j) Is a user of alcohol habitually to excess, or has been such without adequate evidence of rehabilitation or reformation.

(k) Has used, trafficked in, sold, transferred or possessed a drug or other substance listed in the schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, without adequate evidence of rehabilitation or reformation.

(l) Has engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy, and there is no adequate evidence of rehabilitation or reformation; or which furnishes reason to believe that the individual may be subject to coercion, influence, or pressure which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include but are not limited to sexual activity, demonstrated financial irresponsibility or notoriously disgraceful conduct.

[47 FR 30718, July 15, 1982]

PROCEDURES

§ 710.20 Purpose of the procedures.

These procedures establish methods for the conduct of hearings and administrative review of questions concerning an individual's eligibility for access authorization when it is determined that such questions cannot be favorably resolved by interview or other investigation.

[42 FR 52382, Sept. 30, 1977, as amended at 46 FR 18170, Mar. 23, 1981]

§ 710.21 Suspension of access authorization.

In those cases where information is received which raises a question concerning the continued eligibility of an individual for DOE access authorization, the Manager of Operations shall determine whether the individual's access authorization should be suspended pending the final determination resulting from the operations of the procedures provided in this part. In making the determination, the Manager of Operations shall consider such factors as the seriousness of the derogatory information developed, the possible access of the individual to classified information or significant quantities of special nuclear material, and the individual's opportunity by reason of the individual's position to commit acts adversely affecting the national security. The access authorization of an individual shall not be suspended except by direction of the Manager of Operations. Following the decision to suspend the individual's access authorization, the Manager of Operations shall immediately notify the Assistant Secretary for Defense Programs through the Director, Office of Safeguards and Security. In addition, the Manager, within 10 days of the date of suspension shall submit a request for authority to conduct a hearing to the Director, Office of Safeguards and Security. This request should also contain an explanation of the basis for the suspension.

[48 FR 46501, Oct. 13, 1983]

§ 710.22 Notice to individual.

When the Director, Office of Safeguards and Security, has directed the institution of these administrative review procedures with respect to an individual's questioned eligibility for access authorization (as per § 710.10(c)), the Manager of Operations shall prepare a notification letter, approved by the local Office of Chief Counsel, for delivery to the individual within 30 days of the receipt of such directive from the Office of Safeguards and Security, unless an extension has been authorized by the Director, Office of Safeguards and Security. Where practicable, such letter shall be presented to the individual in person. The letter shall state:

(a) That reliable information in possession of DOE has created a substantial doubt concerning the individual's eligibility for access authorization;

(b) The information which creates a substantial doubt regarding the individual's eligibility for access authorization shall be as comprehensive and detailed as the national security permits;

(c) That in the event the individual desires a hearing the individual must, within twenty days of the date of receipt of the notification letter, indicate in writing to the Manager of Operations from whom the letter was received that the individual wishes a hearing before a Hearing Officer.

(d) That within twenty days of the date of receipt of the notification letter, the individual shall file with the Manager from whom he received such letter his written answer under oath or affirmation to each item of reported information which raises the question of the individual's eligibility for access authorization;

(e) That, if the individual so requests, a hearing will be scheduled before a Hearing Officer, with due regard for the convenience and necessity of the parties or their representatives, for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.

(f) That, if the individual requests a hearing, the individual will be notified in writing of the Hearing Officer's identity when the Hearing Officer is appointed by the Manager of Operations.

(g) That the individual will have the right to appear personally before a Hearing Officer, and present evidence in his own behalf, through witnesses, or by documents, or both, and subject to the limitations set forth in § 710.27(f), be present during the entire hearing and be accompanied, represented and advised by counsel of his own choosing;

(h) That the individual's failure to file a written request for a hearing before a Hearing Officer, in accordance with paragraphs (c) and (d) of this section, will be considered as a relinquishment by him of the opportunity of availing himself of the hearing and review procedure provided in this part, and that in such event a recommendation as to the final action to be taken will be made by the Manager of Operations and submitted to the Assistant Secretary for Defense Programs for decision on the basis of the information in the case without reference to a Hearing Officer;

(i) The individual's access authorization status until further notice;

(j) The name of the designated DOE official to contact for any further information desired.

[42 FR 52382, Sept. 30, 1977, as amended at 46 FR 18170, Mar. 23, 1981; 48 FR 46501, Oct. 13, 1983]

§ 710.23 Additional information.

A copy of this part shall be given to the individual with the notification letter.

§ 710.24 Failure of individual to request a hearing.

(a) In the event the individual fails, within the prescribed time, to file a written request for a hearing before a Hearing Officer, pursuant to § 710.22, a recommendation as to the final action to be taken shall be made by the Manager of Operations to the Assistant Secretary for Defense Programs on the basis of the information in the case;

(b) The Manager of Operations may for good cause shown, at the request of the individual, extend the time for filing a written request for a hearing or time for filing a written answer to the matters contained in the notification letter.

§ 710.25 Selection of DOE Hearing Counsel.

(a) Upon receipt from the individual of a written answer to the notification letter, signifying the individual's desire to appear before a Hearing Officer and answering under oath or affirmation the allegations contained in the notification letter, an DOE attorney shall forthwith be assigned by the Manager of Operations to act as Hearing Counsel;

(b) Hearing Counsel shall, prior to the scheduling of the hearings, review the information in the case and shall request the presence of witnesses and the production of physical evidence in accordance with the provisions of paragraphs (m), (n), (o), and (p) of § 710.27. When the presence of a witness is deemed by the Hearing Counsel to be necessary or desirable to a proper determination of the issues before the Hearing Officer, the Manager of Operations shall make arrangements by subpoena or otherwise for such witnesses to appear, be confronted by the individual, and be subject to examination and cross-examination.

(c) Hearing Counsel is authorized to consult directly with the individual if he is not represented by counsel, or if so represented with counsel or representative, for purposes of reaching mutual agreement upon arrangements for expeditious hearing of the case. Such arrangements may include clarification of issues and stipulations with respect to testimony and contents of documents and other physical evidence. Such stipulations when entered into shall be binding upon the individual and the Secretary for the purposes of this part. Prior to such consultation the Hearing Counsel shall advise the individual of his right to counsel or other representation and of the possibility that any statements made by the individual to the Hearing Counsel may be used in subsequent proceedings;

(d) The individual is responsible for producing witnesses in his own behalf or presenting other proof before the board to support the individual's answer and defense to the allegations contained in the notification letter. When requested, however, Hearing Counsel shall assist the individual to the extent practicable and necessary. In the Hearing Counsel's sound discretion he may request the Manager of Operations to arrange for the issuance of subpoenas for witnesses to attend the hearing in the individual's behalf, or for the production of specific documents or other physical evidence, provided a showing of the necessity for such assistance has been made.

[42 FR 52382, Sept. 30, 1977, as amended at 46 FR 18171, Mar. 23, 1981]

§ 710.26 Appointment of Hearing Officers.

(a) Upon notification from the Hearing Counsel that arrangements for an expeditious hearing have been completed, the Manager of Operations shall appoint a Hearing Officer.

(b) No person shall serve as a Hearing Officer who has prejudged the case to be heard; who possesses information that would impair his ability to render impartial recommendations or advice; or who for bias or prejudice generated for any reason would be unable to render fair and impartial recommendations or advice.

(c) Immediately upon the appointment of a Hearing Officer, the Manager of Operations will notify the individual of the identity of the Hearing Officer and of the individual's right to challenge the Hearing Officer for cause. Such challenge, accompanied by the reasons therefor, must be submitted to the Manager of Operations within seventy-two hours of the receipt of the notice of the identity of the Hearing Officer.

(d) In the event the individual challenges the Hearing Officer, the Manager of Operations will rule on the challenge. Where the challenge of the individual is sustained, the Manager of Operations shall appoint a new Hearing Officer and notify the individual. The individual shall have the right to challenge the new Hearing Officer for cause and such challenge shall be dealt with in the same manner as an original challenge. The Manager of Operations shall also notify the individual of the rejection of any challenge. The Hearing Officer shall convene a hearing as soon as is reasonably practicable.

(e) The Manager of Operations shall notify the individual in writing, at least one week in advance of the date, hour, and place the hearing will convene. In the event the individual fails to appear at the time and place specified, a recommendation as to the final action to be taken shall be made by the Manager of Operations to the Assistant Secretary for Defense Programs on the basis of the record in the case. At the request of the individual, however, the Manager of Operations may permit a hearing at a newly scheduled date, hour, and place for good cause shown.

[46 FR 18171, Mar. 23, 1981]

§ 710.27 Conduct of proceedings.

(a) The proceedings shall be conducted by the Hearing Officer in an orderly, impartial, and decorous manner with every effort made to protect the interest of the government and of the individual in determining the truth of the allegations. Hearings shall commence within 90 days from the date the individual's request for hearing is received. This period can only be extended with the approval of the Director, Office of Safeguards and Security, Headquarters, who will consider the effect of such extension on the interests of both the government and the individual. In performing duties, the Hearing Officer shall always bear in mind and make clear to all concerned that the proceeding is an administrative hearing and not a trial.

(b) The proceedings shall be open only to duly authorized representatives of the staff of DOE, the individual, counsel, and such persons as may be officially authorized by the Hearing Officer. Witnesses shall not testify in the presence of other witnesses;

(c)(1) Hearing Counsel shall examine and cross-examine witnesses and otherwise assist the Hearing Officer in such a manner as to bring out a full and true disclosure of all facts, both favorable and unfavorable, having a bearing on the issues before the Hearing Officer. In performing his duties, he shall avoid the attitude of a prosecutor and shall always bear in mind that the proceeding is an administrative hearing and not a trial;

(2) Hearing Counsel shall express no opinion to the Hearing Officer concerning the merits of the case. Hearing Counsel shall advise the individual of the individual's rights under these procedures when the individual is not represented by counsel of the individual's own choosing.

(d) The Hearing Officer may ask the individual, DOE representatives, and other witnesses any supplemental questions which the Hearing Officer deems appropriate to assure the fullest possible disclosure of relevant and material facts. The proponent of a witness shall conduct the direct examination of that witness;

(e) During the course of the hearing the Hearing Officer shall rule on all questions presented to the Hearing Officer for the Hearing Officer's determination.

(f) In the event it appears in the course of the hearing that Restricted Data or national security information may be disclosed, it shall be the duty of the Hearing Officer to assure that disclosure is not made to persons who are not authorized to receive it.

(g) The Hearing Officer shall admit in evidence any matters either oral or written which are material, relevant and competent in determining the issues involved, including the testimony of responsible persons concerning the integrity of the individual. The utmost latitude shall be permitted with respect to relevancy, materiality, and competency. Every reasonable effort shall be made to obtain the best evidence available. Hearsay evidence may for good cause shown be admitted without regard to technical rules of admissibility and accorded such weight as the circumstances warrant;

(h) Testimony of the individual and witness shall be given under oath or affirmation, and the individual and witnesses shall be subject to cross-examination. Attention of the individual and the witness shall be invited to 18 U.S.C. 1001 and 18 U.S.C. 1621;

(i) The individual shall be afforded the opportunity of testifying in his own behalf;

(j) The Hearing Officer shall endeavor to obtain all the facts that are reasonably available in order to arrive at recommendations. If, prior to or during the proceedings, in the opinion of the Hearing Officer the allegations in the notification letter are not sufficient to cover all matters into which inquiry should be directed, the Hearing Officer shall recommend to the Manager of Operations concerned that, in order to give more adequate notice to the individual, the notification letter should be amended. Any amendment shall be made with the concurrence of Counsel. If, in the opinion of the Hearing Officer, the circumstances of such amendment may involve undue hardships to the individual because of limited time to answer the new allegations in the notification letter, an appropriate adjournment shall be granted upon the request of the individual.

(k) Unless permitted by paragraphs (l), (m), (n), (o), and (p) of this section, the record may contain no information adverse to the individual on any controverted issue unless (1) the information or its substance has been made available to the individual and he offers no objection to its presentation; or (2) the information or its substance is made available to him and the individual is afforded an opportunity to cross-examine the person providing the information. Information whose admission is not prohibited by this paragraph, or by any other provision of this part, may be received and made a part of the record and may be considered by the Hearing Officer or officials charged with making determinations under this part;

(l) A written or oral statement of a person relating to the characterization in the notification letter of any organization or person other than the individual may be received and considered by the Hearing Officer without affording the individual an opportunity to cross-examine the person making the statement on matters relating to the characterization of such organization, or person, provided the individual is given notice that it has been received and may be considered by the Hearing Officer, and is informed of its contents provided such is not prohibited by § 710.27(f);

(m) The individual shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the individual relating to a controverted issue except that any such statement may be received and considered by the Hearing Officer without affording such opportunity in either of the following circumstances;

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of the informant's identity would be substantially harmful to the national interest;

(2) The Secretary or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the Secretary or such special designee has determined

that failure of the Hearing Officer to receive and consider such statement would, in view of the access to Restricted Data, national security information, or significant quantities of special nuclear material sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (i) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the individual, or (ii) due to some other cause determined by the Secretary to be good and sufficient;

(n) Whenever procedures under paragraph (m) (1) or (2) of this section are used (1) the individual shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, and (2) appropriate consideration shall be accorded to the fact that the individual did not have an opportunity to cross-examine such person or persons;

(o) Records compiled in the regular course of business, or other physical evidence other than investigative reports, may be received and considered subject to rebuttal without authenticating witnesses, provided that such information has been furnished to DOE by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary to safeguard Restricted Data, national security information or significant quantities of special nuclear material.

(p) Records compiled in the regular course of business, or other physical evidence other than investigative reports, relating to a controverted issue which, because they are classified, may not be inspected by the individual, may be received and considered provided that:

(1) The Secretary or his special designee for that purpose has made a preliminary determination that such physical evidence appears to be material;

(2) The Secretary or such designee has made a determination that failure to receive and consider such physical evidence would, in view of the access to Restricted Data, national security information or significant quantities of special nuclear material sought, be substantially harmful to the national security; and

(3) To the extent that national security permits, a summary or description of such physical evidence shall be made available to the individual. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency shall be considered.

(q) The Hearing Officer may request the Manager of Operations to arrange for additional investigation on any points which are material to the deliberations of the Hearing Officer and which the Hearing Officer believes need extension or clarification. In this event, the Hearing Officer shall set forth in writing those issues upon which more evidence is requested, identifying where possible persons or sources from which evidence should be sought. The Manager of Operations shall make every effort through appropriate sources to obtain additional information upon the matters indicated by the Hearing Officer;

(r) A written transcript of the entire proceedings shall be made by a person possessing appropriate DOE clearance and, except for portions containing Restricted Data or national security information, a copy of such transcript shall be furnished the individual without cost.

[42 FR 52382, Sept. 30, 1977, as amended at 46 FR 18171, Mar. 23, 1981; 48 FR 46501, Oct. 13, 1983]

§ 710.28 Recommendation of the Hearing Officer.

(a) The Hearing Officer shall carefully consider the record and the standards set forth herein. In reaching its determination the Hearing Officer shall consider the demeanor of the witnesses who have testified before the Hearing Officer, the probability or likelihood of the truth of their testimony, their credibility, the authenticity and accuracy of documentary evidence, or lack of evidence upon some material points in issue. If the individual is, or may be, handicapped by the non-disclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the Hearing Officer shall take that fact into consideration. The Hearing Officer may also consider as part of the record the individual's past employment in the energy research and development program, and the nature and sensitivity of the job he is or may be expected to perform. Possible impact of the loss of the individual's services upon the DOE program shall not be considered by the Hearing Officer;

(b) The Hearing Officer shall make specific findings based upon the records as to whether each of the allegations contained in the notification letter is true or false and the significance which the Hearing Officer attaches to such allegations. These findings shall be supported fully by a statement of reasons which constitute the basis for such findings;

(c) The Hearing Officer's recommendation shall be predicated upon the Hearing Officer's findings. If, after considering all the factors in light of the criteria set forth in this part, the Hearing Officer is of the opinion that it will not endanger the common defense and security and will be clearly consistent with the national interest to grant access authorization to the individual, the Hearing Officer shall make a favorable recommendation; otherwise the Hearing Officer shall make an adverse recommendation.

(d) The Hearing Officer's recommendation shall be submitted to the Manager of Operations, accompanied by a statement of the findings and reasons supporting the Hearing Officer's conclusions within 30 days of the receipt of the hearing transcript by the Hearing Officer, or the closing of the record, whichever is later, unless an extension is granted by the Director, Office of Safeguards and Security.

[42 FR 52382, Sept. 30, 1977, as amended at 46 FR 18171, Mar. 23, 1981; 48 FR 46501, Oct. 13, 1983]

§ 710.29 New evidence.

(a) In the event of the discovery of new evidence by the individual prior to final determination of the individual's eligibility for access authorization, such evidence shall be submitted by the individual or his representative to the Manager of Operations from whom he received the notification letter;

(b) The Manager of Operations with the advice of Hearing Counsel shall review the application for the presentation of new evidence to ascertain its materiality and relevancy and further, that the individual or his representative is without fault in failing to present the evidence before. In the event it is determined that the new evidence should be received, the Manager of Operations shall:

(1) Refer the matter to the Hearing Officer who had been appointed in the individual's case when the Manager of Operations has not yet transmitted the record to the Assistant Secretary for Defense Programs. The Hearing Officer receiving the application for the presentation of the new evidence shall determine the form in which it shall be received, whether by testimony before the Hearing Officer, by deposition, or by affidavit.

(2) In those cases where the Manager of Operations has forwarded the record to the Assistant Secretary for Defense Programs, the application for presentation of new evidence shall be referred to the Assistant Secretary for Defense Programs with appropriate comment and recommendations. In the event the Assistant Secretary for Defense Programs determines that the new evidence should be received, he shall determine the form in which it shall be received, whether by testimony before a Hearing Officer, by deposition or by affidavit.

[42 FR 52382, Sept. 30, 1977, as amended at 46 FR 18171, Mar. 23, 1981]

§ 710.30 Actions on the recommendations.

(a) The signed report of the Hearing Officer containing findings, supporting reasons, conclusions and recommendations, shall be submitted to the Manager of Operations, together with the hearing record, within 30 days of the Hearing Officer's receipt of the hearing transcript or the closing of the record, whichever is later, unless an extension is granted by the Director, Office of Safeguards and Security.

(b) Upon receipt of the findings and recommendation of the Hearing Officer and the record, the Manager of Operations shall forthwith transmit it to the Assistant Secretary for Defense Programs through the Director, Division of Safeguards and Security. In those cases where denial of access authorization is recommended by the Hearing Officer, the Manager of Operations shall forward a statement concerning the effect which denial of access authorization would have upon the energy research and development program.

(c) The Assistant Secretary for Defense Programs may return the record to the Manager of Operations for further proceedings by the Hearing Officer with respect to specific matters designated by the Assistant Secretary for Defense Programs.

(d)(1) In the event a recommendation by the Hearing Officer for a denial of access authorization, the individual shall be immediately notified in writing of that fact by the Assistant Secretary for Defense Programs and shall be informed of the Hearing Officer's findings with respect to each allegation contained in the notification letter. The individual shall also be notified of his right to request a review of his case by the DOE Personnel Security Review Examiner and of his right to submit a brief in support of his contentions. The request for a review shall be submitted to the Assistant Secretary for Defense Programs within five days after the receipt of the notice. The brief shall be forwarded to the Assistant Secretary for Defense Programs through the Director, Division of Safeguards and Security, no later than 10 days after receipt of such notice, unless such time is extended by the Assistant Secretary for Defense Programs for good cause shown;

(2) Where the individual requests a review of the adverse recommendation, the Assistant Secretary for Defense Programs shall forthwith send the record, with all findings and recommendations, to the Personnel Security Review Examiner;

(3) In the event the individual fails to request a review by the DOE Personnel Security Review Examiner of an adverse recommendation within the prescribed time, the final determination shall be made on the basis of the record with all findings and recommendations;

(e) Where the DOE Hearing Officer has made a recommendation favorable to the individual and the Assistant Secretary for Defense Programs proposes to transmit the record to the Personnel Security Review Examiner for its recommendation, the Assistant Secretary for Defense Programs shall immediately cause the individual to be notified of that fact and of those matters contained in the notification letter concerning which he desires the advice of the Personnel Security Review Examiner. The Assistant Secretary for Defense Programs shall further inform the individual that he may submit a brief concerning such matters for the consideration of the Personnel Security Review Examiner. Such brief shall be filed not later than 10 days from the receipt of the notice by the individual, unless extended for good cause shown. The brief shall be forwarded to the Assistant Administrator for National Security for transmission to the Personnel Security Review Examiner.

[42 FR 52382, Sept. 30, 1977, as amended at 48 FR 46501, Oct. 13, 1983]

§ 710.31 Recommendations of the DOE Personnel Security Review Examiners.

(a) The Assistant Secretary for Defense Programs shall designate three DOE Personnel Security Review Examiners to conduct a DOE Personnel Security Review Examination of the record of the case. The designated Examiners shall individually and independently, without consulting or otherwise communicating with one another, consider the matter under review based upon the record supplemented by such brief as the individual submits. Examiners may request such additional briefs as any of them deems appropriate, which will be obtained by the Assistant Secretary for Defense Programs and provided to each Examiner. In any case where an Examiner determines that additional evidence or further proceedings are necessary, the record may be returned to the Assistant Secretary for Defense Programs with a recommendation that the case be remanded to the Manager of Operations for appropriate action, which may include returning the case to the Hearing Officer and reconvening the hearing to obtain additional testimony.

(b) In the Examiner's consideration, each shall make individual findings and recommendations on the record supplemented by additional testimony or briefs as have previously been determined by an Examiner(s) as appropriate. When additional testimony is taken by the Hearing Officer, a verbatim transcript of such testimony shall be made part of the record.

(c) The Examiners shall not consider the possible impact of the loss of the individual's services upon the DOE program.

(d) After consideration, each Examiner shall individually prepare a report of findings and recommendations and submit the report in writing to the Assistant Secretary for Defense Programs. These findings and recommendations shall be fully supported by stated reasons for their conclusions. Except in those cases where the Personnel Security Review Examiners have requested additional information as provided for in paragraphs (a) or (b) of this section, the Personnel Security Review Examiners shall submit their report of findings and recommendations to the Assistant Secretary for Defense Programs within 45 days of their receipt of each case, unless an extension is granted by the Deputy Assistant Secretary for Security Affairs.

[46 FR 18172, Mar. 23, 1981, as amended at 48 FR 46501, Oct. 13, 1983]

§ 710.32 Action by the Assistant Secretary for Defense Programs.

(a) The Assistant Secretary for Defense Programs, on the basis of the record accompanied by all recommendations, shall then make a final determination whether access authorization shall be granted or denied;

(b) In making the determination as to whether access authorization shall be granted or denied, the Assistant Secretary for Defense Programs shall give due recognition to the favorable as well as the unfavorable information concerning the individual and shall take into account the value of the individual's services to the energy research and the development program and the operational consequences of denial of access authorization;

(c) In the event of an adverse determination, the Assistant Secretary for Defense Programs shall notify the individual through the Manager of Operations of his decisions that access authorization is being denied or revoked and of his findings with respect to each allegation contained in the notification letter for transmittal to the individual.

§ 710.33 Action by the Secretary.

(a) Whenever an individual has not been afforded an opportunity to confront and cross-examine witnesses who have furnished information adverse to the individual under the provisions of § 710.27 (m), (n), (o), or (p) and an adverse recommendation has been made by the Assistant Secretary for Defense Programs, the Secretary shall personally review the record and determine whether access authorization shall be granted, denied or revoked, based upon the record;

(b) When the Secretary determines to deny or revoke access authorization the individual will be notified through the Manager of Operations of his decision that access authorization is being denied or revoked and of his findings with respect to each allegation contained in the notification letter for transmittal to the individual;

(c) Nothing contained in these procedures shall be deemed to limit or affect the responsibility and powers of the Secretary to deny or revoke access to Restricted Data, national security information, or significant quantities of special nuclear material if the security of the nation so requires. The Secretary's authority may not be delegated and may be exercised only when the Secretary determines that the procedures prescribed in § 710.27 (m), (n), (o), or (p) cannot be invoked consistently with the national security and such determination shall be conclusive.

§ 710.34 Reconsideration of cases.

(a) Where, pursuant to the procedures set forth in §§ 710.20 through 710.33, the Assistant Secretary for Defense Programs or the Secretary has made a determination granting access authorization to an individual, the individual's eligibility for access authorization shall be reconsidered only when, subsequent to the time of the prior hearing, there is new substantially derogatory information or a significant increase in the scope or sensitivity of the Restricted Data or national security information to which the individual has or will have access;

(b) Where, pursuant to those procedures, the Secretary or the Assistant Secretary for Defense Programs has made a determination denying access authorization to an individual, the individual's eligibility for access authorization may be reconsidered when there is a bona fide offer of employment requiring access to Restricted Data, national security information or significant quantities of special nuclear material and either material and relevant new evidence which the individual and his representatives are without fault in failing to present before, or convincing evidence of reformation or rehabilitation. Requests for reconsideration shall be submitted in writing to the Assistant Secretary for Defense Programs through the Manager of Operations having jurisdiction over the position for which access authorization is required. Such requests shall be accompanied by an affidavit setting forth in detail the new evidence or evidence of reformation or rehabilitation. The Assistant Secretary for Defense Programs shall cause the individual to be notified as to whether his eligibility for access authorization will be reconsidered and, if so, the method by which such reconsideration will be accomplished;

(c) Where access authorization has been granted to an individual by a Manager of Operations without recourse to the procedures set forth in §§ 710.20 through 710.33, the individual's eligibility for access authorization shall be reconsidered only in a case where, subsequent to the granting of access authorization, new substantially derogatory information has been received or there is a significant increase in the scope or sensitivity of the Restricted Data or national security information to which the individual has, or will have access, and in any other case only with specific prior approval of the Director, Division of Safeguards and Security, DOE.

MISCELLANEOUS

§ 710.35 Terminations.

In the event the individual is no longer an applicant for access authorization or no longer requires access authorization the procedures of this part shall be terminated without a final determination as to his eligibility for access authorization.

§ 710.36 Attorney representation.

In the event the individual is represented by an attorney or other such representative, the individual shall file with DOE a document designating such attorney or representative and authorizing such attorney or representative to receive all correspondence, transcripts and other documents pertaining to the proceeding under this part.

§ 710.37 Certifications.

Whenever information is made a part of the record under the exceptions authorized by § 710.27 (m), (n), (o), and (p), the record shall contain certificates evidencing that the determinations required therein have been made.

§ 710.38 Washington Area cases.

In those cases which may arise involving individuals within the Washington Area of DOE operations the Director, Division of Safeguards and Security shall discharge the functions and responsibilities assigned to Managers of Operations in these procedures.

§ 710.39 Time frames.

Statements of time established for processing aspects of a case under this part are the agency's desired time frames in implementing the procedures set forth in this part. They shall have no impact upon the final disposition of an access authorization by the Assistant Secretary for Defense Programs, and confer no rights upon an individual whose eligibility for, or suspension of, access authorization is being considered.

[48 FR 46501, Oct. 13, 1983]

Appendix A—Selected Provisions of the Atomic Energy Act of 1954, as Amended, Sec. 141 (42 U.S.C. 2161), Sec. 145 (42 U.S.C. 2165), Sec. 161 (42 U.S.C. 2201)

(By authority of the Energy Reorganization acts of 1974 (42 U.S.C. 5814) the Administrator of DOE or his designated representative is to be substituted for the "Commission" and "General Manager" as appropriate.)

Sec. 141. Policy. It shall be the policy of the Commission to control the dissemination and disclosure of Restricted Data in such a manner as to assure the common defense and security * * *

Sec. 145. Restriction. (a) No arrangement shall be made under section 31, no contract shall be made or continued in effect under section 141, and no license shall be issued under section 103 or 104, unless the person with whom such arrangement is made, the contractor or prospective contractor, or the prospective licensee agrees in writing not to permit any individual to have access to Restricted Data until the Civil Service Commission shall have made an investigation and report to the Commission on the character, association, and loyalty of such individual, and the Commission shall have determined that permitting such person to have access to Restricted Data will not endanger the common defense and security.

(b) Except as authorized by the Commission or the General Manager upon a determination by the Commission or General Manager that such action is clearly consistent with the national interest, no individual shall be employed by the Commission nor shall the Commission permit any individual to have access to Restricted Data until the Civil Service Commission shall have made an investigation and report to the Commission on the character, associations, and loyalty of such individual and the Commission shall have determined that permitting such person to have access to Restricted Data will not endanger the common defense and security.

(c) In lieu of the investigation and report to be made by the Civil Service Commission pursuant to subsection (b) of this appendix, the Commission may accept an investigation and report on the character, associations, and loyalty of an individual made by another Government agency which conducts personnel security investigations, provided that a security clearance has been granted to such individual by another Government agency based on such investigation and report.

(d) In the event an investigation made pursuant to subsections (a) and (b) of this appendix develops any data reflecting that the individual who is the subject of the investigation is of questionable loyalty, the Civil Service Commission shall refer the matter to the Federal Bureau of Investigation for the conduct of a full field investigation, the results of which shall be furnished to the Civil Service Commission for its information and appropriate action.

(e) If the President deems it to be in the national interest he may from time to time determine that investigations of any group or class which are required by subsections (a), (b), and (c) of this appendix be made by the Federal Bureau of Investigation.

(f) Notwithstanding the provisions of subsections (a), (b), and (c) of this appendix, a majority of the members of the Commission shall certify those specific positions which are of a high degree of importance or sensitivity, and upon such certification, the investigation, and reports required by such provisions shall be made by the Federal Bureau of Investigation.

(g) The Commission shall establish standards and specification in writing as to the scope and extent of investigations, the reports of which will be utilized by the Commission in making the determination, pursuant to subsections (a), (b), and (c) of this appendix, that permitting a person access to Restricted Data will not endanger the common defense and security. Such standards and specifications shall be based on the location and class or kind of work to be done and shall, among other considerations, take into account the degree of importance to the common defense and security of the Restricted Data to which access will be permitted.

(h) Whenever the Congress declares that a state of war exists, or in the event of a national disaster due to enemy attack, the Commission is authorized during the state of war or period of national disaster due to enemy attack to employ individuals and to permit individuals access to Restricted Data pending the investigation report, and determination required by section 145b, to the extent that and so long as the Commission finds that such action is required to prevent impairment of its activities in furtherance of the common defense and security.

Sec. 161. General provisions. In the performance of its functions the Commission is authorized to:

(a) Establish advisory boards to advise with and make recommendations to the

Commission on the legislation, policies, administration, research and other matters; Provided, That the Commission issues regulations setting forth the scope, procedure, and limitations of the authority of each such board.

(b) Establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property.

(c) Make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in the administration or enforcement of this Act, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. No person shall be excused from complying with any requirements under this paragraph because of his privilege against self-incrimination, but the immunity provisions of the compulsory Testimony Act of February 11, 1893, shall apply with respect to any individuals who specifically claims such privilege. Witnesses subpoenaed, under this subsection, shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

* * * * *

(i) Prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this Act, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 53 or produced by any person in connection with any activity authorized pursuant to the Act, to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, including regulations or orders designating activities, involving quantities of special nuclear material which in the opinion of the Commission are important to the common defense and security, that may be conducted only by persons whose character, associations, and loyalty shall have been investigated under standards and specifications established by the Commission and as to whom the Commission shall have determined that permitting each person to conduct the activity will not be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity in order to protect health and to minimize danger to life or property;

* * * * *

(n) Delegate to the General Manager or other officers of the Commission any of those functions assigned to it under this Act except those specified in sections 51, 57b., 61, 108, 123, 145b. (with respect to the determination of those persons to whom the Commission may reveal Restricted Data in the national interest), 145f. and 161a.

* * * * *

(p) Make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act.

[42 FR 52388, Sept. 30, 1977]

PART 725—PERMITS FOR ACCESS TO RESTRICTED DATA

GENERAL PROVISIONS

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APPENDIX A TO PART 725—CATEGORIES OF RESTRICTED DATA AVAILABLE

Sec.
Appendix B to Part 725—DOE's Operations Offices and Geographical Areas of Responsibilities

Authority: Sec. 161 of the Atomic Energy Act, as amended, 68 Stat. 943, 42 U.S.C. 2201.

Source: 41 FR 56778, Dec. 30, 1976, unless otherwise noted.

Editorial Note: Regulations in this part are affected by a document published at 44 FR 37938, June 29, 1979. See the redesignation table appearing in the Finding Aids section of this volume.

General Provisions

§ 725.1 Purpose.

This part establishes procedures and standards for the issuance of an Access Permit to any person subject to this part who requires access to Restricted Data applicable to civil uses of atomic energy for use in his business, trade or profession; provides for the amendment, renewal, suspension, termination and revocation of an Access Permit; and specifies the terms and conditions under which the Administrator will issue the Permit.

§ 725.2 Applicability.

The regulations in this part apply to any person within or under the jurisdiction of the United States who desires access to Restricted Data for use in his business, profession or trade.

§ 725.3 Definitions.

As used in this part:

(a) "Access Permit" means a permit, issued by the Administrator authorizing access by the named permittee to Restricted Data applicable to civil uses of atomic energy in accordance with the terms and conditions stated on the permit.

(b) "Act" means the Atomic Energy Act of 1954 (68 Stat. 919), including any amendments thereto.

(c) "Category" means a category of Restricted Data designated in Appendix "A" to the regulations in this part.

(d) "Administrator" means the Administrator of the Department of Energy or his duly authorized representatives.

(e) "DOE" means the Department of Energy.

(f) "Permittee" means the holder of a permit issued pursuant to the regulations in this part.

(g) "Person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than DOE, any state or any political subdivision of, or any political entity within a state, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

(h) "Restricted Data" means all data concerning (1) design, manufacture or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Act.

(i) "Government Confidential Commercial Information" means sensitive commercial information not including Restricted Data, generated by the government, the release of which could put the government at a competitive disadvantage in providing enrichment services.

[41 FR 56778, Dec. 30, 1976, as amended at 52 FR 30139, Aug. 13, 1987]

§ 725.4 Interpretations.

Except as specifically authorized by the Administrator in writing no interpretation of the meaning of the regulations in this part by any officer or employee of DOE other than a written interpretation by the General Counsel will be recognized to be binding upon DOE.

§ 725.5 Communications.

Communications concerning rulemaking, i.e., petition to change part 725, should be addressed to Administrator of Energy Research and Development, Department of Energy, Washington D.C. 20545. Except with respect to category C-24, all other communications concerning the regulations in this part and applications filed under them, should be addressed to the DOE Operations Office listed in Appendix "B" of this part responsible for the geographical area in which (a) the applicant's principal place of business is located, or (b) the principal place where the applicant will use the restricted data is located.

§ 725.6 Categories of available information.

For administrative purposes DOE has categorized Restricted Data which will be made available to permittees in the categories as set forth in Appendix "A" to this part. Top Secret information; information pertaining to the design, manufacture or utilization of atomic weapons; and defense information other than Restricted Data are not included in these categories and will not be made available under this part.

§ 725.7 Specific waivers.

The Administrator may, upon application of any interested party, grant such waivers from the requirements of this part as he determines are authorized by law and will not constitute an undue risk to the common defense and security.

APPLICATIONS

§ 725.11 Applications.

(a) Any person desiring access to Restricted Data pursuant to this part should submit an application (Form DOE 378), in triplicate, for an access permit to the DOE Operations Office, listed in Appendix "B" to this part, responsible for the area in which (1) the applicant's principal place of business is located, or (2) the principal place where the applicant will use the Restricted Data is located. Applications for access to Restricted Data in category C-24 isotope separation, should be submitted to the Oak Ridge Operations Office.

(b) Where an individual desires access to Restricted Data for use in the performance of his duties as an employee, the application for an access permit must be filed in the name of his employer.

(c) Self-employed private consultants, desiring access to Restricted Data, must file the application in their own name for an individual access permit.

(d) Each application should contain the following information:

(1) Name of applicant (unincorporated subsidiaries or divisions of a corporation must apply in the name of the corporation);

(2) Address of applicant;

(3) Description of business or occupation of applicant; and

(4)(i) If applicant is an individual, state citizenship.

(ii) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.

(iii) If applicant is a corporation or an unincorporated association, state:

(A) The state where it is incorporated or organized and the principal location where it does business;

(B) The names, addresses and citizenship of its directors and of its principal officers;

(C) Whether it is owned, controlled or dominated by an alien, a foreign corporation, or foreign government, and if so, give details.

(iv) If the applicant is acting as agent or representative of another person in filing the application, identify the principal and furnish information required under this subparagraph with respect to such principal;

(5) Total number of full-time employees;

(6) Classification of Restricted Data (Confidential or Secret) to which access is requested;

(7) Potential use of the Restricted Data in the applicant's business, profession or trade. If access to Secret Restricted Data is requested, list the specific categories by number and furnish detailed reasons why such access within the specified categories is needed by the applicant. The need for Secret information should be stated by describing its proposed use in specific research, design, planning, construction, manufacturing, or operating projects; in activities under licenses issued by Nuclear Regulatory Commission; in studies or evaluations planned or under way; or in work or services to be performed for other organizations. In addition, if access to secret restricted data in category C-65, plutonium production, or restricted data in cate-

gory C-24, isotope separation, is requested, the application should also include sufficient information to satisfy the requirements of § 725.15(b) (2) or (3), as the case may be."

(8) Principal Location(s) at which Restricted Data will be used.

(e) Applications should be signed by a person authorized to sign for the applicant.

(f) Each application shall contain complete and accurate disclosure with respect to the real party or parties in interest and as to all other matters and things required to be disclosed.

§ 725.12 Noneligibility.

The following persons are not eligible to apply for an access permit:

(a) Corporations not organized under the laws of the United States or a political subdivision thereof.

(b) Any individual who is not a citizen of the United States.

(c) Any partnership not including among the partners one or more citizens of the United States; or any other unincorporated association not including one or more citizens of the United States among its principal officers.

(d) Any organization which is owned, controlled or dominated by the Government of, a citizen of, or an organization organized under the laws of a country or area listed as a Subgroup A country or destination in § 371.3 (15 CFR 371.3) of the Comprehensive Export Schedule of the United States Department of Commerce.

(e) Persons subject to the jurisdiction of the United States who are not doing business within the United States.

§ 725.13 Additional information.

The Administrator may, at any time after the filing of the original application and before the termination of the permit, require additional information in order to enable the Administrator to determine whether the permit should be granted or denied or whether it should be modified or revoked.

§ 725.14 Public inspection of applications.

Applications and documents submitted to DOE in connection with applications may be made available for public inspection in accordance with the regulations contained in Part 702 of this chapter.

§ 725.15 Requirements for approval of applications.

(a) An application for an access permit authorizing access to confidential restricted data in the categories set forth in Appendix A of this part (except C-91 and C-24) will be approved only if the application demonstrates that the applicant has a potential use or application for such data in his business, trade, or profession and has filed a complete application form.

(b)(1) An application for an access permit authorizing access to restricted data in category C-24 or secret restricted data in other categories will be approved only if the applicant has a need for such data in his business, trade, or profession and has filed a complete application form.

(2) An application for an access permit authorizing access to Secret Restricted Data in category C-65 Plutonium Production will be approved only if the application demonstrates also that the applicant:

(i) Is directly engaged in a substantial effort to develop, design, build or operate a chemical processing plant or other facility related to his participation in the peaceful uses of atomic energy for which such production rate and cost data are needed; or

(ii) Is furnishing to a permittee having access to C-65 under paragraph (b)(2)(i) of this section, substantial scientific, engineering or other professional services to be used by said permittee in carrying out the activities for which said permittee received access to category C-65.

(3) An application for an access permit authorizing access to Restricted Data in category C-24, isotope separation—subcategory A or B—will be approved only if the application demonstrates also that the applicant:

(i) Possesses technical, managerial and financial qualifications demonstrating that the applicant is potentially capable of undertaking or participating significantly in the construction and/or operation of production or manufacturing facilities and offers reasonable assurance of adequacy of resources to carry on, alone or with others, uranium enrichment on a production basis or the large-scale manufacture or assembly of precision equipment systems, or is potentially capable of utilizing centrifuge machines in its business for uranium enrichment or for purposes other than uranium enrichment; and is not subject to foreign ownership, control, or influence; and

(A) For subcategory A, desires to determine its interest in participating significantly in a substantial effort to develop, design, build, and operate a uranium enrichment facility or a facility for the manufacture of uranium enrichment equipment.

(B) For subcategory B, proposes to (*1*) participate significantly in, or is directly participating significantly in, a substantial effort to evaluate alternative processes, develop, design, build, and operate a uranium enrichment facility or a facility for the manufacture of uranium enrichment equipment, or (*2*) utilize centrifuge machines and related equipment in its business for uranium enrichment or for purposes other than uranium enrichment, or

(ii) Is furnishing to a permittee having access to Category C-24 under the paragraph (b)(3)(i) of this section substantial scientific, engineering, or other professional services to be used by said permittee in carrying out the activities for which said permittee received access to Category C-24.

(4) An application for an access permit authorizing access to Confidential and Secret Restricted Data in C-91, Nuclear Reactors for Rocket Propulsion, will be approved only if the application demonstrates also that the applicant:

(i) Possesses qualifications demonstrating that he is capable of making a contribution to research and development in the field of nuclear reactors for rocket propulsion and is directly engaged in or proposes to engage in a substantial research and development program in such field of work; or

(ii) Is engaged in or proposes to engage in a substantial study program in the field of nuclear reactors for rocket propulsion preparatory to the submission of a research and development proposal to DOE; or

(iii) Is furnishing to a permittee having access under paragraph (b)(4) (i) or (ii) of this section substantial scientific, engineering or other professional services to be used by that permittee in a study or research and development program for which said permittee received access.

[41 FR 56778, Dec. 30, 1976, as amended at 52 FR 30139, Aug. 13, 1987]

PERMITS

§ 725.21 Issuance.

(a) Upon a determination that an application meets the requirements of this regulation, the Administrator will issue to the applicant an access permit on Form DOE 379.

(b) An Access Permit is not an access authorization. It does not authorize any individual not having an appropriate DOE access authorization to receive Restricted Data. See § 725.24 and Part 795 of this chapter.

§ 725.22 Scope of permit.

(a) All access permits will as a minimum authorize access, subject to the terms and conditions of the access permit to confidential restricted data in all of the categories set forth in Appendix A to this part, except C-91 and C-24.

(b) In addition, access permits may authorize access, subject to the terms and conditions of the access permit to such Secret Restricted Data as is included within the particular category or categories specified in the permit.

(c) In addition, access permits may authorize access, subject to the terms and conditions of the access permit, to such government confidential commercial information as is included within the particular category or categories specified in the permit.

[41 FR 56778, Dec. 30, 1976, as amended at 52 FR 30139, Aug. 13, 1987]

§ 725.23 Terms and conditions of access.

(a) Neither the United States, nor DOE, nor any person acting on behalf of DOE makes any warranty or other representation, expressed or implied, (1) with respect to the accuracy, completeness or usefulness of any information made available pursuant to an access permit, or (2) that the use of any such information may not infringe privately owned rights.

(b) The Administrator, on behalf of DOE, hereby waives such rights with respect to any invention or discovery as it may have pursuant to section 152 of the Act by reason of such invention or discovery having been made or conceived in the course of, in connection with, or resulting from access to Restricted Data received under the terms of an access permit. (Note provisions of § 725.23(d).)

(c) Each permittee shall: (1) Comply with all applicable provisions of the Atomic Energy Act of 1954, as amended, and with parts 795 and 810 of this chapter and with all other applicable rules, regulations, and orders of DOE, including such rules, regulations, and orders as DOE may adopt or issue to effectuate the policies specified in the act directing DOE to strengthen free competition in private enterprise and avoid the creation or maintenance of a situation inconsistent with the antitrust laws.

(2) Be deemed to have waived all claims for damages under section 183 of title 35 U.S. Code by reason of the imposition of any secrecy order on any patent application and all claims for just compensation under section 173 of the Atomic Energy Act of 1954, with respect to any invention or discovery made or conceived in the course of, in connection with or as a result of access to Restricted Data received under the terms of the access permit;

(3) Be deemed to have waived any and all claims against the United States, DOE and all persons acting on behalf of DOE that might arise in connection with the use, by the applicant, of any and all information supplied by them pursuant to the access permit;

(4) Obtain and preserve in his files written agreements from all individuals who will have access to Restricted Data under his access permit. The agreement shall be as follows:

> In consideration for receiving access to Restricted Data under the access permit issued by the Administrator of Energy Research and Development, I hereby agree to:
>
> (a) Waive all claims for damages under section 183 of Title 35 U.S. Code by reason of the imposition of any secrecy order on any patent application, and all claims for just compensation under section 173 of the Atomic Energy Act of 1954, with respect to any invention or discovery made or conceived in the course of, in connection with or resulting from access to Restricted Data received under the terms of the access permit issued to (insert the name of the holder of the access permit);
>
> (b) Waive any and all claims against the United States, DOE, and all persons acting on behalf of DOE that might arise in connection with the use, by me, of any and all information supplied by them pursuant to the access permit issued to (insert the name of the holder of the access permit).

In case of an access permit authorizing access to restricted data in category C-24, isotope separation, the agreement shall also provide for such requirements as the permittee considers necessary for purposes of fulfilling its obligations under paragraph (d) of this section.

(5) Pay all established charges for personnel access authorizations, DOE consulting services, publication and reproduction of documents, and such other services as DOE may furnish in connection with the access permit.

(d) The following terms and conditions are applicable to an access permit authorizing access to restricted data in category C-24, isotope separation irrespective of whether access to DOE's restricted data information is desired:

(1) The permittee agrees to grant a nonexclusive license at reasonable royalties to the United States and, at the request of DOE, to domestic and foreign persons, to use in the production or enrichment of special nuclear material any U.S. patent or any U.S. patent application (otherwise in condition for allowance except for a secrecy order thereon) on any invention or discovery made or conceived by the permittee, its employees, or others engaged by the permittee in the course of the permittee's work under the access permit, or as a result of access to data or information made available by DOE.

(2) The permittee agrees to grant to the United States, and, at the request of DOE, to domestic and foreign persons, the right at reasonable royalties to use for research, development, or manufacturing programs for the production or enrichment of special nuclear material, any technical informa-

tion or data, including economic evaluations thereof, of a proprietary nature developed by the permittee, its employees, or others engaged by the permittee in the course of the permittee's work under the access permit or as a result of access to data or information made available by DOE and not covered by a U.S. patent or U.S. patent application referred to in paragraph (d)(1) of this section. If DOE disseminates any such proprietary technical information or data in its possession to any of its contractors for use in any DOE research, development, production, or manufacturing programs, it will do so under contractual provisions pursuant to which the contractor would undertake to use this information only for the work under the pertinent DOE contract. Notwithstanding the foregoing provisions of this subparagraph, the permittee waives any claim against DOE for compensation or otherwise, in connection with any use or dissemination of information or data not specifically identified and claimed by the permittee as proprietary in a written notice to DOE at the time of the furnishing of the information or data to DOE. As used in this subparagraph, the term "technical information or data, including economic evaluations thereof, of a proprietary nature" means information or data which:

(i) Is not the property of the Government by virtue of any agreement;

(ii) Concerns the details of trade secrets or manufacturing processes which the permittee has protected from us by others; and

(iii)(A) Is specifically identified as proprietary at the time it is made available to DOE.

(B) Technical information or data shall not be deemed proprietary in nature whenever substantially the same technical information is available to DOE which has been prepared, developed or furnished as nonproprietary information by another source independently of the proprietary information and data furnished by the permittee.

(3) If the amount of reasonable royalties provided for in paragraphs (d) (1) and (2) of this section cannot be agreed upon, the permittee agrees that such amount shall be determined by the Administrator under the provisions of section 157c of the Atomic Energy Act of 1954, as amended.

(4) In the event domestic commercial uranium enriching services are provided by persons other than an agency of the United States, the permittee agrees not to require the United States to pay the royalties provided for in paragraphs (d) (1) and (2) of this section.

(5) The acceptance, exercise, or use of the licenses or rights provided for in paragraphs (d) (1) and (2) of this section shall not prevent the Government, at any time, from contesting their validity, scope or enforceability.

(6) The permittee agrees, during the term of the access permit, to make quarterly reports to DOE in writing, in reasonable detail, respecting all technical information or data, including economic evaluations thereof, which the permittee or DOE considers may be of interest to DOE, including reports of patent applications on inventions or discoveries and of technical information and data of a proprietary nature. These reports will cover the results of the permittee's work under the access permit or as a result of data or information made available by DOE. The foregoing provisions of this subparagraph shall be subject to the provisions of paragraphs (d) (1) and (2) of this section.

(7) The permittee agrees to make available to DOE, at all reasonable times during the term of the access permit, for inspection by DOE personnel, or by mutual agreement, others on behalf of DOE, all experimental equipment and technical information or data developed by the permittee, its employees, or others engaged by the permittee, in the course of the permittee's work under the access permit or as a result of data or information made available by DOE. The foregoing provision of this subparagraph shall be subject to the provisions of paragraphs (d) (1) and (2) of this section.

(8) The permittee agrees to pay such reasonable compensation as DOE may elect to charge for the commercial use of its inventions and discoveries including related data and technology and, except for an applicant qualifying

for a permit pursuant to § 725.15(b)(3)(ii), agrees to pay $25,000 for an access permit authorizing access to restricted data in subcategory B.

(9) Except as may be otherwise authorized by DOE, the permittee agrees not to disseminate to persons not granted access by DOE, restricted data or government confidential commercial information made available to the permittee by DOE or restricted data developed by the permittee, its employees, or others engaged by the permittee in the course of the permittee's work under the access permit or as a result of data or information made available by DOE.

(10) The granting of an access permit does not constitute any assurance, direct or implied, that the Nuclear Regulatory Commission will grant the permittee a license for a production facility or any other license.

(11) In the event the permittee is engaged by DOE to perform work for DOE in the field of the separation of isotopes, the permittee agrees to undertake such measures as DOE may require for the separation of its activities under the access permit from its work for DOE.

[41 FR 56778, Dec. 30, 1976, as amended at 52 FR 30139, Aug. 13, 1987]

§ 725.24 Administration.

With respect to each permit issued pursuant to the regulations in this part, the cognizant Operations Office will:

(a) Process all personnel access authorizations requested in connection with the permit;

(b) Review the procedures submitted by the Applicant, in accordance with Part 795 of this chapter, for the safeguarding of Restricted Data; and

(c) Provide information to the permittee with respect to the sources and locations of Restricted Data available under this permit and to assist the permittee in other matters pertaining to the administration of his permit.

§ 725.25 Term and renewal.

(a) Each access permit will be issued for a two year term, unless otherwise stated in the permit.

(b) Applications for renewal shall be filed in accordance with § 725.11. Each renewal application must be complete, without reference to previous applications. In any case in which a permittee has filed a properly completed application for renewal more than thirty (30) days prior to the expiration of his existing permit, such existing permit shall not expire until the application for a renewal has been finally acted upon by the Administrator.

§ 725.26 Assignment.

An access permit is nontransferable and nonassignable.

§ 725.27 Amendment.

An access permit may be amended from time to time upon application by the permittee. An application for amendment may be filed, in triplicate, in letter form and shall be signed by an individual authorized to sign on behalf of the applicant. The term of an access permit shall not be altered by an amendment thereto.

§ 725.28 Administrator action on application to renew or amend.

In considering an application by a permittee to review or amend his permit, the Administrator will apply the criteria set forth in § 725.15. Failure of an applicant to reply to an DOE request for additional information concerning an application for renewal or amendment within 60 days shall result in a rejection of the application without prejudice to resubmit a properly completed application at a later date.

§ 725.29 Suspension, revocation and termination of permits.

The Administrator may revoke or suspend any access permit for any material false statement in the application or in any report submitted to DOE pursuant to the regulations in this part or because of conditions or facts which would have warranted a refusal to grant the permit in the first instance, or for violation of any of the terms and conditions of the Atomic Energy Act of 1954 or rules, regulations or orders issued pursuant thereto. A permittee should request termination of his permit when he no longer requires Restricted Data for use in his business, trade or profession.

§ 725.30 Exceptions and additional requirements.

Notwithstanding any other provision in the regulations in this part, the Administrator may deny an application for an access permit or suspend or revoke any access permit, or incorporate additional conditions or requirements in any access permit, upon finding that such denial, revocation or the incorporation of such conditions and limitations is necessary or appropriate in the interest of the common defense and security or is otherwise in the public interest.

§ 725.31 Violations.

An injunction or other court order may be obtained prohibiting any violation of any provision of the Act or any regulation or order issued thereunder. Any person who willfully violates any provision of the Act or any regulation or order issued thereunder may be guilty of a crime and, upon conviction, may be punished by fine or imprisonment or both, as provided by law.

APPENDIX A TO PART 725—CATEGORIES OF RESTRICTED DATA AVAILABLE

C-24 Isotope separation.—This category is divided into subcategories A and B.

Subcategory A includes information in summary form concerning the status and potential of the gaseous diffusion and gas centrifuge processes for the separation of uranium isotopes.

Subcategory B includes information on the following:

a. Any aspect of separating one or more isotopes of uranium from a composition containing a mixture of isotopes of that element by the gas centrifuge or gaseous diffusion processes.

b. Design, construction, and operation of any plant, facility or device capable of separating by the gas centrifuge or gaseous diffusion processes one or more isotopes of uranium from a composition containing a mixture of isotopes of that element, including means and methods of transporting materials from one to another device.

C-44 Nuclear Technology. This category includes classified technical information concerning nuclear technology. It may contain information on the following:

a. Materials, including metals, ceramics, organic and inorganic compounds. Included are such technical areas as the technology and fabrication of fuel elements, corrosion studies, cladding techniques and radiation studies.

b. Chemistry, chemical engineering and radiochemistry of all the elements and their compounds. Included are techniques and processes of chemical separations, radioactive waste handling and feed material processing.

c. Reactor physics, engineering and technology including theory, design, criticality studies and operation of reactors, reactor systems and reactor components.

d. Reserved.

e. Lithium isotope separation technology. This subcategory includes classified technical information on the separation of lithium isotopes by using counter-current flows of lithium amalgam and aqueous lithium hydroxide solution in packed columns. Not included is information regarding plant design and operating conditions from which total production rates or design capacity of the lithium isotope separation plant (Colex) in Oak Ridge, Tennessee, can be inferred. In addition to the other requirements of this part, access permits for Restricted Data in this subcategory will be approved, provided the permittee:

1. Demonstrates that it is not a corporation or entity owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, and

2. Agrees to insertion in his access permit of the terms and conditions:

(i) Set forth in paragraphs (a) and (b) of § 725.23 of this part;

(ii) Set forth in paragraph (c) of § 725.23 of this part, amended by deleting the phrase "category C-24, isotope separation," and inserting in lieu thereof the phrase "subcategory C-44e, lithium isotope separation technology";

(iii) Set forth in paragraph (d) of § 725.23 of this part, amended by:

(A) Deleting the phrases "production or enrichment of special nuclear material" and "separation of isotopes" wherever they appear, and inserting in lieu thereof the phrase "separation of isotopes of lithium";

(B) Deleting the phrase "domestic commercial uranium enriching services are provided by," and inserting in lieu thereof the phrase "domestic lithium isotope separation capacity becomes available to."

This category does not include information which reveals or from which can be calculated actual or planned (as distinguished from design) capacities, production rates and unit costs for the plutonium production program.

C-65 Plutonium Production. This category includes information on reactor, fuel element and separations technology which reveals or from which can be calculated actual or planned (as distinguished from design) capacities, production rates and unit costs for the Hanford and Savannah River production facilities.

Technology which does not reveal or enable calculation of production rates and unit costs of Hanford or Savannah River production facilities is categorized in C-44 Nuclear Technology.

C-90 Nuclear Reactors for Ram-Jet Propulsion. This category includes information on:

a. Programs pertaining to the development of nuclear reactors for application to ram-jet propulsion systems including theory and/or design, test philosophy procedures and/or results.

b. Fabrication technology and evaluation of performance or characteristics of materials or components for such reactors.

c. Controls, control systems and instrumentation relating to the design or technology of such reactors.

d. Data pertaining to heat transfer, propellant kinetics or corrosion and erosion of materials under conditions of high temperature, high gas flows or other environmental conditions characteristic of ram-jet propulsion systems.

This category does not include information on:

a. Design details of weapons systems or nuclear warheads.

b. Military operational techniques or characteristics.

c. General aspects of nuclear ram-jet missiles, such as payload, aerodynamic characteristics, guidance systems, physical size, gross weight, thrust and information of this kind which is associated with utilization of a nuclear ram-jet propulsion system.

C-91 Nuclear Reactors for Rocket Propulsion. This category includes information on:

a. Programs pertaining to nuclear reactors for rocket propulsion, i.e., missile propulsion, theory and/design, test philosophy procedures and/or results.

b. Design, fabrication technology and evaluation of performance or characteristics of material, components, or subsystems or nuclear rocket reactors.

c. Controls, control systems and instrumentation relating to the design or technology of rocket reactor systems.

d. Data pertaining to heat transfer, propellant kinetics or corrosion and erosion of rocket reactor system materials under conditions of high temperature, high gas flows, or other environmental conditions characteristic of rocket reactors.

This category does not include information on:

a. Design details of weapons systems or nuclear warheads.

b. Military operational techniques or characteristics.

c. General aspects of payload and aerodynamic characteristics.

d. Design details and development, information of components and subsystems of the nuclear rocket engine other than that associated with the reactor system.

C-92 Systems for Nuclear Auxiliary Power (SNAP). This category includes information on:

a. Isotopic SNAP Program, including theory, design, research and development, fabrication, test procedures and results for the device, including power conversion device and the fuels used.

b. Reactor SNAP Program, including theory, design, research and development, fabrication, test procedures and results for the reactor, including the directly associated power conversion device when developed by DOE.

This category does not include that technical and scientific data developed under the SNAP Advanced Concept Program which should be reported in C-93.

C-93 Advanced Concepts for Future Application.

C-93a Reactor Experiments. This category includes classified technical information developed in the pursuit of work on new or advanced concepts of reactors or components which DOE considers essential to future growth or for general application to future generations of reactors. Classified information developed in the pursuit of work on the lithium cooled reactor experiment is an example of the type of information to be reported in this category, i.e., information resulting from an experimental reactor project or component development which may have many future applications but which is not currently being pursued to meet the specific needs of an approved requirement for which other information categories have been provided. For example, classified technical information developed in the pursuit of work on Naval, Ram-Jet or Rocket nuclear reactors would not be reported here but under their respective specific categories. This category will include classified technical information on the following:

a. Theory, design, and performance, either estimated or actual.

b. Design details, composition and performance characteristics of major components (e.g., fuel media, reflectors, moderators, heat exchangers, pressure shells or containment devices, control rods, conversion devices, instrumentation and shielding).

c. Material (metals, ceramics and compounds) development, alloying, cladding, corrosion, erosion, radiation studies and fabrication techniques.

d. Chemistry, including chemical engineering, processes and techniques. Reactor physics, engineering and criticality studies.

C-93b Conversion Devices. This category includes classified technical information developed in the pursuit of studies, designs, research and development, fabrication and operation of any energy conversion device to be used with nuclear energy sources which is not being applied to a specific system development project.

C-94 Military Compact Reactor (MCR). This category includes classified technical information on the actual or planned Military Compact Reactor and its components developed in the pursuit of studies, designs, research and development, fabrication, and operation of the reactor system or its components.

Examples of the areas of information included are:

a. Reactor core physics.

b. Fuel elements and fuel element components.

c. Moderator and reflector details.

d. Data on primary coolant system.

e. Radiation shield.

f. Controls and instrumentation.

This category does not include information on military operational characteristics or techniques.

[41 FR 56778, Dec. 30, 1976, as amended at 44 FR 37939, June 29, 1979]

APPENDIX B TO PART 725—DOE'S OPERATIONS OFFICES AND GEOGRAPHICAL AREAS OF RESPONSIBILITIES

Albuquerque Operations Office, U.S. Department of Energy, P.O. Box 5400, Albuquerque, New Mexico 87115: Arizona, Kansas, New Mexico, Oklahoma, and Texas.

Chicago Operations Office, U.S. Department of Energy, 9800 South Cass Avenue, Argonne, Illinois 60439: Connecticut, Delaware, District of Columbia, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, North Dakota, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, and Wisconsin.

Richland Operations Office, U.S. Department of Energy, P.O. Box 550, Richland, Washington 99352: Alaska, Oregon, and Washington.

Oak Ridge Operations Office, U.S. Department of Energy, P.O. Box E, Oak Ridge, Tennessee 37830: Arkansas, Kentucky, Louisiana, Mississippi, Missouri, Panama Canal Zone, Puerto Rico, Tennessee, Virginia, Virgin Islands, and West Virginia.

San Francisco Operations Office, U.S. Department of Energy, 2111 Bancroft Way, Berkeley 4, California 94612: California, Colorado, Hawaii, Idaho, Montana, Nevada, Utah, Wyoming, and U.S. Pacific Territories.

Savannah River Operations Office, U.S. Department of Energy, P.O. Box A, Aiken, South Carolina 29810: Alabama, Florida, Georgia, North Carolina, and South Carolina.

[41 FR 56778, Dec. 30, 1976, as amended at 44 FR 37939, June 29, 1979]

PART 730—UNUSUAL VOLUMES ALLOCATION PETITION PROCEDURES

Subpart A—General Provisions

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730.1 Purpose and scope.
730.2 Definitions.
730.3 Communications.

Subpart B—Allocation Petitions

730.4 Filing.
730.5 Contents of petitions.
730.6 Eligibility criteria.
730.7 Volume determination.
730.8 Schedule for distributing allocations.

AUTHORITY: Sec. 5(c)(5), Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b-j).

SOURCE: 53 FR 36962, Sept. 23, 1988, unless otherwise noted.

Subpart A—General Provisions

§ 730.1 Purpose and scope.

(a) The regulations in this part establish procedures for submitting petitions and for allocating disposal capacity under section 5(c)(5) of the Low-Level Radioactive Waste Policy Amendments Act of 1985, and prescribe criteria for determining eligibility for such allocations. The regulations in this part apply to all operators of commercial nuclear power reactor units possessing a full-power operating license (pursuant to 10 CFR Part 50).

§ 730.2 Definitions.

As used in this part:

"Act" means the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Pub. L. 99-240);

"Department" means the U.S. Department of Energy;

"Interim Access Period" means the 7-year period beginning January 1, 1986 and ending December 31, 1992;

"Licensing Period" means the 3-year period within the interim access period beginning January 1, 1990 and ending December 31, 1992;

"Regular Activity" means an event at a commercial nuclear power reactor associated with day-to-day plant operations;

"Regular Allocation" means the issuance of a specific volume of low-level radioactive waste disposal capacity made to each commercial nuclear power reactor based on the formula in section 5(c) (1) and (2) of the Act for use at any of the currently operating commercial disposal sites;

"Transition Period" means the 4-year period within the interim access period beginning January 1, 1986 and ending December 31, 1989;

"Unusual or Unexpected Activity" means an event at a commercial nuclear reactor not typically associated with day-to-day plant operations, including but not limited to steam generator repair, primary coolant recirculation pipe repair or replacement, operation as a "dry site" reactor within off-site radioactive liquid discharge, major equipment or hardware repair, removal, modification, or replacement, major equipment modification under the Nuclear Regulatory Commission's backfit rule (10 CFR 50.109), and activities designed to increase the capacity for spent nuclear fuel storage at power reactors.

"Unusual Volume Allocation" means an issuance of a specific volume of low-level radioactive waste disposal capacity to a commercial nuclear power reactor by the Secretary of Energy under section 5(d)(5) of the Act for disposal of waste from unusual or unexpected activities.

"Yearly Base Volume" is the total of Unusual Volume capacity in cubic feet that may be allocated by the Department for any calendar year.

§ 730.3 Communications.

Any communication or report concerning the regulation in this part and any petition filed under these regulations may be submitted to the Director, Office of Remedial Action and Waste Technology, Office of Nuclear Energy, U.S. Department of Energy, Washington, DC 20545.

Subpart B—Allocation Petitions

§ 730.4 Filing.

(a) Petitions for Unusual Volume allocations shall be filed in triplicate with the Director, Office of Remedial Action and Waste Technology, Office of Nuclear Energy, U.S. Department of Energy, Washington, DC 20545. Written notification will be provided to the petitioner acknowledging receipt of the petition.

(b) Petitions may be filed as needed, i.e., before, during or after the activity for which the request is made.

(c) No Unusual Volume allocation will be made earlier than 6 months before the start of the unusual or unexpected activity for which an allocation is requested.

(d) A petition may be submitted for additional capacity for disposal of waste resulting from an unusual or unexpected activity for which an Unusual Volume allocation has already been made.

(e) Petitions are granted conditionally upon use of the volume allocated for the activity stated in the grant. Within 30 days after all waste resulting from such activity has been disposed, the recipient of an Unusual Volume allocation report to the Department the volume of waste resulting from the activity that has been disposed. The excess of any Unusual Volume capacity allocated for the activity will thereupon revert to DOE.

§ 730.5 Contents of petitions.

(a) Each petition for an Unusual Volume allocation shall contain the following information:

(1) Name, address and telephone number of point of contact;

(2) Name of the reactor and utility requesting an allocation;

(3) Detailed description of the activity generating the waste;

(4) Dates during which the activity occurred or will occur;

(5) Estimated dates (months and years) during which the waste will be shipped for disposal;

(6) Explanation of the need for the Unusual Volume allocation. This explanation shall include:

(i) The reactor's regular allocation for the period in which the unusual or unexpected activity occurred or will occur;

(ii) The volume of waste generated or estimated to be generated by the unusual or unexpected activity;

(iii) Explanation of the extent to which the reactor's regular allocation for the period in which the unusual or unexpected activity occurred or will occur can accommodate the waste generated by the unusual or unexpected activity;

(iv) The volume of disposal capacity requested, expressed in cubic feet.

(7) Statement that the petitioner has not applied to the Nuclear Regulatory Commission for emergency access under section 6 of the Act;

(8) Statement that the waste for which the petition is submitted is suitable for disposal at at least one of the operating disposal sites identified in the Act.

(9) Any other information the petitioner believes will assist in evaluating the petition.

(b) After the petition has been submitted, the Department may seek additional information from the petitioner in order to enable the Department to determine eligibility for an allocation, or to determine the capacity to be allocated.

§ 730.6 Eligibility criteria.

The Department will use the following criteria to determine whether a petition is eligible for an allocation.

(a) The activity for which the petition is submitted should be an unusual or unexpected activity, as defined in § 730.2.

(b) The petition should demonstrate that the balance of a reactor's regular allocation at the time the unusual or unexpected activity occurred or will occur, plus the balance of any Unusual Volume allocation the reactor has received, will not exceed the sum of the volume that will be needed for regular activities during the transition period or the licensing period, as applicable, and the volume that is needed during the period for the unusual or unexpected activity.

(c) The waste resulting from the activity for which the petition is submitted should be suitable for disposal at at least one of the operating disposal sites identified in the Act.

§ 730.7 Volume determination.

(a) Except as adjusted under paragraphs (b), (c) or (d) of this section, the allocation issued in response to a petition shall be the difference between the volume that the Department determines to be required to dispose of waste from the unusual or unexpected activity, and that portion of total allocations received by the reactor (regular and Unusual Volume allocations) that will be available for application toward disposal of waste from the activity. The allocation volume that will be available for disposal of this waste is the difference between the total allocation volume that the reactor has received, and the sum of:

(1) The reactor's regular allocation volume already used for disposal of waste from regular activities;

(2) The reactor's regular allocation volume that is expected to be required for disposal of waste from regular activities through the remainder of the transition period or licensing period, as applicable;

(3) Any portion of the reactor's regular allocation volume that will have been used at the time the Unusual Volume allocation is issued to dispose of waste from the activity for which the petition is submitted;

(4) Any portion of any previous Unusual Volume allocation that will have been used at the time the Unusual Volume allocation is issued to dispose of waste from the activity for which the petition is submitted; and

(5) Any portion of the reactor's regular allocation volume that has been transferred to another entity under the provisions of section 5(c)(4) of the

Act. The petitioner shall provide DOE a copy of the allocation transfer documentation described in this section of the Act.

(b) Except as provided in § 730.8, if the Department determines that the total Unusual Volume awarded for any year, as determined under paragraph (a) of this section, may exceed the yearly base volume for that year, as determined under § 730.8, the Department shall reduce pending and subsequent allocations for that year so that the sum of the volumes awarded does not exceed the yearly base volume.

(c) The capacity allocated to any single reactor shall not exceed 25 percent of the yearly base volume, as determined under § 730.8, during the year for which the allocation is made.

(d) If the Department determines that licensing of new reactors will result in the sum of regular reactor allocations and Unusual Volume allocations exceeding 11,900,000 cubic feet, then pending and subsequent allocations will be reduced so that the sum of all allocations does not exceed 11,900,000 cubic feet.

§ 730.8 Schedule for distributing allocations.

(a) The yearly base volume that is available for disbursement by the Department during a calendar year in response to Unusual Volume petitions shall be determined as follows: The 800,000 cubic feet of capacity available shall be divided equally among the 7 years. Any capacity not allocated in a year shall be distributed in equal portions among subsequent years.

(b) Any excess disposal capacity conveyed to the Department under § 730.4(e) shall be distributed in equal portions to the yearly base volumes for subsequent years.

(c) The Department shall not allocate more than the yearly base volume in any year, unless it determines that:

(1)(i) The volume capacity to be issued does not significantly exceed the yearly base volume, and

(ii) A significant number of petitions would be affected by so limiting allocations; or

(2) It is substantially likely that the Unusual Volume capacity available for the remainder of the interim access period will exceed the capacity for which petitions will be submitted.

PART 745—PROTECTION OF HUMAN SUBJECTS

Sec.
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745.2 Policy.
745.3 Definitions.
745.4 Submission of assurances.
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745.7 Minimum requirements for special assurances.
745.8 Evaluation and disposition of assurances.
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745.11 Submission and certification of applications and proposals—general assurances.
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745.13 Applications and proposals lacking definite plans for involvement of human subjects.
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745.15 Evaluation and disposition of applications and proposals.
745.16 Cooperative activities.
745.17 Investigational new drug 30-day delay requirement.
745.18 Institution's executive responsibility.
745.19 Institution's records; confidentiality.
745.20 Reports.
745.21 Early termination of awards; evaluation of subsequent applications and proposals.
745.22 Conditions.

AUTHORITY: Energy Reorganization Act (Sec. 105(a), Pub. L. 93-438, 88 Stat. 1233 (42 U.S.C. 5801 et seq.)).

SOURCE: 41 FR 52434, Nov. 30, 1976, unless otherwise noted.

§ 745.1 Applicability.

(a) The regulations in this part are applicable to all Department of Energy (DOE) agreements including, but not limited to, grants and contracts supporting research, development, and related activities within the

United States and its territories in which human subjects are involved.

(b) For agreements supporting activities outside the United States and its territories in which human subjects are involved, the requirements of this part shall apply to the maximum extent practicable as determined by the Administrator on a case-by-case basis, taking into account the relevant laws and practices of the foreign nation in which the activity will be conducted.

(c) The Administrator may, from time to time, determine in advance whether specific programs, methods, or procedures to which this part is applicable place subjects at risk, as defined in § 745.3(b). Such determinations will be published as notices in the FEDERAL REGISTER and will be included in an appendix to this part.

§ 745.2 Policy.

(a) Safeguarding the rights and welfare of subjects at risk in activities supported under DOE agreements is primarily the responsibility of the institution which receives, or is accountable to DOE for, the funds awarded for the support of the activity. In order to provide for the adequate discharge of this institutional responsibility, it is the policy of DOE that no activity involving human subjects within the United States and its territories to be supported by DOE agreements shall be undertaken unless an Institutional Review Board has reviewed and approved such activity, and the institution has submitted to DOE a certification of such review and approval, in accordance with the requirements of this part.

(b) This review shall determine whether these subjects will be placed at risk, and, if risk is involved, whether:

(1) The risks to the subject are so outweighed by the sum of the benefit to the subject and the importance of the knowledge to be gained as to warrant a decision to allow the subject to accept these risks;

(2) The rights and welfare of any such subjects will be adequately protected;

(3) Legally effective informed consent will be obtained by adequate and appropriate methods in accordance with the provisions of this part; and

(4) The conduct of the activity will be reviewed at timely intervals.

(c) No agreement involving human subjects at risk shall be awarded to an individual unless he is affiliated with or sponsored by an institution which can and does assume responsibility for the subjects involved.

§ 745.3 Definitions.

(a) "Institution" means any public or private institution or agency (including Federal, State, and local government agencies).

(b) "Subject at risk" means any individual who may be exposed to the possibility of injury, including physical psychological, or social injury, as a consequence of participation as a subject in any research, development, or related activity which departs from the application of those established and accepted methods necessary to meet his needs, or which increases the ordinary risks of daily life, including the recognized risks inherent in a chosen occupation or field of service.

(c) "Informed consent" means the knowing consent of an individual or his legally authorized representative so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress, or other form of constraint or coercion. The basic elements of information necessary to such consent include:

(1) A fair explanation of the procedures to be followed, and their purposes, including identification of any procedures which are experimental;

(2) A description of any attendant discomforts and risks reasonably to be expected;

(3) A description of any benefits reasonably to be expected;

(4) A disclosure of any appropriate alternative procedures that might be advantageous for the subject;

(5) An offer to answer any inquiries concerning the procedures; and

(6) An instruction that the person is free to withdraw his consent and to discontinue participation in the project or activity at any time without prejudice to the subject.

(d) "DOE" means the Department of Energy.

(e) "Administrator" means the Administrator of DOE or any other officer or employee of DOE to whom authority has been delegated.

(f) "Agreement" means a grant, contract, cooperative agreement, or any other instrument under which DOE provides funds or other resources for projects or efforts involving human subjects.

(g) "Approved assurance" means a document that fulfills the requirements of this part and is approved by the Administrator or Secretary of DHHS.

(h) "Certification" means the official institutional notification to DOE in accordance with the requirements of this part that a project or activity involving human subjects at risk has been reviewed and approved by the institution in accordance with the "approved assurance" on file at DOE or DHHS.

(i) "Legally authorized representative" means an individual or judicial, or other body authorized under applicable law to consent on behalf of a prospective subject to such subject's participation in the particular activity or procedure.

(j) "DHHS" means the Department of Health, Education and Welfare.

[41 FR 52434, Nov. 30, 1976, as amended at 42 FR 30493, June 15, 1977]

§ 745.4 Submission of assurances.

(a) Except as provided in paragraph (b) of this section, recipients or prospective recipients of DOE support under any agreement involving subjects at risk shall provide written assurance acceptable to DOE that they will comply with DOE policy as set forth in this part. Each assurance shall embody:

(1) A statement of compliance with DOE requirements for initial and continuing Institutional Review Board review of the supported activities; and

(2) A set of implementing guidelines, including identification of the Board and a description of its review procedures; or, in the case of special assurance concerned with single activities or projects, a report of initial findings of the Board and of its proposed continuing review procedures.

(b) Recipients or prospective recipients of DOE support under any agreement involving subjects at risk who have on file with DHHS an approved general assurance pursuant to 45 CFR Part 46 will be considered to have an approved general assurance on file with DOE. Those recipients meeting this requirement shall, in lieu of the requirements of paragraph (a) of this section, submit a document to DOE stating that they presently have an approved general assurance on file with DHHS.

(c) Such assurance under paragraph (a) or document under paragraph (b) of this section, shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this part, and shall be filed in such form and manner as the Administrator may require.

[41 FR 52434, Nov. 30, 1976, as amended at 42 FR 30493, June 15, 1977]

§ 745.5 Types of assurances.

(a) *General assurances.* A general assurance describes the review and implementation procedures applicable to all DOE-supported activities conducted by an institution, regardless of the number, location, or types of its components or field activities. General assurances will be required from institutions having a significant number of concurrent DOE-supported projects or activities involving human subjects.

(b) *Special assurances.* A special assurance will, as a rule, describe those review and implementation procedures applicable to a single activity or project. A special assurance will not be solicited or accepted from an institution which has on file with DOE or DHHS an approved general assurance.

[41 FR 52434, Nov. 30, 1976, as amended at 42 FR 30493, June 15, 1977]

§ 745.6 Minimum requirements for general assurances.

General assurances shall be submitted in such form and manner as the Administrator may require. The institution must include, as part of its general assurance, implementing guidelines that specifically provide for:

(a) A statement of principles which will govern the institution in the discharge of its repsonsibilities for protecting the rights and welfare of subjects. This may include appropriate existing codes or declarations, or statements formulated by the institution itself. It is to be understood that no such principles supersede DOE policy or applicable law.

(b) An Institutional Review Board or Board structure which will conduct initial and continuing reviews in accordance with the policy outlined in § 745.2. Such a Board or Board structure shall meet the following requirements:

(1) The Board must be composed of not less than five persons with varying backgrounds to assure complete and adequate review of activities commonly conducted by the institution. The Board must be sufficiently qualified through the maturity, experience, and expertise of its members, and diversity of its membership, to insure respect for its advice and counsel for safeguarding the rights and welfare of human subjects. In addition to possessing the professional competence necessary to review specific activities, the Board must be able to ascertain the acceptability of applications and proposals in terms of institutional commitments and regulations, applicable law, standards of professional conduct and practice, and community attitudes. The Board must, therefore, include persons whose conerns are in these areas.

(2) The Board members shall be identified to DOE by name; earned degrees, if any; position or occupation; representative capacity; and by other pertinent indications of experience, such as board certification, licenses, etc., sufficient to describe each member's chief anticipated contributions to Board deliberations. Any employment or other relationship between each member and the institution shall be identified, i.e., full-time employee, part-time employee, member of governing panel or board, paid consultant, or unpaid consultant. Changes in Board membership shall be reported to DOE in such form and at such times as the Administrator may require.

(3) No member of a Board shall be involved in either the initial or continuing review of an activity in which he has a conflicting interest, except to provide information requested by the Board.

(4) No Board shall consist entirely of persons who are officers, employees, or agents of, or are otherwise associated with, the institution, apart from their membership on the Board.

(5) No Board shall consist entirely of members of a single professional group.

(6) The quorum of the Board shall be defined, but may in no event be less than a majority of the total membership duly convened to carry out the Board's responsibilities under the terms of the assurance.

(c) Procedures which the institution will follow in its initial and continuing review of applications, proposals, and activities.

(d) Procedures which the Board will follow: (1) To provide advice and counsel to activity directors and investigators with regard to the Board's actions,

(2) To insure prompt reporting to the Board of proposed changes in an activity, and of unanticipated problems involving risk to subjects or others, and

(3) To insure that any such problems, including adverse reactions to biologicals, drugs, radioisotope-labelled drugs, or to medical devices, are promptly reported to DOE.

(e) Procedures which the institution will follow to maintain an active and effective Board and to implement its recommendations.

§ 745.7 Minimum requirements for special assurances.

Special assurances shall be submitted in such form and manner as the Administrator may require. An acceptable special assurance shall:

(a) Identify the specific agreement involved by its full title and by the name of the activity or project director, principal investigator, fellow, or other person immediately responsible for the conduct of the activity.

(b) Include a statement, executed by an appropriate institutional official, indicating that the institution has established an Institutional Review Board satisfying the requirements of § 745.6(b).

(c) Describe the makeup of the Board and the training, experience, and background of its members as required by § 745.6(b)(2).

(d) Describe, in general terms, the risks to subjects that the Board recognizes as inherent in the activity, and justify its decision that these risks are so outweighed by the sum of the benefit to the subject, and the importance of the knowledge to be gained, as to warrant the Board's decision to permit the subject to accept these risks.

(e) Describe the informed consent procedures to be used, and attach documentation as required by § 745.10.

(f) Describe procedures which the Board will follow to insure prompt reporting to the Board of proposed changes in the activity, and of any unanticipated problems involving risks to subjects or others, to insure that any such problems, including adverse reactions to biologicals, drugs, radioisotope-labelled drugs, or to medical devices, are promptly reported to DOE.

(g) Indicate at what time intervals the Board will meet to provide for continuing review. Such review must occur no less than annually.

(h) Be signed by the individual members of the Board and be endorsed by an appropriate institutional official.

§ 745.8 Evaluation and disposition of assurances.

(a) All assurances submitted in accordance with §§ 745.6 and 745.7 shall be evaluated by the Administrator through such officers and employees of DOE as he determines to be appropriate. The Administrator's evaluation shall take into consideration, among other pertinent factors, the adequacy of the proposed institutional Review Board in light of the anticipated scope of the applicant institution's activities and the types of subject populations likely to be involved, the appropriateness of the proposed initial and continuing review procedures in light of the probable risks, and the size and complexity of the institution.

(b) On the basis of his evaluation of an assurance, pursuant to paragraph (a) of this section, the Administrator shall (1) approve, (2) enter into negotiations to develop a more satisfactory assurance, or (3) disapprove. With respect to approved assurances, the Administrator may determine the period during which any particular assurance or class of assurances shall remain effective or otherwise condition or restrict his approval. With respect to negotiations, the Administrator may, pending completion of negotiations for a general assurance, require an institution, otherwise eligible for such an assurance, to submit special assurances.

§ 745.9 Obligation to obtain informed consent; prohibition of exculpatory clauses.

Any institution proposing to place any subject at risk is obligated to obtain and document legally effective informed consent. No such informed consent, oral or written, obtained under an assurance provided pursuant to this part shall include any exculpatory language through which the subject is made to waive, or to appear to waive, any of his legal rights, including any release of the institution or its agents from liability for negligence.

§ 745.10 Documentation of informed consent.

The actual procedure utilized in obtaining legally effective informed consent and the basis for Institutional Review Board determinations that the procedures are adequate and appropriate shall be fully documented. The documentation of consent will employ one of the following three forms:

(a) Provision of a written consent document embodying all of the basic elements of informed consent. This may be read to the subject or to his legally authorized representative, but in any event he or his legally authorized representative must be given adequate opportunity to read it. This document is to be signed by the subject or his legally authorized representative. Sample copies of the consent form, as approved by the Board, are to be retained in its records.

(b) Provision of a "short form" written consent document indicating that the basic elements of informed consent have been presented orally to the subject or his legally authorized representative. Written summaries of what is to be said to the subject are to be approved by the Board. The short form is to be signed by the subject or his legally authorized representative and by an auditor witness to the oral presentation and to the subject's signature. A copy of the approved summary, annotated to show any additions, is to be signed by the persons officially obtaining the consent and by the auditor witness. Sample copies of the consent form and of the summaries as approved by the Board are to be retained in its records.

(c) Modification of either of the primary procedures outlined in paragraphs (a) and (b) of this section. Granting of permission to use modified procedures imposes additional responsibility upon the Board and the institution to establish:

(1) That the risk to any subject is minimal,

(2) That use of either of the primary procedures for obtaining informed consent would surely invalidate objectives of considerable immediate importance, and

(3) That any reasonable alternative means for attaining these objectives would be less advantageous to the subjects. The Board's reasons for permitting the use of modified procedures must be individually and specifically documented in the minutes and in reports and Board actions to the files of the institution. All such modifications should be regularly reconsidered as a function of continuing review and as required for annual review, with documentation of reaffirmation, revision, or discontinuation, as appropriate.

§ 745.11 Submission and certification of applications and proposals—general assurances.

(a) *Timely review.* Any institution having an approved general assurance shall indicate in each application or proposal for support of activities covered by this part (or in a separate document submitted with such application or proposal) that it has on file with DOE or DHHS such an assurance. In addition, unless the Administrator otherwise provides, each such application or proposal must be given review and, when found to involve subjects at risk, approval, prior to submission, or a written assurance must be submitted that a review is planned or in progress and that the results of the review will be received by the administrator no later than 60 days after the date of submission to DOE. In the event the Administrator provides for the performance of institutional review of an application or proposal after its submission to DOE, processing of such application or proposal by DOE will under no circumstances be completed until such institutional review and approval has been certified. Except where the institution determines that human subjects are not involved, the application or proposal should be appropriately certified in the spaces provided on forms, or one of the following certifications, as appropriate, should be typed on the lower or right-hand margin of the page bearing the name of an official authorized to sign or execute applications or proposals for the institution.

Human Subjects: Reviewed, Not at Risk
(Date) ______________________

Human Subjects: Reviewed, at Risk, Approved.
(Date) ______________________

(b) *Applications and proposals not certified.* Applications and proposals not properly certified, or submitted as not involving human subjects and found by the operating agency to involve human subjects, will be returned to the institution concerned.

[41 FR 52434, Nov. 30, 1976, as amended at 42 FR 30493, June 15, 1977]

§ 745.12 Submission and certification of applications and proposals, special assurances.

(a) Except as provided in paragraph (b) of this section, institutions not having an approved general assurance shall submit in or with each application or proposal for support of activities covered by this part a separate special assurance and certification of its review and approval.

(b) If the Administrator so provides, the assurance which must be submitted in or with the application or proposal under paragraph (a) of this section need satisfy only the requirements of § 745.7 (a) and (b) of this part. Under such circumstances, processing of such application or proposal by DOE will not be completed until a further assurance satisfying the remaining requirements of § 745.7 has been submitted to DOE.

(c) An assurance and certification prepared in accordance with this part and approved by DOE shall be considered to have met the requirement for certification for the initial agreement period concerned. If the terms of the agreement recommend additional support periods, each application or proposal for continuation or renewal of support must satisfy the requirements of this section or § 745.11, whichever is applicable at the time of its submission.

§ 745.13 Applications and proposals lacking definite plans for involvement of human subjects.

Certain types of applications or proposals are submitted with the knowledge that subjects are to be involved within the support period, but definite plans for this involvement would not normally be set forth in the application or proposal. These include such activities as—

(a) Institutional-type grants where selection of projects is the responsibility of the institution;

(b) Training grants where training projects remain to be selected; and

(c) Research, pilot, or developmental studies in which involvement depends upon such things as the completion of instruments, or of prior animal studies, or upon the purification of compounds. Such applications or proposals shall be reviewed and certified in the same manner as more definitive applications or proposals. The initial certification indicates institutional approval of the applications or proposals as submitted and commits the institution to later review of the plans when completed. Such later review and certification to DOE should be completed prior to the beginning of the budget period during which actual involvement of human subjects is to begin. Review and certification to DOE must in any event be completed prior to involvement of human subjects.

§ 745.14 Applications and proposals submitted with the intent of not involving human subjects.

If an application or proposal does not anticipate involving or intend to involve human subjects, no certification should be included with the initial submission of the application or proposal. In those instances, however, when later it becomes appropriate to use all or part of awarded funds for one or more activities which will involve subjects, each such activity shall be reviewed and approved in accordance with the assurance of the institution prior to the involvement of subjects. In addition, no such activity shall be undertaken until the institution has submitted to DOE:

(a) A certification that the activity has been reviewed and approved in accordance with this part; and

(b) A detailed description of the proposed activity (including any protocol, revised statement of work or similar document). Also, where support is provided by project grants or contracts, subjects shall not be involved prior to certification and institutional receipt of DOE approval and, in the case of contracts, prior to negotiation and formal amendment of the contract statement of work.

§ 745.15 Evaluation and disposition of applications and proposals.

(a) Notwithstanding any prior review, approval, and certification by the institution, all applications or proposals submitted to DOE involving human subjects at risk shall be evaluated by the Administrator for compliance with this part through such officers and employees of DOE as he determines to be appropriate. This evaluation may take into account, among other pertinent factors, the apparent risks to the subjects, the adequacy of protection against these risks, the potential benefits of the activity to the subjects and to others, and the importance of the knowledge to be gained.

(b) *Disposition.* On the basis of his evaluation of an application or proposal, pursuant to paragraph (a) of this section, and subject to such approval or recommendation by or consultation with appropriate councils, committees, or other bodies as may be required by law, the Administrator shall

(1) Approve;

(2) Defer for further evaluation; or

(3) Disapprove support of the proposed activity in whole or in part. With respect to any grant or contract award or other agreement, the Administrator may impose conditions, including restrictions on the use of certain procedures or certain subject groups, or requiring use of specified safeguards or informed consent procedures when in his judgment such conditions are necessary for the protection of human subjects.

§ 745.16 Cooperative activities.

Cooperative activities are those which involve institutions in addition to the institution having an agreement with DOE (herein referred to as, though not limited to, a grantee or prime contractor). Examples of cooperative activities are those of a contractor under a grantee or of a subcontractor under a prime contractor. If, in such instances, the grantee or prime contractor obtains access to all or some of the subjects involved through one or more cooperating institutions, the basic DOE policy applies and the grantee or prime contractor remains responsible for safeguarding the rights and welfare of the subjects.

(a) *Institutions with approved general assurances.* Initial and continuing review by the institution may be carried out by one or a combination of procedures:

(1) *Cooperating institution with approved general assurance.* When the cooperating institution has on file with DOE or DHHS an approved general assurance, the grantee or prime contractor may, in addition to its own review, request the cooperating institution to conduct an independent review, and to report its recommendations on those aspects of the activity that concern individuals for whom the cooperating institution has responsibility under its own assurance to the grantee's or prime contractor's Institutional Review Board. The grantee or prime contractor may, at its discretion, concur with or further restrict the recommendations of the cooperating institution. It is the responsibility of the grantee or prime contractor to maintain communication with the Boards of the cooperaing institution. However, the cooperating institution shall promptly notify the grantee or contracting institution whenever the cooperating institution finds the conduct of the project or activity within its purview to be unsatisfactory.

(2) *Cooperating institution with no approved general assurance.* When the cooperating institution does not have an approved general assurance on file with DOE or DHHS, DOE may require the submission of a general or special assurance which, if approved, will permit the grantee or prime contractor to follow the procedure outlined in the preceding subparagraph.

(3) *Interinstitutional joint review.* The grantee or prime contracting institution may wish to develop an agreement with cooperating institutions to provide for an Institutional Review Board with representatives from cooperating institutions. Representatives of cooperating institutions may be appointed as ad hoc members of the grantee or contracting institution's existing Institutional Review Board or, if cooperating is on a frequent or continuing basis, as between a medical school and a group of affiliated hospitals, appointments for extended periods may be made. All such cooperative arrangements must be approved by DOE or DHHS as part of a general assurance, or as an amendment to a general assurance.

(b) *Institutions with special assurances.* While responsibility for initial and continuing review necessarily lies with the grantee or prime contracting institution, DOE may also require approved assurance from those cooperating institutions having immediate responsibility for subjects. If the cooperating institution has on file with DOE or DHHS an approved general assurance, the grantee or prime contractor shall request the cooperating institution to conduct its own independent review of those aspects of the project or activity which will involve human subjects for which it has responsibility. Such a request shall be in writing and should provide for direct notification of the grantee's or prime contractor's Institutional Review Board in the event that the cooperating institution's Board finds the conduct of the activity to be unsatisfactory. If the cooperating institution does not have an approved general assurance on file with DOE or DHHS, it must submit to DOE a general or special assurance which is determined by DOE to comply with the provisions of this part.

[41 FR 52434, Nov. 30, 1976, as amended at 42 FR 30493, June 15, 1977]

§ 745.17 Investigational new drug 30-day delay requirement.

Where an institution is required to prepare or to submit a certification under §§ 745.11, 745.12, 745.13, or § 745.14, and the application or proposal involves an investigational new drug within the meaning of The Food, Drug, and Cosmetic Act, the drug shall be identified in the certification, together with a statement that the 30-day delay required by 21 CFR 312.1(a)(2) has elapsed and the Food and Drug Administration has not, prior to expiration of such 30-day interval, requested that the sponsor continue to withhold or to restrict use of the drug in human subjects; or that the Food and Drug Administration has waived the 30-day delay requirement; provided, however, that in those cases in which the 30-day delay interval has neither expired nor been waived, a statement shall be forwarded to DOE upon such expiration, or upon receipt of a waiver. No certification shall be considered acceptable until such statement has been received.

§ 745.18 Institution's executive responsibility.

Specific executive functions to be conducted by the institution include policy development and promulgation and continuing indoctrination of personnel. Appropriate administrative assistance and support shall be provided for the Board's functions. Implementation of the Board's recommendations through appropriate administrative action and follow-up is a condition of DOE approval of an assurance. Board approvals, favorable actions, and recommendations are subject to review and to disapproval or further restriction by the institution officials. Board disapprovals, restrictions, or conditions cannot be rescinded or removed except by action of a Board described in the assurance approved by DOE or DHHS.

[41 FR 52434, Nov. 30, 1976, as amended at 42 FR 30493, June 15, 1977]

§ 745.19 Institution's records; confidentiality.

(a) Copies of all documents presented, or required for initial and continuing review by the Institutional Review Board, and documents such as Board minutes, records of subject's consent, transmittals on actions, instructions, and conditions resulting from Board deliberations addressed to the activity director, are to be retained by the institution permanently unless permission is obtained from the Administrator to destroy specific records.

(b) Except as otherwise provided by law, information in the records or possession of an institution acquired in connection with an activity covered by this part, which information refers to or can be identified with a particular subject, may not be disclosed except:

(1) With the consent of the subject or his legally authorized representative; or

(2) As may be necessary for the Administrator to carry out his responsibilities under this part.

§ 745.20 Reports.

Each institution with an approved assurance shall provide the Administrator with such reports and other information as the Administrator may, from time to time, prescribe.

§ 745.21 Early termination of awards; evaluation of subsequent applications and proposals.

(a) If, in the judgment of the Administrator, an institution has failed materially to comply with the terms of this policy with respect to a particular DOE agreement, he may require that said agreement be terminated or suspended in the manner prescribed in applicable regulations.

(b) In evaluating applications or proposals for support of activities covered by this part, the Administrator may take into account, in addition to all other eligibility requirements and program criteria, such factors as:

(1) Whether the applicant or offeror has been subject to a termination or suspension under paragraph (a) of this section;

(2) Whether the applicant, offeror, or the person who would direct the scientific and technical aspects of an activity has, in the judgment of the Administrator, failed materially to discharge his, her, or its responsibility for the protection of the rights and welfare of subjects in his, her, or its care (whether or not DOE funds were involved); and

(3) Whether, where past deficiencies have existed in discharging such responsibility, adequate steps have, in the judgment of the Administrator, been taken to eliminate these deficiencies.

§ 745.22 Conditions.

The Administrator may, with respect to any agreement or any class of agreements, impose additional conditions prior to or at the time of any award when in his judgment such conditions are necessary for the protection of human subjects.

PART 760—DOMESTIC URANIUM PROGRAM

§ 760.1 Uranium leases on lands controlled by DOE. (Domestic Uranium Program Circular No. 760.1, formerly (AEC) Domestic Uranium Program Circular 8, 10 CFR 60.8).

(a) *What this section does.* This section sets forth regulations governing the issuance of leases to permit the exploration for and mining of deposits containing uranium in public lands withdrawn from entry and location under the general mining laws for use of DOE, and in certain other lands under DOE control.

(b) *Statutory authority.* The Atomic Energy Act of 1954, as amended (68 Stat. 919, 42 U.S.C. 2011 et seq.) is the authority for this section.

(c) *Who may hold leases.* Only parties who are (1) citizens of the United States; (2) associations of such citizens; or (3) corporations organized under the laws of the United States or territories thereof, are eligible lessees under this section. Persons under 21 years of age or employees of DOE are not eligible.

(d) *Issuance of leases through competitive bidding.* Except under special circumstances as provided in paragraph (u) of this section, each lease will be offered through competitive bidding and, except as otherwise provided in this paragraph (d), will be issued to the acceptable bidder offering the highest bid. The bid may be on a cash bonus, royalty bonus, or other basis as specified in the invitation to bid. Invitations to bid on some of the lands may be limited to small business concerns as defined by the Small Business Administration, and such invitations may limit the number of leases to be awarded to each bidder. In such cases DOE will accept those bids which, in relation to other bids received pursuant to the invitation, are most advantageous to the Government. Before any lease is awarded, DOE may require high bidders to submit a detailed statement of the facts as to such matters as their experience, organization, and financial resources. DOE reserves the right to reject any and all bids.

(e) *Solicitation of bids.* Announcements of the availability of invitations to bid for a lease will be publicly posted and published. Copies of such announcements will also be mailed to parties who submit to DOE's Grand Junction, Colorado, Office subsequent to publication in the FEDERAL REGISTER of this (DOE) Domestic Uranium Program Circular 760.1, written requests that their names be placed on a mailing list for receipt of such announcements. The invitations containing information for preparation and submission of bids will be available at the Grand Junction Office, and will be mailed only on specific written request, following announcement of their availability. Invitations will specify the land to be leased, the basis on which bids are to be submitted, the amount of the monetary deposit which must be transmitted with the bid, the place and time the bids will be publicly opened, the term, royalty and other payments, performance requirements, and other payments, performance requirements, and other conditions which will become a part of the lease. In addition, data which have been assembled pertaining to the lands to be leased will be available for public inspection at the Grand Junction Office; copies will also be available for purchase.

(f) *Bidding requirements; deposits.* All bids must be filed at the place and prior to the time set forth in the invitation. Each bid must be sealed and accompanied by a deposit, in the form of a certified check, cashier's check, or bank draft, in an amount as specified in the invitation to bid. Deposits of unsuccessful bidders will be returned. If the bidder is an individual, he must submit with his bid a statement of his citizenship and age. If the bidder is an association (including a partnership), the bid shall be accompanied by a certified copy of the articles of association together with a statement as to the citizenship and age of its members. If the bidder is a corporation, evidence that the officer signing the bid had authority to do so and a statement as to the State of incorporation shall also be submitted.

(g) *Awarding of lease.* Following public opening of the bids, DOE, subject to the right to reject any and all bids, will determine the successful bidder. In the event the highest acceptable bids are tie bids, a public drawing will be held by DOE to determine the successful bidder. After notice of award and within the time period prescribed in the invitation, the successful bidder shall execute and return to DOE three (3) copies of the lease and shall remit payments due as prescribed in the invitation. Should the successful bidder fail to execute the lease, or make payments as required, in accordance with the terms of the invitation, or fail to otherwise comply with applicable regulations, he may be required to forfeit any payments previously made, and lose any further right or interest in the lease. In such event, DOE may offer the lease to the next highest acceptable bidder, reoffer the lease for bidding, or take such other action as appropriate. If the awarded lease is executed by the bidder through an agent, evidence of authorization must be submitted.

(h) *Dating of lease.* A lease issued under this section will ordinarily be effective as of the date it is signed on behalf of DOE.

(i) *Term of lease.* A lease shall be for the period specified in the invitation to bid. When deemed desirable by DOE, the lease will provide that the lease term may be extended at the option of the lessee for a specified period and upon stipulated conditions.

(j) *Payments to DOE under lease.* Royalty payments shall be specified in the invitation to bid; base royalty, minimum royalty, advance royalty, and rental payments, or a combination thereof may be required.

(k) *Title to unshipped ore.* DOE, unless it approves otherwise, reserves all right and title to property in and to all ores and other uranium- or vanadium-bearing material not removed from the leased premises within 60 days after expiration or other termination of the lease. Unless DOE approves otherwise, all material mined from the leased premises and not marketed by the lessee shall remain on the leased premises.

(l) *Environmental controls.* Each lease will contain such provisions as may be deemed necessary by DOE with respect to the lessee's use of the leased lands. DOE may require periodic submission of plans for exploration and mining activities including provisions for control of environmental impact. The lessee will be required to conduct operations so as to minimize adverse environmental effects, to comply with all applicable State and Federal statutes and regulations and to the extent stipulated in the lease agreement, will be held responsible for maintenance or rehabilitation of affected areas in accordance with plans submitted to and approved by DOE.

(m) *Performance requirements.* A lease shall require that exploration, development, and mining activities, as appropriate, be conducted on the leased premises with reasonable diligence, skill, and care as required to achieve and maintain production of uranium ore at rates consistent with good and safe mining practice and with market conditions.

(n) *Health and safety requirements.* A lease (1) shall require that exploration, development, and mining activities, as appropriate, be conducted on the leased premises with due regard for the health and safety of those involved, and (2) shall include appropriate measures for the control of radiation exposure in the mines.

(o) *Lessee's records.* Leases shall provide that the lessee keep and make available to DOE such records as DOE deems necessary for the administration of the lease and its leasing program.

(p) *Rights of DOE.* DOE reserves the right to enter upon the leased property and into all parts of the mine for inspection and other purposes. DOE also reserves the right to grant to other persons easements or rights of way upon, through, or in the leased premises. DOE and the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after termination or expiration of lease, have access to and the right to examine any directly pertinent books, papers, and records of the lessee involving transactions related to the lease.

(q) *Relinquishment of leases.* A lease may be surrendered by the lessee upon filing with and approval by DOE of a written application for relinquishment. Approval of the application shall be contingent upon the delivery of the leased premises to DOE in a condition determined to be satisfactory to DOE. The lessee shall continue to be liable for the payment of all royalty and other debts due DOE.

(r) *Assignment of leases.* Any transfer of a lease or any interest therein or claim thereunder, will not be recognized unless and until approved by DOE in writing. Ordinarily, DOE will not approve any transfer of a lease which involves overriding royalties or deferred payments of any kind to the transferor.

(s) *Cancellation.* Any lease may be cancelled by DOE whenever the lessee fails to comply with the provisions of the lease. Failure of DOE to exercise its right to cancel shall not be deemed a waiver thereof.

(t) *Form of lease.* Leases will be issued on forms prescribed by DOE.

(u) *Noncompetitive leases.* Under special circumstances, where DOE believes it to be in the best interest of the Government, DOE at its discretion may award or extend leases on the basis of negotiation.

(v) *DOE decisions.* All matters connected with the issuance and administration of leases will be determined by DOE whose decisions shall be final and conclusive.

(w) *Definitions.* "DOE" as used in this section means the United States Department of Energy or its duly authorized representative or representatives.

(x) *Multiple use of land.* Leases issued under this section shall provide that operations under them will be conducted so as not to interfere with the lawful operations of any third party having a lease, permit, easement, or other right or interest in the premises.

(y) *Compliance with State and Federal regulations.* Every lease shall provide that the lessee is required to comply with all applicable State and Federal statutes and regulations.

(Secs. 66, 161, 68 Stat. 933, 948, as amended; 42 U.S.C. 2096, 2201)

[41 FR 56783, Dec. 30, 1976]

PART 761—CRITERIA TO ASSESS VIABILITY OF DOMESTIC URANIUM MINING AND MILLING INDUSTRY

Sec.
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SOURCE: 48 FR 45749, Oct. 6, 1983, unless otherwise noted.

§ 761.1 Purpose and scope.

This part contains the regulations of the Energy Information Administration (EIA) of the Department of Energy (DOE) implementing section 170B of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*), which requires the Secretary of Energy to monitor and for the years 1983 to 1992 report annually to the Congress and the President a determination of the viability of the domestic uranium mining and milling industry. The regulations stated here provide for the establishment of criteria which shall be assessed in the annual reports and information collections necessary to determine if the criteria have been met.

§ 761.2 Definitions.

As used in this part:

(a) "Statutory Criterion No. 1" means an assessment of whether executed contracts or options for source material or special nuclear material will result in greater than 37½ percent of actual or projected domestic uranium requirements for any two-consecutive-year period being supplied by source material or special nuclear material from foreign sources;

(b) "Statutory Criterion No. 2" means projections of uranium requirements and inventories of domestic utilities for a 10-year period;

(c) "Statutory Criterion No. 3" means present and probable future use of the domestic market by foreign imports;

(d) "Statutory Criterion No. 4" means whether domestic economic reserves can supply all future needs for a future 10-year period;

(e) "Statutory Criterion No. 5" means present and projected domestic uranium exploration expenditures and plans;

(f) "Statutory Criterion No. 6" means present and projected employment and capital investment in the uranium industry;

(g) "Statutory Criterion No. 7" means the level of domestic uranium production capacity sufficient to meet projected domestic nuclear power needs for a 10-year period;

(h) "Statutory Criterion No. 8" means a projection of domestic uranium production and uranium price levels which will be in effect under various assumptions with respect to imports.

(i) "Domestic uranium mining and milling industry" or "domestic uranium industry" means resource ownership, exploration, development, mining, milling, and other beneficiation activities, directed specifically toward the ultimate production of uranium from mineral deposits located in the United States, to be offered for sale in the commercial marketplace.

(j) "Domestic economic reserves," as referred to in Statutory Criterion No. 4, means uranium that occurs in known mineral deposits located in the United States of such size, grade and configuration that it could reasonably be expected to be recoverable, at or below specified production costs, with currently proven mining and processing technology and under current law and regulations. Estimates of uranium mineralization size, grade and configuration are based on specific sample data and measurements of the deposits and on knowledge of deposit characteristics.

(k) "Production cost" means costs that would have to be incurred to produce uranium in the form of concentrate. They include any:

(1) Direct costs of mining, transporting, and processing the uranium ore.

(2) Costs of associated environmental and waste management.

(3) Costs of maintaining non-operating production units where applicable.

(4) Capital costs of providing new production units where applicable.

(5) Cost of finance including any unamortized past costs where applicable.

(6) Indirect costs, such as office overheads, taxes and royalties where applicable.

(7) Future exploration and development costs wherever required for further or body delineation to the stage where it is ready to be mined or otherwise extracted from the ground.

(l) "Unfilled requirements" means sum of uranium:

(1) Required to be delivered, under terms of an enrichment contract to enrichment suppliers, that is not accounted for by usage of inventory or supply contracts as of a given date;

(2) Anticipated to be purchased to maintain a prudent level of inventory; and

(3) Anticipated to be purchased to satisfy Government requirements for military or other needs.

(m) "Domestic uranium supply security requirements" means, for a given hypothetical import supply disruption, the quantity of uranium to be delivered in a given future period representing the sum of:

(1) Domestic unfilled requirements;

(2) Contracts with domestic uranium mining and milling industry companies (excluding contracts between such companies); and

(3) Contracts for uranium imports subject to the hypothetical supply disruption.

§ 761.3 Resource capability.

(a) *Components.* The following components will be used to determine the current and future values assigned to this attribute:

(1) Statutory Criterion No. 2;

(2) Statutory Criterion No. 3;

(3) Statutory Criterion No. 4;

(4) Statutory Criterion No. 5; and

(5) Statutory Criterion No. 8.

(b) *Current status.* Statutory Criterion No. 4 will be the basis for the current status of the domestic uranium mining and milling industry's resource capability.

(1) The quantity of uranium producible from domestic reserves will be estimated by the EIA on the basis of data provided by domestic uranium mining and milling industry companies.

(2) Domestic economic reserves will be determined by the following method. The EIA will compare the estimated production cost to the price terms of any existing commercial sales contract to which the uranium may be committed. For uranium which may not be committed to commercial contracts, EIA will estimate the production cost in view of market conditions for domestic uranium supply security requirements exclusive of contracts with domestic uranium companies. Reserves will be considered economically producible when estimated production costs are less than expected prices to be realized.

(3) The quantity of domestic economic reserves will be compared to the 10-year-forward sums of domestic uranium supply security requirements with corresponding market conditions.

(c) *Projected status.* The EIA will estimate resource capability at future times under various market assumptions.

(1) In order to project resource capability, EIA will estimate the additions to domestic economic reserves due to the results of exploration activities on potential resources, additions or subtractions to reserves due to projected changes in uranium prices, and reductions due to projected domestic production.

(2) Projected domestic economic reserves for each year will be compared to the sum of domestic uranium supply security requirements projected for a subsequent 10-year period, adjusting the unfilled requirements portion to account for such factors as projected use of the market by imports and projected changes in prices of uranium relative to enrichment services.

§ 761.4 Supply response capability.

(a) *Components.* The following components will be used to determine the current and future values assigned to this attribute:

(1) Statutory Criterion No. 2;

(2) Statutory Criterion No. 3;

(3) Statutory Criterion No. 6;

(4) Statutory Criterion No. 7; and

(5) Statutory Criterion No. 8.

(b) *Current status.* Statutory Criterion No. 7 will be the basis for the supply response capability of the domestic uranium industry.

(1) Schedules of annual domestic uranium supply security requirements for a future 10-year period will be the benchmarks against which the ability of the domestic uranium industry to supply uranium will be compared, assuming hypothetical immediate supply disruptions or other potential developments such as changes in the degree of competition in the international uranium market.

(2) Given schedules of future requirements, EIA will estimate the technical ability (under existing legal and regulatory conditions) of the do-

mestic uranium industry to supply those future requirements under unconstrained financial conditions. This estimate will be based on current uranium industry inventories, the capacity of uranium mills (or other beneficiation facilities) and the ability to supply those mills with uranium ore (including the availability of uranium miners). EIA will consider mining and milling facilities in operation, shut down facilities which could be reopened, facilities under development, and potential new production facilities in regions where the amount and grade of reserves justify production but where mill construction commitments are not yet evident. If there is a resulting projected need for uranium beyond the sources identified as domestic supply response capability, any potential availability of the Federally-owned stockpile in excess of its military and enrichment-plant working inventory needs will be identified for consideration.

(c) *Projected status.* EIA will estimate vulnerability of supply response capability at future times to various potential future import supply disruptions or other international market developments.

(1) Annual schedules of domestic uranium supply security requirements, within a moving 10-year-wide future period beginning at the time of hypothetical import supply disruptions or other potential developments (such as changes in the degree of competition in the international uranium market), will be the benchmarks against which the domestic uranium industry's future projected supply response capability will be compared.

(2) In order to project supply response capability, EIA will project the evolving status of production facilities in operation, shut down, under development or planned, and potential new production facilities in regions where the amount and grade of reserves justify production but where mill construction commitments are not yet evident, up to the time of hypothetical import supply disruptions or other international market developments. The projection of status at future times will be based on present and future imports, present and projected employment and capital investment, and projections of domestic uranium production and prices. If there is a resulting projected need for uranium beyond the sources identified as domestic supply response capability, any projected availability of the Federally-owned stockpile in excess of its military and enrichment-plant working inventory needs will be identified for consideration.

§ 761.5 Financial capability.

(a) *Components.* The following components will be used to determine the current and future values assigned to this attribute:

(1) Statutory Criterion No. 5;

(2) Statutory Criterion No. 6;

(3) Statutory Criterion No. 7;

(4) Statutory Criterion No. 8; and

(5) The working capital of the uranium industry, net property, plant and equipment, capitalization, profits, availability of funds and uses to which the funds are applied.

(b) *Current status.* The current adequacy of the domestic uranium industry's financial capability will be determined by comparing the industry's current-year sources of funds to the current-year funds needed for uranium activities, such as exploration, property development, mine and mill development, maintenance of facilities in standby condition, etc., to maintain an adequate supply response capability.

(1) Current-year domestic uranium industry fund requirements will be computed, consistent with an adequate supply response capability from § 761.4.

(2) Current-year domestic uranium industry fund availability will be determined from the information collections outlined in section 761.8.

(c) *Projected status.* The long-term funds generation potential of the domestic uranium industry will be projected and compared to the investment and other fund needs associated with the range of projected supply response capabilities required under § 761.4.

(1) Projected fund needs will be based on projected exploration expenditures, projected employment-re-

lated expenditures, capital investment, and other expenses projected for an adequate supply response capability.

(2) Projected fund generation potential will be based on projected domestic uranium production and prices and the projected attractiveness of domestic uranium industry investments relative to other alternatives.

§ 761.6 Import commitment dependency.

(a) *Components.* The following components will be used to determine the current and projected values of the attribute:

(1) Statutory Criterion No. 1;

(2) Statutory Criterion No. 2; and

(3) Statutory Criterion No. 3.

(b) *Current status.* Statutory Criterion No. 1 is the basis of the current status for the import commitment dependency attribute. Scheduled uranium deliveries from contracts and options in place at the time of assessment will be compared to total uranium deliveries for domestic utility use, expected at the time of assessment. For all current and future years, EIA will estimate the quantity of foreign-source uranium expected to be used by domestic utilities within each 2-consecutive-calendar-year period and determine if such quanity represents greater than 37½ percent of total projected domestic utility requirements during the same period. The current status of this attribute will serve as the basis for the Secretary of Energy's mandatory responsibility under section 170B(e)(1) of the Atomic Energy Act of 1954, as amended by Pub. L. 97-415.

(c) *Projected status.* For the projected status, EIA will estimate future uranium imports (including those from current contracts), as provided for in Statutory Criterion No. 3, and project total utility requirements consistent with EIA's projections of domestic nuclear power plant start-up dates and operating factors. A comparison of 2-consecutive-calendar-year import usage and total domestic utility requirements will be made in a manner analogous to that carried out for the current status of this attribute.

§ 761.7 Determination of viability.

The Secretary of Energy will determine the domestic uranium mining and milling industry's viability on the basis of information provided by EIA on the current and projected attributes identified in §§ 761.3 through 761.6.

§ 761.8 Reports by companies involved in domestic uranium commerce.

(a) Every company engaged in domestic uranium commerce shall report periodically to the EIA, in accordance with forms and instructions issued by EIA, such information as is required, including the following:

(1) Inventories of and requirements for uranium supplies.

(2) Terms of contractual arrangements for uranium sales, purchases, loans and other similar forms of uranium commerce.

(3) Reserves of uranium-bearing ore.

(4) Exploration, development, construction, production, and operation activities concerning uranium supplies.

(5) Capital expenditures and employment for uranium exploration, development, construction, production, and operation activities.

(6) Financial information about uranium exploration, development, construction, production, and operation activities, such as that contained in:

(i) A Balance Sheet;

(ii) A Statement of Income;

(iii) A Statement of Changes in Financial Position; and

(iv) A Statement of Changes in Property, Plant and Equipment and a related Statement of Changes in Accumulated Depreciation, Depletion and Amortization, which will provide data similar to that contained in Schedules V and VI of Securities and Exchange Commission Form 10-K.

(b) The EIA has determined that the data to be furnished on individual company uranium exploration, development, construction, production, operation, and marketing activities may constitute confidential commercial information as specified in the Freedom of Information Act (5 U.S.C. 552). The EIA has taken the position that such individual company data will be kept confidential to the maximum extent permitted by the Freedom of Information Act and the Trade Secrets Act (18 U.S.C 1905). Except as otherwise provided by law, the information must be made available, upon request, to the Congress or any Committee of Congress and the General Accounting Office.

PART 762—URANIUM ENRICHMENT SERVICES CRITERIA

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AUTHORITY: Sec. 161(v) of the Atomic Energy Act of 1954, 68 Stat. 921 (42 U.S.C. 2201(v)).

SOURCE: 51 FR 27144, July 29, 1986, unless otherwise noted.

§ 762.1 General.

(a) *Authority.* These criteria set forth the general terms and conditions applicable to the provision to civilian customers of uranium enrichment services in facilities owned by DOE, as authorized by the Atomic Energy Act of 1954, as amended (the Act). Specifically, these criteria are established pursuant to section 161(v) of the Act, which was added by Pub. L. 88-489, the "Private Ownership of Special Nuclear Materials Act."

(b) *Eligible customers.* DOE may enter into contracts for providing enrichment services with licensees and cooperative agreement customers. Enrichment services can be offered to cooperative agreement customers only while comparable services are available to licensees and cannot be offered for prices less than the prices for services to licensees.

(c) *Capacity limitations.* DOE will not enter into contracts in excess of the available capabilities of DOE. Available capability consists of inventories of material available or committed to DOE and the physical capability of existing and authorized enrichment plants, fully powered and operated without limitation as to mode of operation, but as reduced by potential commitments involving forecasts of Government needs.

(d) *Sale limitations.* Except as specifically provided, nothing in this notice shall be deemed to affect the sale or leasing of special nuclear material by DOE or the entering into "barter" arrangements whereby special nuclear material is distributed pursuant to section 54 of the Act and source material is accepted in part payment therefor.

(e) *Committed services.* Contracts for the provision of enrichment services shall specify the extent to which a customer is committed to take services from DOE and the charge, if any, for not taking committed services.

(f) *Duration.* Contracts for the provision of enrichment services shall be long-term, except that DOE may offer short-term contracts if, in its view, such contracts would promote the objectives of the AEA.

(g) *Revision of criteria.* The criteria contained in this notice are subject to change by DOE from time to time; however, any such changes shall be developed in conformance with applicable administrative guidelines and shall be submitted to the Committees of the Senate and House of Representatives which under the rules of the Senate and House have jurisdiction for review in accordance with the Act.

§ 762.2 Definitions.

(a) "Enrichment services" means the separative work necessary to enrich or further enrich uranium in the isotope U-235.

(b) "Cooperative agreement customer" means a person receiving enrichment services pursuant to an agreement for cooperation arranged pursuant to section 123 of the AEA.

(c) "Licensee" means a person licensed under sections 53, 63, 103 or 104 of the AEA.

(d) "Separative work" means the measure of the effort required to separate a quantity of uranium feed material into (1) an enriched fraction containing a higher concentration of U-235 than the feed material and (2) a tails fraction containing a lower concentration of U-235.

§ 762.3 Enrichment of uranium of foreign origin.

DOE may not restrict the enrichment of uranium of foreign origin for domestic use except to the extent it determines such a restriction is necessary to assure the maintenance of a viable domestic uranium industry.

§ 762.4 Prices.

DOE may negotiate prices in individual enrichment services contracts in accordance with an overall approach intended to maintain the long-term competitive position of DOE while obtaining the recovery of the Government's costs over a reasonable period of time.

§ 762.5 Costs.

DOE will establish charges for enrichment services on a basis that recovers appropriate Government costs over a reasonable period of time. Such costs will be determined on a basis that includes the costs incurred in providing enrichment services as follows:

(a) Electric power and all other costs, direct and indirect, of operating the enrichment plants;

(b) Depreciation of enrichment plants;

(c) Costs of process development;

(d) Cost of DOE administration and other Government functions in support of the Enrichment Program; and

(e) Imputed interest on investment in plant, working capital, the natural uranium contained in those inventories at the DOE enrichment plants needed to provide enrichment services, and the separative work costs of preproduced inventories.

§ 762.6 Recovery of prior unrecouped Government costs.

In establishing prices for providing enrichment services for civilian customers, DOE will establish reserves sufficient to return to the Treasury of the United States, over a reasonable period of time, previously unrecouped and unrecovered costs associated with provision of enrichment services to civilian customers. The estimate of such costs will include costs attributable to plant capacity used to provide enrichment services for civilian customers, but will not necessarily include costs attributable to plant capacity or other investments not properly allocable to the Government's costs associated with providing enrichment services to civilian customers. DOE shall determine the amount to be returned to the U.S. Treasury each year. In determining this amount, DOE shall consider all relevant factors, including the following:

(a) Long-term financial integrity of the enrichment program;

(b) Reliability of service at competitive prices;

(c) Market share;

(d) Impact upon existing enrichment facilities and other program expenditures;

(e) Impact upon research and development; and

(f) Need to reduce the deficit.

§ 762.7 Non-discrimination.

The same prices, as well as other terms and conditions, shall be available to all similarly-situated customers on a non-discriminatory basis, reflecting DOE's judgment of cost differentials associated with supplying enrichment services to different customers.

§ 762.8 Amendment of contract.

At the request of either DOE or the customer, the parties will negotiate and, to the extent mutually agreed, amend the contract without additional consideration. A contract may provide for renegotiation of prices, as well as other terms and conditions, at specified times or upon request by either party.

§ 762.9 Termination by DOE.

(a) The contract may be terminated by DOE without cost to DOE upon reasonable notice at such time as commercial enrichment services are provided by another domestic source: Provided, however, that DOE will upon request by the customer rescind any notice of termination and will continue to furnish the services specified in the contract if the services of the domestic source are not available to the customer: (1) To the extent provided for in the DOE contract during the remainder of its terms; and (2) on terms and conditions, including charges, which are considered by the DOE to be reasonable and nondiscriminatory.

(b) DOE may terminate the contract without cost to DOE in the event the customer loses its right to possess enriched uranium, or defaults on its contractual obligations, or becomes involved in bankruptcy proceedings where such involvement interferes with the customer's ability to perform its obligations. In such instances, the customer will be required to pay a termination charge determined as if the customer had terminated the contract.

§ 762.10 Termination by customer.

The contract shall provide the circumstances under which the customer may terminate the contract in whole or in part. Reasonable and appropriate charges for termination as are negotiated shall be specified in the contract.

§ 762.11 Quantities and form of feed and product material.

The form of feed and product material shall be UF-6, except where DOE and the customer agree to another form. The quantity of material to be furnished by the customer in relationship to the quantity of enriched uranium to be delivered by DOE and the related amount of separative work to be performed by DOE normally will be determined in accordance with the then current standard table of enrichment services published by DOE. DOE may agree to perform such services in accordance with such other table as is within its capability. DOE will not necessarily use the specific feed material or quantity of material furnished by the customer in producing the enriched uranium delivered to the customer.

§ 762.12 Customer's option to acquire tails material.

The customer shall be granted an option to acquire tails material (depleted uranium) resulting from the performance of enrichment services. The option as to quantity (kg U) of tails material desired by the customer, within the maximum quantity subject to the option, must be exercised at the time of delivery of the related quantity of feed material. The U-235 assay of the tails material delivered to the customer will be within the sole discretion of DOE. The maximum quantity of depleted uranium subject to the option will be equal to the difference between the total uranium supplied by the customer as feed material and the total enriched uranium furnished to the customer, less processing losses as established from time to time by DOE. Delivery of tails material will normally be at the same time as delivery of enriched uranium.

§ 762.13 Responsibility for material meeting specifications.

The customer warrants that all feed material meets specifications and, with stated exceptions, agrees to hold DOE and its representatives harmless from all damages, liabilities, or costs arising out of a breach of the warranty where such damages, liabilities, or costs are incurred prior to final acceptance of the feed material by DOE. However, the customer is not deprived of any rights under indemnification agreements entered into pursuant to section 170 of the Act (Price-Anderson indemnification). DOE's obligation to furnish specification material to the customer terminates upon final acceptance of such material by the customer.

§ 762.14 Other terms.

A contract may contain terms and conditions not specified in these criteria, so long as the terms and conditions are not inconsistent with these criteria.

§ 762.15 Prior contracts.

All contracts under which DOE was providing enrichment services prior to the adoption of these criteria are valid. These prior contracts may be amended to conform to these criteria without penalty, if both parties agree.

PART 763—URANIUM ENRICHMENT LATE PAYMENT CHARGES

AUTHORITY: Sec. 161(v) of the Atomic Energy Act, as amended, 68 Stat. 943, 42 U.S.C. 2201(v).

§ 763.1 Uranium enrichment late payment charges.

The late payment charge for uranium enrichment customers will be the current Treasury Funds rate plus 6 percent pro rata on a daily basis. The additional 6 percent charge will not go into effect until five business days after payment is due. However, if the payment is due between September 15, and September 30, the additional 6 percent charge will go into effect the first day the payment is late.

[52 FR 28538, July 31, 1987]

PART 780—PATENT COMPENSATION BOARD REGULATIONS

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AUTHORITY: Department of Energy Organization Act, secs. 301 and 644, Pub. L. 95-91 (42 U.S.C. 7151, 7254); Energy Reorganization Act of 1974, secs. 104 and 105, Pub. L. 93-438 (42 U.S.C. 5814, 5815); Atomic Energy Act of 1954, secs. 153, 157 and 173, Pub. L. 83-703 (42 U.S.C. 2183, 2187, 2223); Invention Secrecy Act (35 U.S.C. 183).

SOURCE: 46 FR 39581, Aug. 4, 1981, unless otherwise noted.

Subpart A—General Provisions

§ 780.1 Scope.

The regulations in this part establish the procedures, terms, and conditions for Patent Compensation Board:

(a) Proceedings to declare a patent affected with the public interest pursuant to section 153a of the Atomic Energy Act of 1954 (Pub. L. 83-703; 42 U.S.C. 2183);

(b) Proceedings to determine a reasonable royalty fee pursuant to section 157 of the Atomic Energy Act of 1954;

(c) Proceedings for the grant of an award pursuant to section 157 of the Atomic Energy Act of 1954;

(d) Proceedings to obtain compensation pursuant to section 173 of the Atomic Energy Act of 1954 and the Invention Secrecy Act (35 U.S.C. 183);

And for applications to the Department of Energy (DOE) for a patent license pursuant to sections 153b(2) and 153c of the Atomic Energy Act of 1954.

§ 780.2 Definitions.

(a) "Act" means the Atomic Energy Act of 1954 (Pub. L. 83-703; 42 U.S.C. 2011).

(b) "Application" means the application filed by an applicant for a patent license, for the determination of a reasonable royalty fee, for an award, or for compensation under this part.

(c) "Board" means the Patent Compensation Board.

(d) "Chairman" means the Chairman of the Patent Compensation Board.

(e) "Department", or "DOE", or "Department of Energy" means the Department of Energy, established by the Department of Energy Organization Act (Pub. L. 95-91; 42 U.S.C. 7101).

(f) "Party" means the applicant, patent owner, Department representative, and any person admitted as a party by the Board for any proceeding under this part.

(g) "Patent Owner" means the owner of record in the United States Patent and Trademark Office.

(h) "Secretary" means the Secretary of the Department of Energy or the delegate of the Secretary of Energy.

§ 780.3 Jurisdiction of the Patent Compensation Board.

The Patent Compensation Board was established by section 157 of the Atomic Energy Act of 1954. It was transferred to the Energy Research and Development Administration pursuant to section 104(d) of the Energy Reorganization Act of 1974 (42 U.S.C. 5814) and subsequently to the Department of Energy by section 301 of the Department of Energy Organization Act (42 U.S.C. 7151). Under section 157, the Board is given authority to determine reasonable royalty fees or resolve issues involving the grant of awards. In addition, the Board has authority:

(a) To hear and make decisions as to compensation under section 173 of the Act (42 U.S.C. 2223) and the Invention Secrecy Act (35 U.S.C. 183);

(b) To hear and make decisions as to whether a specific patent is affected with the public interest pursuant to section 153a of the Act;

(c) To hear and make decisions as to whether a specific patent license should be granted under sections 153b(2) and 153e of the Act;

(d) To give notices, hold hearings and take such other actions as may be necessary under section 153; and

(e) To exercise all powers available under the Act and necessary for the performance of these duties, including the issuance of such rules of procedure as may be necessary.

§ 780.4 Filing and service of documents.

(a) All communications regarding proceedings subject to this part should be addressed to: Chairman, Patent Compensation Board, U.S. Department of Energy, Webb Building, Room 1006, 4040 N. Fairfax Drive, Arlington, Virginia 22203. All documents offered for filing shall be accompanied by proof of service upon all parties to the proceeding or their attorneys of record as required by law, rule, or order of the Department. Service on the Department shall be by mail, telegram, or delivery to: Office of the Assistant General Counsel for Patents, U.S. Department of Energy, Washington, D.C. 20585.

(b) Filing by mail or telegram will be deemed to be complete as of the time of deposit in the United States mail or with a telegraph company.

§ 780.5 Applications—General form, content, and filing.

(a) Each application shall be signed by the applicant and shall state the applicant's name and address. If the applicant is a corporation, the application shall be signed by an authorized officer of the corporation, and the application shall indicate the state of incorporation. Where the applicant elects to be represented by counsel, a signed notice to that effect shall be filed with the Board.

(b) Each application must contain a concise statement of all of the essential facts upon which it is based. No particular form of statement is required. Each application shall be verified by the applicant or by the person having the best knowledge of such facts. In the case of facts stated on information and belief, the source of such information and grounds of belief shall be given.

(c) Each application must identify any person whose interest the applicant believes may be affected by the proceeding before the Board.

(d) Three copies of each application shall be filed with the Board. However, only one copy of the accompanying exhibits need be filed.

(e) The Board will acknowledge the receipt of the application in writing and advise the applicant of the docket number assigned to the application.

§ 780.6 Department participation.

The Department shall be a party to all proceedings under this part, and the Office of the General Counsel will represent the Department's interests before the Board.

§ 780.7 Designation of interested persons as parties.

In any proceeding under this part, the Board shall admit as a party any person, upon application of such person or on the Board's own initiative, whose interest may be affected by the proceeding.

§ 780.8 Security.

In any proceeding under this part, the Board shall take such steps as necessary pursuant to chapter 12 of the Act and section 181 of the Act to assure compliance with Department security regulations and the common defense.

§ 780.9 Rules of procedure before the Board.

Except as set forth in this part, all Board proceedings, including the hearing and decision, shall be conducted pursuant to the rules of practice of the Department of Energy Board of Contract Appeals, 10 CFR Part 1023, modified as the Board may determine to be necessary and appropriate.

§ 780.10 Decision of the Board.

The decision of the Board in any proceeding under this part shall constitute the final action of the Department on the matter.

§ 780.11 Records of the Board.

The records of the Board in cases filed before it, including the pleadings, the transcript, and the final decision, shall be open to public inspection, except to the extent that such records or portions thereof are withheld from disclosure by the Board pursuant to 10 CFR Part 1004.

Subpart B—Declaring Patents Affected With the Public Interest Under Section 153a of the Atomic Energy Act of 1954

§ 780.20 Initiation of proceeding.

When any person in the Department believes that the Department should declare a patent affected with the public interest pursuant to section 153a of the Act, that person shall make such a recommendation to the Under Secretary. If, after consultation with the General Counsel, the Under Secretary agrees with the recommendation, the Under Secretary shall initiate in writing a proceeding under section 153a before the Board. The communication of the Under Secretary to the Board shall identify the patent and state the basis for the proposed declaration.

§ 780.21 Notice.

The Board will serve upon the patent owner and all other parties a written notice of the Department's proposed action to declare the patent affected with the public interest, and the notice shall identify the patent and state the basis for the proposed declaration.

§ 780.22 Opposition, support and request for hearing.

(a) Any party may, within thirty (30) days after service of the notice or such other time as may be provided by the terms of the notice, file with the Board a written statement in opposition to or in support of the Department's proposed action. Such statement may also include a request for hearing. The statement shall contain a concise description of the facts, law, or any other relevant matter which the party believes should be reviewed by the Board during its consideration of the proposed declaration. If the request for a hearing is timely received, the Board shall call a hearing and provide notice of the time and place to all parties.

(b) Failure of all parties to oppose the proposed action or to request a hearing within the time specified in the notice shall be deemed an acquiescence to that action and may result in a declaration by the Board that the patent is affected with the public interest.

§ 780.23 Hearing and decision.

If a timely request for a hearing is made by any party, the Board will proceed with a hearing and decision. If a hearing is not requested, the Board shall prepare and issue its decision on the record.

§ 780.24 Criteria for declaring a patent affected with the public interest.

A patent shall be declared to be affected with the public interest pursuant to section 153a of the Act upon the Board's final decision that:

(a) The invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy; and

(b) The licensing of such invention or discovery under section 153 of the Act is of primary importance to effectuate the policies and purposes of the Act.

Subpart C—Application for a License Pursuant to Section 153b(2) of the Atomic Energy Act of 1954

§ 780.30 Filing of application.

An applicant for a license pursuant to section 153b(2) of the Act, under a patent which the Department has declared to be affected with the public interest, shall file an application with the Board in accordance with § 780.5. The Board will docket the application and serve notice of the docketing upon all parties.

§ 780.31 Contents of application.

Each application shall contain, in addition to the requirements specified in § 780.5, the following information:

(a) The activities in the production or utilization of special nuclear material or atomic energy to which applicant proposes to apply the patent license;

(b) The nature and purpose of the applicant's intended use of the patent license;

(c) The relationship of the invention or discovery to the authorized activities to which it is to be applied, including an estimate of the effect on such activities stemming from the grant or denial of the license;

(d) Efforts made by the applicant to obtain a patent license from the owner of the patent;

(e) Terms, if any, on which the owner of the patent proposes to grant the applicant a patent license;

(f) The terms the applicant proposes for the patent license; and

(g) A request for either a hearing or a decision on the record.

§ 780.32 Response and request for hearing.

Any party within thirty (30) days after service of the notice of docketing of the application:

(a) May file with the Board a response containing a concise statement of the facts or law or any other relevant information which that party believes should be considered by the Board in opposition to or in support of the proposed application; and

(b) May file a request for a hearing or for a decision on the record.

§ 780.33 Hearing and decision.

If any party requests a hearing, the Board will proceed with a hearing and decision. If a hearing is not requested, the Board shall on the basis of the record prepare and issue its decision.

§ 780.34 Criteria for decision to issue a license.

A license shall issue to the applicant to use the invention covered by the patent declared to be affected with the public interest pursuant to subsection 153b(2) of the Act upon a final decision that:

(a) The activities to which the patent license is proposed to be applied are of primary importance to the applicant's conduct of an activity authorized under the Act; and

(b) The applicant cannot otherwise obtain a patent license from the owner of the patent on terms which are reasonable for the intended use to be made of the patent by the applicant.

§ 780.35 Communications of decision to General Counsel.

Following a determination to issue a patent license under section 153b(2) of the Act, the Board shall send the decision to the General Counsel and instruct the General Counsel to issue the license on terms deemed equitable by the Department and generally not less fair than those granted by the patentee or by the Department to similar licensees for comparable use.

§ 780.36 Conditions and issuance of license.

(a) Upon receipt of the Board's decision and instruction to issue a patent license, the General Counsel shall issue the license which contains all necessary terms and conditions except for the royalty fee. The parties will propose and agree on a reasonable royalty fee within a reasonable time as determined by the General Counsel. If a party does not agree with the terms and conditions of the license as determined by the General Counsel or if a royalty fee cannot be agreed upon within the reasonable time period established by the General Counsel, any party may, within 30 days after the expiration of such time period, initiate a proceeding before the Board, in accordance with Subpart E of this part, for a reconsideration of the General Counsel's determination. After the proceeding under Subpart E of this part is completed, the General Counsel shall modify the patent license in accordance with the Board's determination.

Subpart D—Application for a License Pursuant to Section 153c of the Atomic Energy Act of 1954

§ 780.40 Filing of application.

An application to the Department, pursuant to section 153c of the Act, for the issuance of a license to use the invention or discovery covered by a patent useful in the production or utilization of special nuclear material or atomic energy shall be filed with the Board in accordance with requirements of § 780.5.

§ 780.41 Contents of application.

In addition to the information specified in § 780.5, each application shall contain the following:

(a) The applicant's contention, with supporting data, that the invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy;

(b) The applicant's contention, with supporting data, that the licensing of such invention or discovery is of primary importance to the conduct of the activities of the applicant, including information concerning:

(1) The activities in the production or utilization of special nuclear material or atomic energy to which applicant proposes to apply the license;

(2) The nature and purpose of the applicant's intended use of the patent license; and

(3) The relationship of the invention or discovery to the activities to which it is to be applied, including an estimate of the effect of such activities stemming from the grant or denial of the license.

(c) The applicant's contention, with supporting data, that the activities to which the patent license are proposed to be applied are of primary importance to the furtherance of policies and purposes of the Act;

(d) The applicant's contention, with supporting data, that such applicant cannot otherwise obtain a patent license from the owner of the patent on terms which are reasonable for the applicant's intended use of the patent, including information concerning:

(1) Efforts made by applicant to obtain a patent license from the owner of the patent; and

(2) Terms, if any, on which the owner of the patent proposed to grant applicant a patent license.

(e) The terms the applicant proposes as reasonable for the patent license; and

(f) A copy of any license, permit, or lease obtained by the applicant under the procedures outlined in section 153(c) of the Act.

§ 780.42 Notice of hearing.

Within thirty (30) days after the filing of the application, the Board will serve on all parties a notice of hearing to be held not later than sixty (60) days after the filing of the application.

§ 780.43 Response.

Any party may file a response with the Board containing a concise statement of the facts or law or any other relevant information in opposition to or in support of the application which that party believes should be considered by the Board. Such response must be filed by a party within twenty (20) days after being served a copy of the application.

§ 780.44 Hearing and decision.

In accordance with section 153d of the Act, the Board shall hold a hearing and issue a final decision on the application.

§ 780.45 Criteria for decision to issue a license.

A license shall issue to the applicant to use the invention covered by the patent for the purposes stated in the application upon a final decision that:

(a) The invention or discovery covered by the patent is of primary importance in the production or utilization of special nuclear material or atomic energy;

(b) The licensing of such invention or discovery is of primary importance to the conduct of the activities of the applicant;

(c) The activities to which the patent license is proposed to be applied by such applicant are of primary importance to the furtherance of policies and purposes of the Act; and

(d) Such applicant cannot otherwise obtain a patent license from the owner of the patent on terms which the Department deems to be reasonable for the applicant's intended use of the patent.

§ 780.46 Communication of decision to General Counsel.

When the Board decides to issue a patent license under section 153c of the Act, the Board shall send the decision to the General Counsel and instruct the General Counsel to issue the license on terms deemed equitable by the Department and generally not less fair than those granted by the patentee or by the Department to similar licensees for comparable use.

§ 780.47 Conditions and issuance of license.

Upon receipt of the Board's decision and instruction to issue a patent license, the General Counsel shall issue the license which contains all necessary terms and conditions except for the royalty fee. The parties will propose and agree on a reasonable royalty fee within a reasonable time as determined by the General Counsel. If a party does not agree with the terms and conditions of the license or if a royalty fee cannot be agreed upon within the reasonable time period established by the General Counsel, any party may, within 30 days after the expiration of such time period, initiate a proceeding before the Board in accordance with Subpart E of this part, for a reconsideration of the General Counsel's determination. After the proceeding under Subpart E of this part is completed, the General Counsel shall modify the patent license in accordance with the Board's determination.

Subpart E—Application for Royalties and Awards Under Section 157 of the Atomic Energy Act of 1954 and Compensation Under Section 173 of the Atomic Energy Act of 1954 and the Invention Secrecy Act (35 U.S.C. 183)

§ 780.50 Applicants.

(a) Any owner or licensee of a patent licensed under section 158 or subsections b or e of section 153 of the Act may file an application with the Board for the determination of a reasonable royalty fee.

(b) Any owner or licensee of a patent licensed under subsections b or e of section 153 of the Act may file an application with the Board for the modification of any terms and conditions of the license.

(c) Any person who has made an invention or discovery useful in the production or utilization of special nuclear material or atomic energy, has complied with the provisions of section 151c, but, under the Act, is not entitled to a royalty for such invention or discovery, may file an application for an award.

(d) Any owner of a patent application that contains restricted data not belonging to the United States which the Department has communicated to any foreign nation may make application for just compensation pursuant to section 173 of the Act.

(e) Any patent applicant, whose patent is withheld because of a secrecy order issued at the request of the Department may, beginning at the date the patent applicant is notified that, except for such order, the application is otherwise in condition for allowance, apply for compensation for the damage caused by the secrecy order and/or for the use of the invention by the Government, resulting from any disclosure to the Department required by the Invention Secrecy Act.

§ 780.51 Form and content.

(a) Each application shall contain a statement of the applicant's interest in the patent, patent application, invention or discovery and identify any other claimants of whom the applicant has knowledge.

(b) Each application must contain a concise statement of all of the essential facts upon which it is based. No particular form of statement is required, but it will facilitate consideration of the application if the following specific data accompany the application:

(1) In the case of an issued patent, a copy of the patent.

(2) In the case of a patent application, a copy of the application and of all Patent and Trademark Office actions and responses thereto.

(3) In the case of an invention or discovery as to which a report has been filed with the Department pursuant to subsection c of section 151 of the Act, a copy of such report.

(4) In the case of an award, the date relied upon as the date of invention.

(5) In all cases, a statement of the extent to which the invention or discovery was developed through federally financed research or with other federal support.

(6) In all cases, the degree of the utility, novelty, and importance of the invention or discovery.

(7) In all cases, a statement of the actual use by the federal Government or others of such invention or discovery, to the extent known to the applicant.

(8) In all cases, the cost of developing the invention or discovery and acquiring the patent or patent application.

(9) The royalty fee proposed, the proposed terms and conditions of a license agreement, or the amount sought as compensation or award, as well as the basis used in calculating such fee, compensation or award and whether a lump sum or periodic payments are sought.

(10) In an application for just compensation pursuant to section 173 of the Act, the ownership of the invention that is the subject matter of the patent application at the time the Department communicated the restricted data shall be set forth, and any restricted data contained in the application shall be specifically identified.

(11) In an application for compensation under the authority provided in the Invention Secrecy Act (35 U.S.C. 183), for the damage caused by imposi-

tion of a secrecy order on a patent application and/or for the use of the invention by the Government, the date of the secrecy order, the date of the notice that the patent application is in condition for allowance, and, if known to the applicant, the date of the first use of the invention by the Government.

§ 780.52 Notice and hearing.

The Board shall, in its discretion, afford the applicable party an opportunity for a hearing for the presentation of relevant evidence. Thirty (30) days notice shall be given of the time and place of such hearing. After expiration of the notice period, the Board shall proceed with a hearing and render its decision.

§ 780.53 Criteria for decisions for royalties, awards and compensation.

(a) In deciding a reasonable royalty fee for a patent licensed under section 158 or sections 153b or 153e of the Act, the Board shall consider:

(1) Any defense, general or special, that a defendant could plead in an action for infringement;

(2) The extent to which such patent was developed through federally financed research or with other federal support;

(3) The degree of utility, novelty, and importance of the invention or discovery; and

(4) The cost to the owner of the patent of developing such invention or discovery or of acquiring such patent.

(b) In deciding whether or not to grant an award, under section 157 of the Act, for the making of an invention or discovery useful in the production or utilization of special nuclear material or atomic energy, the Board shall take into account the considerations set forth in § 780.53(a) of this part and the actual use of such invention or discovery.

(c) In deciding whether or not to provide compensation, pursuant to section 173 of the Act, to a person who owns a patent application that contains restricted data not belonging to the United States which the Department has communicated to a foreign nation, the Board shall take into account the considerations set forth in § 780.53(b) of this part and the damage to the applicant resulting from such communication.

(d) In the course of its review of an application to provide compensation, pursuant to 35 U.S.C. 183, to an applicant whose patent was withheld because of a secrecy order issued at the request of the Department, the Board shall take into account the considerations set forth in § 780.53(b) of this part and:

(1) The damage sustained by the applicant as a result of the secrecy order; and

(2) The use of the invention by the Government resulting from the disclosure of such invention to the Department.

PART 781—DOE PATENT LICENSING REGULATIONS

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AUTHORITY: Dept. of Energy Organization Act, sec. 301, Pub. L. 95-91 (42 U.S.C. 7301); Federal Nonnuclear Energy Research and Development Act of 1974, sec. 9(g), Pub. L. 93-577 (42 U.S.C. 5908(g)); Atomic Energy Act of 1954, as amended, secs. 156, 161g, Pub. L. 83-703 (42 U.S.C. 2186, 2201g); Presidential Statement, 36 FR 16887, Aug. 26, 1971.

SOURCE: 45 FR 73447, Nov. 4, 1980, unless otherwise noted.

GENERAL PROVISIONS

§ 781.1 Scope.

The regulations of this part establish the procedures, terms, and conditions upon which licenses may be granted in inventions covered by patents or patent applications, both domestic and foreign, vested in the United States of America, as represented by or in the custody of the Department of Energy.

§ 781.2 Policy.

(a) The inventions covered by the patents and patent applications, both foreign and domestic, vested in the Government of the United States of America, as represented by or in the custody of the Department, normally will best serve the public interest when they are developed to the point of practical or commercial application and made available to the public in the shortest possible time. This may be accomplished by the granting of express nonexclusive, exclusive, or partially exclusive licenses for the practice of these inventions. However, it is recognized that there may be inventions as to which the Department deems dedication to the public by publication the preferable method of accomplishing these objectives.

(b) Although DOE encourages the nonexclusive licensing of its inventions to promote competition and to achieve their widest possible utilization, the commercial development of certain inventions may require a substantial capital investment that private manufacturers may be unwilling to risk under a nonexclusive license. Thus, DOE may grant exclusive or partially exclusive licenses where the granting of such exclusive or partially exclusive licenses is consistent with § 781.52.

(c) Decisions as to grants or denials of any license application will, in the discretion of the Secretary, be based on the Department's view of what is in the best interests of the United States and the general public under the provisions of these regulations. Decisions of the Department under these regulations may be made on the Secretary's behalf by the General Counsel or the General Counsel's delegate, except where otherwise delegated to the Invention Licensing Appeal Board. When the Department determines that it is appropriate to grant a license, the license will be negotiated on terms and conditions most favorable to the interests of the United States and the general public.

(d) No license shall be granted or implied under a DOE invention except as provided for in these regulations, in patent rights articles under Department procurement regulations (41 CFR Part 9-9), in agreements between DOE and other Government bodies, or in any existing or future treaty or agreement between the United States and any foreign government or intergovernmental organization.

(e) No grant of a license under this part shall be construed to confer upon any licensee any immunity from the antitrust laws or from liability for patent misuse, and the acquisition and use of rights pursuant to this part shall not be immunized from the operation of state or federal law by reason of the source of the grant.

§ 781.3 Definitions.

(a) "Board" means the Invention Licensing Appeal Board.

(b) "Department of Energy", "Department", or "DOE" mean the Department of Energy, established by the Department of Energy Organization Act (Pub. L. 95-91; 42 U.S.C. 7101).

(c) "DOE invention" means an invention covered by a U.S. or foreign patent or patent application that is vested in the Government of the United States, as represented by or in the custody of the Department or any of its predecessors, and which is designated by the Department as appropriate for the grant of an express nonexclusive, exclusive, or partially exclusive license.

(d) "Exclusive license" means a license in which the licensee has the exclusive right under the patent for a part or the full term of the patent, subject only to the retention by the U.S. Government of a license and rights in the invention, as specified herein.

(e) "Partially exclusive license" means (1) an exclusive license where the exclusive right granted is limited to making or using or selling the invention, or is limited to specified fields of use or use in specified geographic locations; or (2) a license where the number of licenses under the particular invention is limited.

(f) "Person" means any individual, partnership, corporation, association, or institution, or other entity.

(g) "Predecessor" means the Energy Research and Development Administration, the Atomic Energy Commission, and any of the Government entities or parts thereof whose functions were transferred to the Department of Energy pursuant to Title III of the Department of Energy Organization Act.

(h) "Responsible applicant" means an applicant who, in the discretion of the Department, has the intention, plans, and ability expeditiously to bring the invention to the point of practical or commercial application.

(i) "Secretary" means the Secretary of Energy or the delegate of the Secretary of Energy.

(j) "To the point of practical or commercial application" means to manufacture in the case of composition or product, to practice in the case of a process, or to operate in the case of a machine, under such conditions as to establish that the invention is being worked and that its benefits are reasonably accessible to the public.

(k) "United States and the general public" means the United States Government, United States citizens, and United States organizations.

(l) "United States Organization" means any partnership, corporation, association, or institution where 75 percent or more of the voting interest is owned by United States citizens.

§781.4 Communications.

All communications concerning the regulations in this part, including applications for licenses, should be addressed or delivered to the General Counsel, Attention: Assistant General Counsel for Patents, U.S. Department of Energy, Washington, D.C. 20545.

TYPES OF LICENSES AND CONDITIONS FOR LICENSING

§781.51 Nonexclusive licenses.

(a) *Availability of licenses.* Except as provided in §781.52, DOE inventions will be made available for the grant of nonexclusive, revocable licenses to responsible applicants. However, when in the best interests of the United States and the general public, licenses may be restricted to manufacture in the United States. Factors which the Department will consider in so restricting a license include, but are not limited to, the following:

(1) The nature of the invention;

(2) The effect of the license upon the policies of the United States Government;

(3) The effect of the license upon domestic and international commerce and competition;

(4) The effect of the license upon the balance of payments of the United States; and

(5) The effect of the license upon the overall posture of the United States in world markets.

(b) *Terms of grant.* Nonexclusive licenses shall contain such terms and conditions as the Department may determine appropriate for the protection of the interests of the United States and the general public, including but not limited to the following:

(1) The duration of the license will be negotiated and may be extended upon application therefor, provided the licensee complies with all the terms of the license and shows that substantial utilization has been, or within a reasonable time will be, achieved.

(2) The license shall require the licensee to bring the invention to the point of practical or commercial application in the geographic area of the license, within a period of time specified in the license or such period as may be extended by the Department, upon request in writing to the General Counsel, for good cause shown. The license shall further require the licensee to continue to make the benefits of the invention reasonable accessible in the geographic area of the license.

(3) The license may be granted for all or less than all fields of use of the invention and in any one or all of the countries, or any lesser geographic area thereof, in which the invention is covered by a patent or a patent application.

(4) Reasonable royalties may be charged for nonexclusive licenses on DOE inventions. Factors to be considered in determining whether to charge royalties, or the amount thereof, include but are not limited to, the following:

(i) The nature of the invention;

(ii) Applicant's status as a small business, minority business, or business in an economically depressed, low-income or labor surplus area;

(iii) The extent of U.S. Government contribution to the development of the invention;

(iv) The degree of development of the invention;

(v) The extent of effort necessary for the licensee to bring the invention to the point of practical or commercial application;

(vi) The extent of effort necessary to create or penetrate the market for the invention;

(vii) Whether the licensee is a U.S. citizen or U.S. organization; and

(viii) Whether the invention is to be licensed in the U.S. or in a foreign country.

(5) In the jurisdiction of the license, the license may extend to the licensee's subsidiaries and to affiliates within the corporate structure of which licensee is a part, if any. However, the license shall not be assignable or include the right to grant sublicenses without the approval of the Department in writing.

(6) The licensee shall be required to submit written reports annually, and when specifically requested by the Department, on its efforts to bring the invention to a point of practical or commercial application and the extent to which the licensee continues to make the benefits of the invention reasonably accessible to the public. The reports shall contain information within the licensee's knowledge, or which the licensee may acquire under normal business practices, pertaining to the commercial use being made of the invention.

(7) The Department may restrict the license to the fields of use or geographic areas in which the licensee has brought the invention to the point of practical or commercial application and continues to make the benefits of the invention reasonably accessible to the public.

(The information collection requirements contained in paragraph (b)(6) were approved by the Office of Management and Budget under control number 1902-0232)

[45 FR 73447, Nov. 4, 1980, as amended at 46 FR 63209, Dec. 31, 1981]

§ 781.52 Exclusive and partially exclusive licenses

(a) *Availability of licenses.* The Department may grant exclusive or partially exclusive licenses in any invention only if:

(1) The invention has been published as available for licensing pursuant to § 781.61 for a period of at least six (6) months;

(2) It does not appear that the desired practical or commercial application has been or will be achieved on a nonexclusive basis, and that exclusive or partially exclusive licensing is a reasonable and necessary incentive to call forth the risk capital and expenses necessary to bring the invention to the point of practical or commercial application;

(3) A sixty (60) day notice of a proposed exclusive or partially exclusive licensee has been provided, pursuant to § 781.63(a), advising of an opportunity for a hearing; and

(4) After termination of the sixty (60) day notice period, the Secretary has determined that:

(i) The interests of the United States and the general public will best be served by the proposed license, in view of the license applicant's intention, plans, and ability to bring the invention to the point of practical or commercial application;

(ii) The desired practical or commercial application has not been achieved, or is not likely expeditiously to be achieved, under any nonexclusive license which has been granted, or which may be granted, on the invention;

(iii) Exclusive or partially exclusive licensing is a reasonable and necessary incentive to call forth the risk capital and expenses necessary to bring the invention to the point of practical or commercial application; and

(iv) The proposed terms and scope of exclusivity are not substantially greater than necessary to provide the incentive for bringing the invention to the point of practical or commercial application and to permit the licensee to recoup its costs and a reasonable profit thereon;

(5) Any determination pursuant to paragraph (a)(4) of this section regarding the practical or commercial application of an invention may be limited to the making, using or selling of an invention, a specific field of use, or a geographic location, provided that the grant of such license will not tend substantially to lessen competition or result in undue concentration in any section of the United States in any line of commerce to which the technology to be licensed relates.

(b) *Limited number of partially exclusive licenses.* In appropriate circumstances, and only after compliance with the requirements of paragraph (a) of this section, the Department may offer a limited number of partially exclusive licenses under a particular invention, when limitation of the number of licenses is found to be in the public interest and consistent with the purpose of these regulations. Factors to be considered in a determination to offer a limited number of licenses under a particular invention include, but are not limited to, the following: (1) The nature of the invention; (2) the projected market size; (3) the need for limitation of licenses to attract risk capital; and (4) the need for limitation of licenses to achieve expeditious commercialization of the invention. When such a determination is made, a Notice of Intent to limit the number of licenses shall be published in the FEDERAL REGISTER, identifying the invention and advising that the Department will entertain no further applications for license under the subject invention unless, within 60 days of the publication of the notice, the General Counsel receives, in writing, responses in accordance with § 781.63.

(c) *Selection of exclusive licensee or partially exclusive licensee among multiple applicants.* When a determination is made by the Department that grant of an exclusive license or partially exclusive license under a particular invention is a reasonable and necessary incentive, in accordance with paragraphs (a) and (b) of this section, to call forth the risk capital and expenses required to bring the invention to the point of practical or commercial application, and there is more than one applicant in a particular jurisdiction seeking an exclusive license, and no applicant will accept either a nonexclusive or a partially exclusive license, the Department shall make a written determination selecting an exclusive licensee. Similarly, when a determination is made to grant a limited number of partially exclusive licenses under a particular invention and there are more applicants for such licenses than acceptable, the Department shall make a written determination selecting a limited number of partially exclusive licenses. Factors to be considered in making these determinations include, but are not limited to, the following:

(1) The relative intentions, plans, and abilities of the applicants to further the technical and market development of the invention and to bring the invention to the point of practical or commercial application;

(2) The projected impact on competition in the U.S.;

(3) Projected market size;

(4) The benefit to the U.S. Government, U.S. organizations, and the U.S. public;

(5) Assistance to small business and minority business enterprises and economically depressed, low-income, and labor-surplus areas; and

(6) Whether the applicant is a U.S. citizen or U.S. organization.

(d) *Terms of grant.* Exclusive or partially exclusive licenses shall contain such terms and conditions as the Secretary may determine to be appropriate for the protection of the interests of the United States and the general public, including but not limited to the following:

(1) The duration of the license will be negotiated, and the terms and scope of exclusivity shall not be substantially greater than necessary to provide the incentive for bringing the invention to the point of practical or commercial application and to permit the licensee to recoup its costs and a reasonable profit thereon. Extensions are permissible only through reapplication for an exclusive or partially exclusive license under procedures established in these regulations. The license shall be subject to any compulsory license provision required by law in a particular jurisdiction.

(2) The license shall require the licensee to bring the invention to the point of practical or commercial application in the geographic area of the license, within a period of time specified in the license or such period as may be extended by the Department, upon request in writing to the General Counsel, for good cause shown. The license shall further require the licensee to continue to make the benefits of the invention reasonably accessible in the geographic area of the license. In specifying the period for bringing the invention to the point of practical or commercial application, the license shall specify the minimum sum to be expended by the licensee and/or other specific actions to be taken by it within the time periods indicated in the license.

(3) The license may be granted for all or less than all fields of use of the invention and in any one or all of the countries, or any lesser geographic area thereof, in which the invention is covered by a patent or a patent application.

(4) Reasonable royalties shall be charged by the Department unless the Department determines that charging of royalties would not be in the best interests of the United States and the general public.

(5) In the jurisdiction of the license, the license may extend to the licensee's subsidiaries and to affiliates within the corporate structure of which the licensee is a part, if any. However, the license shall not be assignable or include the right to grant sublicenses without the approval of the Department in writing.

(6) The licensee shall be required to submit written reports annually, and when specifically requested by the Department, on its efforts to bring the invention to the point of practical or commercial application and the extent to which the licensee continues to make the benefits of the invention reasonably accessible to the public. The reports shall contain information within the licensee's knowledge, or which the licensee may acquire under normal business practices, pertaining to the commercial use being made of the invention.

(7) The license shall reserve at least an irrevocable, nonexclusive, paid-up license to make, use and sell the invention throughout the world by or on behalf of the United States (including any Government agency), the states, and domestic municipal governments, unless the Secretary determines that it would not be in the public interest to reserve such a license for the states and domestic municipal governments.

(8) The license shall reserve in the United States the right to sublicense the licensed invention to any foreign government pursuant to any existing or future treaty or agreement, if the Secretary determines it would be in the national interest to acquire this right.

(9) The license shall reserve in the Secretary the right to require the granting of a nonexclusive or partially exclusive sublicense to a responsible applicant or applicants, upon terms reasonable under the circumstances, (i) to the extent that the invention is required for public use by governmental regulations, (ii) as may be necessary to fulfill health, safety, or energy needs, or (iii) for such other purposes as may be stipulated in the license.

(10) The license shall reserve in the Secretary the right to terminate such license, in whole or in part, subject to the notice and appeal provisions of §§ 781.64 and 781.65, unless the licensee demonstrates to the satisfaction of the Secretary that he has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.

(11) The license shall reserve in the Secretary the right, commencing three

years after the grant of the license, to terminate the license, in whole or in part, subject to the provisions of § 781.66 and following a publicly-noticed hearing, initiated pursuant to a petition by an interested person justifying such hearing—

(i) If the Secretary determines, upon review of such material as he deems relevant and after the licensee or other interested person has had the opportunity to provide such relevant and material information as the Secretary may require, that such license has tended substantially to lessen competition or to result in undue concentration in any section of the United States in any line of commerce to which the technology relates; or

(ii) If the licensee fails to demonstrate to the satisfaction of the Secretary at such hearing that he has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.

§ 781.53 Additional licenses.

Subject to any outstanding licenses, nothing in this part shall preclude the Department from granting additional nonexclusive, or exclusive, or partially exclusive licenses for inventions covered by this part when the Department determines that to do so would provide for an equitable exchange of patent rights. The following circumstances are examples in which such licenses may be granted:

(a) In consideration of the settlement of interferences;

(b) In consideration of a release of any claims;

(c) In exchange for or as a part of the consideration for a license under adversely held patents; or

(d) In consideration for the settlement or resolution of any proceeding under the Department of Energy Organization Act or other law.

PROCEDURES

§ 781.61 Publication of DOE inventions available for license.

(a) The Department will publish periodically in the FEDERAL REGISTER a list of the DOE inventions available for licensing under this part. In addition, a list of those DOE inventions that are protected in the United States will be published in the U.S. Patent and Trademark Office Official Gazette and in the National Technical Information Service (NTIS) publication "Government Inventions for Licensing."

(b) Interested persons may obtain copies of such lists by contacting the General Counsel, Attention: Assistant General Counsel for Patents, U.S. Department of Energy, Washington, D.C. 20545. Copies of U.S. patents may be obtained from the U.S. Patent and Trademark Office, Washington, D.C. 20231. Copies of U.S. patent applications, specifications, or microfiche reproductions thereof may be secured at reasonable cost from the National Technical Information Service (NTIS), Springfield, Virginia 22151.

§ 781.62 Contents of a license application.

An application for a license under a DOE invention must be accompanied by a processing fee of $25 for each patent or patent application under which a license is desired, which shall be credited towards royalty if royalties are charged, and must include the following information:

(a) Identification of the invention for which the license is desired, including the title of the invention and the patent application serial number or the patent number of the invention;

(b) Name and address of the person applying for a license and whether the applicant is a U.S. citizen or U.S. organization;

(c) Name and address of a representative of the applicant to whom correspondence should be sent and any notices served;

(d) Nature and type of the applicant's business;

(e) Applicant's status, if any, as a small business firm, minority business firm, or business firm located in a labor surplus area, low-income area, or economically depressed area.

(f) Identification of the source of the applicant's information concerning the availability of a license on the invention;

(g) A statement of the field or fields of use in which the applicant intends to practice the invention;

(h) A statement of the geographic area or areas in which the applicant proposes to practice the invention, including a statement of any foreign countries in which the applicant proposes to practice the invention;

(i) A description of the applicant's technical and financial capability and plan for bringing the invention to a point of practical or commercial application, and the applicant's offer to implement that plan, if the license is granted.

(j) The amount of royalty fees or other consideration, if any, that the applicant would be willing to pay the Government for the license;

(k) Applicant's knowledge of the extent to which the invention is being practiced by private industry and the Government; and

(l) In the case of an exclusive or partially exclusive license application, any facts which the applicant believes will show that it is in the public interest for the Department to grant such a license rather than a nonexclusive license and that such exclusive or partially exclusive license should be granted to the applicant.

(Approved by the Office of Management and Budget under control number 1901-0232)*

[45 FR 73447, Nov. 4, 1980, as amended at 46 FR 63209, Dec. 31, 1981]

§ 781.63 Published notices.

(a) A notice of a proposed exclusive license or partially exclusive licenses shall be published in the FEDERAL REGISTER, and a copy of the notice shall be sent to the Attorney General. The notice shall include:

(1) Identification of the invention;

(2) Identification of the proposed exclusive licensee or partially exclusive licensees;

(3) Duration and scope of the proposed license;

(4) A statement that the license will be granted unless:

(i) An application for a nonexclusive license, submitted by a responsible applicant pursuant to § 781.62, is received by the Department within sixty (60) days from the publication of the notice in the FEDERAL REGISTER, and the Department determines that the applicant has established that it has already achieved, or is likely expeditiously to achieve, practical or commercial application under a nonexclusive license; or

(ii) The Department determines, based upon evidence and argument submitted in writing by a third party, that it would not be in the interest of the United States and the general public to grant the exclusive or partially exclusive licenses; and

(5) A statement advising that applicants or third parties participating in response to the FEDERAL REGISTER notice shall have the right to appeal any adverse decision, including the right to request an oral hearing, in accordance with § 781.65.

(b) In situations where the Department intends to limit the number of partially exclusive licenses under a particular invention pursuant to § 781.52(b), the notice in paragraph (a) of this section will be modified to reflect that intent and to invite applicants to apply for such partially exclusive licenses by a date specified in the notice.

(c) If an exclusive or partially exclusive license has been granted or, in whole or in part, terminated pursuant to this regulation, notice thereof shall be published in the FEDERAL REGISTER. Such notice shall include:

(1) Identification of the invention;

(2) Identification of the licensee; and

(3) If a license grant, the duration and scope of the license; or

(4) If a termination in whole or in part, the effective date of the termination and whether it is in whole or in part.

§ 781.64 Termination.

(a) The Department may terminate, in whole or in part, a license:

(1) For failure, within the time specified in the license, to take steps necessary to accomplish substantial utilization of the invention;

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*EDITORIAL NOTE: The section amended at 46 FR 63209, Dec. 31, 1981, appears as § 781.52.

(2) For failure of the licensee, upon bringing the invention to the point of practical or commercial application, to continue to make the benefits of the invention reasonably accessible to the public;

(3) If an exclusive or partially exclusive license, for failure of the licensee to expend the minimum sum or to take any other action specified in the license agreement;

(4) For failure of the licensee to make any payments or periodic reports required by the license;

(5) For a false statement or omission of a material fact in the license application submitted pursuant to § 781.62 or in any required report;

(6) For failure to grant a nonexclusive or partially exclusive license when required by the Secretary in accordance with this regulation; or

(7) For breach of any other term or condition on which the license was issued.

(b) Before terminating, in whole or in part, any license granted pursuant to this part, the Department shall mail to the licensee and any sublicensee of record, at the last address filed with the Department, a written notice of the Department's intention to terminate, in whole or in part, the license, with reasons therefor, and the licensee and any sublicensee shall be allowed thirty (30) days from the date of the mailing of such notice, or within such further period as may be granted by the Department for good cause shown in writing, to remedy any breach of any term or condition referred to in the notice or to show cause why the license should not be terminated in whole or in part.

(c) Termination shall be effective upon final written notice thereof to the licensee, after consideration of the response, if any, to the notice of intent to terminate, unless an appeal is taken in accordance with § 781.65, in which case the effective date of the termination is stayed, pending a final administrative decision on the appeal.

§ 781.65 Appeals.

(a) The following parties have the right to appeal under this part:

(1) A person whose application for a license has been denied;

(2) A licensee or sublicensee whose license has been terminated, in whole or in part, pursuant to § 781.64; and

(3) A third party who has participated under § 781.63 of this regulation.

(b) Appeal under paragraph (a) of this section shall be initiated by filing a Notice of Appeal with the Secretary, ATTN: Invention Licensing Appeal Board, with a copy to the General Counsel ATTN: Assistant General Counsel for Patents, within thirty (30) days from the date of receipt of a written notice by the Department. The Notice of Appeal shall specify the portion of the decision from which the appeal is taken. A statement of fact and argument in the form of a brief in support of the appeal shall be submitted with the notice of appeal or within thirty (30) days thereafter. Upon receipt of a Notice of Appeal, the General Counsel shall have thirty (30) days to transmit a copy of the administrative record of the decision to the Board with a copy to appellant. The General Counsel shall respond to appellant within 30 days from receipt of appellant's brief.

(c) The appellant shall have the burden of proving by a preponderance of evidence, based upon the administrative record as supplemented by evidence and argument submitted by the parties to the appeal, that the decision appealed from should be reversed or modified.

(d) The Board shall offer to the applicant, or to any other party who has participated under § 781.63, an opportunity to join as a party to the appeal.

(e) A hearing may be requested by any party to the appeal within a time period set by the Board.

(f) Except as set forth in this part, all Board proceedings shall be conducted pursuant to the Rules of Practice of the Department of Energy Board of Contract Appeals, 10 CFR Part 1023, modified as the Board may determine to be necessary or appropriate.

(g) The decision of the Board shall constitute the final action of the Department on the matter.

§ 781.66 Third-party termination proceedings.

(a) Any interested person may petition the Secretary to terminate, in whole or in part, an exclusive or partially exclusive license three years after such license was granted.

The petition shall be sent to the Secretary, ATTN: Invention Licensing Appeal Board, and shall be verified and accompanied by any supporting documents or affidavits that the petitioner believes demonstrates that either:

(1) The license has tended substantially to lessen competition or to result in undue concentration; or

(2) The licensee has not taken effective steps, or within a reasonable time thereafter is not expected to take such steps, necessary to accomplish substantial utilization of the invention.

(b) Upon receipt of such a petition, the Board shall forward a copy of the petition and supporting documents to the General Counsel, ATTN: Assistant General Counsel for Patents. The General Counsel shall then forward a copy of the petition and supporting documents to the licensee, who shall have thirty (30) days from receipt of the petition to submit a response thereto together with any supporting documents and affidavits. The General Counsel shall then make a preliminary review of the petition, response, and any supporting documents or affidavits to determine whether a hearing on the matter is justified. If the General Counsel finds that a hearing on the matter has been justified, he shall so advise the Board in writing.

(c) If the General Counsel finds that a hearing has not been justified by petitioner, he shall so find in writing. The General Counsel shall promptly notify the Board and the petitioner of the finding. The petitioner may appeal this finding by filing a Notice of Appeal with the Board within thirty (30) days of the date of the mailing of the finding by the General Counsel. The Board shall review the finding concerning petitioner's justification for a hearing, and shall uphold the finding of the General Counsel unless petitioner can demonstrate that the finding was arbitrary, capricious, or an abuse of discretion. If the Board reverses the finding as to the justification for a hearing, the petition shall be heard by the Board in accordance with the procedures outlined in paragraph (d) of this section.

(d) When it has been determined, in accordance with paragraph (b) of this section, that a hearing is justified, the Board shall so notify the petitioner and the licensee, and the Board shall publish a Notice in the FEDERAL REGISTER advising the public that a hearing is to be scheduled. The Notice shall describe the subject matter of the hearing and shall advise of the right of any interested person to file a petition with the Board, within thirty (30) days of the Notice, showing cause why he should be added as a party to the hearing. The Board shall, in its discretion, determine who should be added as a party.

(e) Any party shall have the right to request a full evidentiary hearing on the matter. In lieu thereof, if the parties agree, the matter may be decided at an "informal" hearing in which no party has the right to call and cross-examine witnesses, but in which the parties have the right to present oral argument to the Board to supplement briefs, affidavits, and other documentary evidence that may have been submitted. Any hearing and related procedures shall be conducted pursuant to the Rules of Practice of the Department of Energy Board of Contract Appeals, 10 CFR Part 1023, modified as the Board may determine to be necessary or appropriate.

(f) If petitioner alleges that the exclusive or partially exclusive license has tended substantially to lessen competition or to result in undue concentration in any section of the country in any line of commerce to which the technology relates, the petitioner shall have the burden to prove the allegation by a preponderance of evidence.

(g) If petitioner alleges that licensee has failed to accomplish substantial utilization of the invention and has presented sufficent proof, in accordance with paragraph (b) of this section, to justify a hearing on the matter, the licensee shall have the burden to prove, by a preponderance of evidence, that he has taken effecive steps, or within a reasonable time hereafter is expected to take such teps, necessary to accomplish subtantial utilization of the invention.

(h) The Board shall make findings f fact and render a conclusion of law ith respect to the challenged license. he conclusion of the Board shall contitute the final action of the Departent on the matter.

Special Provisions

781.71 Litigation.

(a) An exclusive or partially excluve licensee may be granted the right sue at his own expense any party ho infringes the rights set forth in is license and covered by the licensed atent. Upon a determination that the overnment is a necessary party, the censee may join the Government of e United States, upon consent of the ttorney General, as a party comlainant in such suit. The licensee hall pay costs and any final judgment decree that may be rendered gainst the Government in such suit. he Government shall have the absote right to intervene in any such suit its own expense.

(b) The licensee shall be obligated to rnish promptly to the Government, pon request, copies of all pleadings nd other papers filed in any such suit nd of evidence adduced in proceedgs relating to the licensed patent, inuding but not limited to, negotiaons, agreements settling claims by a censee based on a licensed patent, nd all other books, documents, papers nd records pertaining to such suit. If, a result of any such litigation, the atent shall be declared invalid, the liensee shall have the right to surrener his license and be relieved from ny further obligation thereunder.

781.81 Transfer of custody.

The Department may enter into an greement to transfer custody of any atent to another Government agency r purposes of administration, includg the granting of licenses pursuant this part.

PART 782—CLAIMS FOR PATENT AND COPYRIGHT INFRINGEMENT

Subpart A—General

Sec.
782.1 Purpose.
782.2 Objectives.
782.3 Authority.

Subpart B—Requirements and Procedures

782.5 Contents of communication initiating claim.
782.6 Processing of administrative claims.
782.7 Incomplete notice of infringement.
782.8 Indirect notice of infringement.

Authority: Dept. of Energy Organization Act; sec. 651, 91 Stat. 601, 42 U.S.C. 7261; Atomic Energy Act of 1954; sec. 107(d), 88 Stat. 1241, 42 U.S.C. 5817(d); sec. 161(g), 80 Stat. 443, 42 U.S.C. 2201(g); sec. 172, 62 Stat. 933, 42 U.S.C. 2223; Foreign Assistance Act of 1961, sec. 2356, 75 Stat. 440, 22 U.S.C. 2356; Patents, Invention Secrecy Act; sec. 183, 66 Stat. 4, 35 U.S.C. 183; Judiciary and Judical Procedure Act, sec. 1498, 62 Stat. 601, 28 U.S.C. 1498.

Source: 45 FR 26950, Apr. 22, 1980, unless otherwise noted.

Subpart A—General

§ 782.1 Purpose.

The purpose of this regulation is to set forth policies and procedures for the filing and disposition of claims asserted against the Department of Energy of infringement of privately owned rights in patented inventions or copyrighted works.

§ 782.2 Objectives.

Whenever a claim of infringement of privately owned rights in patented inventions or copyrighted works is asserted against the Department of Energy, all necessary steps shall be taken to investigate and to settle administratively, to deny, or otherwise to dispose of such claim prior to suit against the United States.

§ 782.3 Authority.

The General Counsel or the General Counsel's delegate is authorized to investigate, settle, deny, or otherwise dispose of all claims of patent and copyright infringement pursuant to 42 U.S.C. 2201(g), 2223, 5817(d) and 7261;

the Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 183; and 28 U.S.C. 1498.

Subpart B—Requirements and Procedures

§ 782.5 Contents of communication initiating claim.

(a) *Requirements for claim.* A patent or copyright infringement claim for compensation, asserted against the United States as represented by the Department of Energy under any of the applicable statutes cited in § 782.3, must be actually communicated to and received by an agency, organization, office, or field establishment within the Department of Energy. Claims must be in writing and must include the following:

(1) An allegation of infringement;

(2) A request, either expressed or implied, for compensation;

(3) A citation of the patents or copyrighted items alleged to be infringed;

(4) In the case of a patent infringement claim, a sufficiently specific designation to permit identification of the items or processes alleged to infringe the patents, giving the commercial designation if known to the claimant, or, in the case of a copyright infringement claim, the acts alleged to infringe the copyright;

(5) In the case of a patent infringement claim, a designation of at least one claim of each patent alleged to be infringed or, in the case of a copyright infringement claim, a copy of each work alleged to be infringed;

(6) As an alternative to paragraphs (a)(4) and (5) of this section, certification that the claimant has made a bona fide attempt to determine the items or processes which are alleged to infringe the patents, or the acts alleged to infringe the copyrights, but was unable to do so, giving reasons, and stating a reasonable basis for the claimant's belief that the patents or copyrighted items are being infringed.

(b) *Additional information for patent infringement claims.* In addition to the information listed in paragraph (a) of this section the following material and information generally is necessary in the course of processing a claim of patent infringement. Claimants are encouraged to furnish this information at the time of filing a claim to permit rapid processing and resolution of the claim.

(1) A copy of the asserted patents and identification of all claims of the patents alleged to be infringed.

(2) Identification of all procurements known to claimant that involve the accused items or processes, including the identity of the vendors or contractors and the Government acquisition activity or activities.

(3) A detailed identification and description of the accused articles or processes, particularly where the articles or processes relate to components or subcomponents of the item acquired, and an element-by-element comparison of representative claims with the accused articles or processes. If available, the identification and description should include documentation and drawings to illustrate the accused articles or processes in sufficient detail to enable verification that the claims of the asserted patents read on the accused articles or processes.

(4) Names and addresses of all past and present licensees under the patents and copies of all license agreements and releases involving the patents.

(5) A brief description of all litigation in which the patents have been or are now involved, and their present status.

(6) A list of all persons to whom notices of infringement have been sent, including all departments and agencies of the Government, and a statement of the status or ultimate disposition of each.

(7) A description of Government employment or military service, if any, by the inventors or patent owner.

(8) A list of all contracts between the Government and inventors, patent owner, or anyone in privity with them that were in effect at the time of conception or actual reduction to practice of the inventions covered by the patents.

(9) Evidence of title to the asserted patents or other right to make the claim.

(10) If it is available to claimant, a copy of the Patent Office file of each patent.

(11) Pertinent prior art of which the claimant has become aware after issuance of the asserted patents.

In addition to the foregoing, if claimant can provide a statement that the investigation may be limited to the specifically identified accused articles or processes, or to a specific acquisition (e.g. identified contracts), it may speed disposition of the claim.

(c) *Denial for refusal to provide information.* In the course of investigating a claim, it may become necessary for the Department of Energy to request information in the control and custody of claimant that is relevant to the disposition of the claim. Failure of the claimant to respond to a request for such information may be sufficient reason alone for denying a claim.

§ 782.6 Processing of administrative claims.

(a) *Filing and forwarding of claims.* All communications regarding claims should be addressed to:

General Counsel, ATTN: Assistant General
Counsel for Patents, Office of the General
Counsel, U.S. Department of Energy,
Washington, D.C. 20545.

If any communication relating to a claim or possible claim of patent or copyright infringement is received by an agency, organization, office, or field establishment within the Department of Energy, it should be forwarded to the Assistant General Counsel for Patents.

(b) *Disposition and notification.* The General Counsel shall investigate and administratively settle, deny, or otherwise dispose of each claim by denial or settlement. When a claim is denied, the Department shall so notify the claimant or his authorized representative and provide the claimant with the reasons for denying the claim. Disclosure of information shall be subject to applicable statutes, regulations, and directives pertaining to security, access to official records, and the rights of others.

§ 782.7 Incomplete notice of infringement.

(a) If a communication alleging patent or copyright infringement is received that does not meet the requirements set forth above in § 782.5, the sender shall be advised in writing by the General Counsel:

(1) That the claim for infringement has not been satisfactorily presented; and

(2) Of the elements considered necessary to establish a claim.

(b) A communication, such as a mere offer of a license, in which an infringement is not alleged in accordance with § 782.5(a) of this part shall not be considered a claim for infringement.

§ 782.8 Indirect notice of infringement.

If a patent or copyright owner communicates an allegation of infringement in the performance of a Government contract, grant, or other arrangement to addressees other than those specified in § 782.5(a), such as Department of Energy contractors including contractors operating government-owned facilities, the communication shall not be considered a claim within the meaning of § 782.5 until it meets the requirements of that section.

PART 783—WAIVER OF PATENT RIGHTS

Sec.
783.1 Waiver.
783.2 Limitations.

AUTHORITY: Secs. 152, 161, 68 Stat. 944, 948, as amended; (42 U.S.C. 2182, 2201).

SOURCE: 41 FR 56784, Dec. 30, 1976, unless otherwise noted.

§ 783.1 Waiver.

The Department of Energy, hereinafter "DOE", waives its rights under section 152 of the Atomic Energy Act of 1954 (66 Stat. 944) with respect to inventions and discoveries resulting from the use of the following materials and services:

(a) Source materials, special nuclear materials, and heavy water distributed by DOE in accordance with the "Schedules of Base Charges for Materials Sold of Leased by DOE for Use in

Private Atomic Energy Development and Base Prices Which DOE Will Pay for Certain Products From Private Reactors."

(b) Radioactive and stable isotopes, irradiation services (this waiver does not include inventions or discoveries made by DOE or DOE contractor personnel in the course of or in connection with the performance of an irradiation service), and radioactive material resulting from the performance of an irradiation service sold or distributed by DOE in accordance with the prices and charges established by:

(1) Oak Ridge National Laboratory Inventory and Price List of electromagnetically enriched and other stable isotopes.

(2) Oak Ridge National Laboratory Catalog and Price List of radioisotopes, special materials, and services.

(3) Idaho National Engineering Laboratory Catalog of Price and charges on irradiation services at the materials testing reactor. The waiver does include inventions or discoveries made by sponsor personnel in the course of their use of the Gamma Irradiation Facility at the Idaho National Engineering Laboratory.

(4) Argonne National Laboratory schedule of charges for irradiation services at its irradiation facilities.

(5) Brookhaven National Laboratory schedule of prices and charges for irradiation services and radioisotopes.

§ 783.2 Limitations.

(a) Except with regard to the use of the Gamma facility at the Idaho National Engineering Laboratory, nothing contained in this part shall be deemed to waive any rights in inventions or discoveries where a person or a group of persons acting on behalf of the person requesting the irradiation service works at the DOE facility in connection with the irradiation service. In such event, special arrangements are made.

(b) Nothing contained in this part shall be construed to affect the provisions of any written agreement to which DOE has or may become a party.

PART 790—THE GEOTHERMAL LOAN GUARANTY PROGRAM

Subpart A—General Provisions

Sec.

790.1 Purpose.
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790.3 Effective date.
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790.30 Loan servicing by lender or servicing agent.
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790.40 Assignment and participation in the guaranteed loan.
790.41 Survival of guaranty agreement.
790.42 Modifications to existing guaranty agreements.
790.43 Other Federal assistance.
790.44 Inventions and other intellectual property.
790.45 Closing.
790.46 Nondiscrimination in Federally assisted programs.
790.47 Suspension, termination, or cancellation of operations or production on Federal land and leases administered by the Secretary of the Interior.
790.48 Appeals.

AUTHORITY: Title II of the Geothermal Energy Research, Development, and Demonstration Act of 1974, Pub. L. 93-410, 88 Stat. 1086 (30 U.S.C. 1141 et seq.); Dept. of Energy Organization Act, Pub. L. 95-91 91 Stat. 565 (42 U.S.C. 7101 et seq.); Title V of the Dept. of Energy Act of 1978—Civilian Applications, Pub. L. 95-238, 92 Stat. 86.

SOURCE: 44 FR 75080, Dec. 18, 1979, unless otherwise noted.

Subpart A—General Provisions

§ 790.1 Purpose.

The purpose of this regulation is to set forth policies and procedures under which the Department of Energy (DOE) will issue a Federal guaranty on loans related to the commercial development of practicable means to produce or utilize energy from geothermal resources in an environmentally acceptable manner.

§ 790.2 Objectives.

The objectives of the Federal geothermal loan guaranty program are: (a) To encourage and assist the private and public sectors to accelerate development of geothermal resources with environmentally acceptable processes by enabling the Secretary in the exercise of reasonable judgment, to minimize a lender's financial risk that is associated with the development of new geothermal reservoirs and with the application of new technology; (b) to develop normal borrower-lender relationships which will in time encourage the flow of credit for geothermal energy projects without the need for Federal assistance; and (c) to enhance competition and encourage new entrants into the geothermal market.

§ 790.3 Effective date.

This regulation is effective December 18, 1979.

§ 790.4 Eligible loans and priorities.

(a) The Secretary may approve agreements to guaranty, and commitments to guaranty, lenders against the loss of principal and accrued interest on loans made by such lenders to qualified borrowers. Any such agreements shall be made subject to the application of priorities and preferential considerations for guarantees as set forth in paragraph (b) of this section and subject to criteria in § 790.6. Such agreements may be entered into only for the purposes of:

(1) Determination and evaluation of the commercial potential of geothermal resources;

(2) Research and development with respect to geothermal extraction and utilization technologies, including but not limited to the mitigation of adverse environmental effects;

(3) Acquisition of rights in geothermal resources;

(4) Development, construction, and operation of facilities for the demonstration or commercial production of electricity through the use of geothermal resources, including onsite generation of electricity for direct use by a single customer or,

(5) Construction and operation of a new commercial, agricultural, or industrial facility, or modification and operation of an existing commercial, agricultural, or industrial facility, when geothermal hot water or steam is to be used within or by such facility or modification thereto, for the purposes of space heating or cooling, industrial or agricultural processes, other commercial applications, including hybrid plants, or combinations of applications separately eligible for loan guaranty assistance under this regulation.

(b) In complying with the objectives of the Geothermal Loan Guaranty Program, the Secretary will give first priority consideration to those applications for projects having a plan of operations which shows substantial promise of the prompt development and utilization of energy from undeveloped geothermal resource areas. Second priority consideration will be given to those applications for projects designed to demonstrate or utilize new technological advances. Third priority will be given to projects that will exploit the commercial potential of partially developed geothermal resource areas. The Secretary will give lower priority consideration to applications involving projects that propose: only geological and geophysical exploration; only the acquisition of land or leases; only research and development, or to be located at a geothermal resource area where utilization technology and economics have been proven. Within each category of priority as described herein, preferential consideration will be given to (1) applications in which the lender is providing a portion of the loan for which a guaranty is not requested, (2) projects to be carried out by small public and private utilities and small businesses, and (3) projects from which the Federal Government will receive royalty payments.

(c) Not less than ten percent of the amount available for loan guarantees during a fiscal year will be allocated to guarantees on loans to small public and private utilities and small businesses, as defined in § 790.5. At the Secretary's discretion the allocation reserved for such concerns may be adjusted. To the extent that guarantees on loans to such concerns are not issued within six months following the beginning of each fiscal year, the uncommitted allocation of loan guarantees for such concerns, at the discretion of the Secretary, may become available on an unrestricted basis.

(d) A loan application which, in the Secretary's view, meets usual loan standards of lenders without a Federal guaranty will be regarded by the Secretary as not eligible for a loan guaranty under this regulation. In addition, an application for a guaranty which does not represent a complete project, or an application which does not present an acceptable plan to repay the proposed guaranteed debt, or a project which is devoted exclusively to the extraction or production of geothermal byproducts as defined in § 790.5(b), or a project devoted exclusively to the desalination of geothermal brines will not be eligible for a Federal loan guaranty under this regulation.

(e) A guaranty issued by, or in behalf of, any state, political subdivision or Indian Tribe (which would be an otherwise tax-exempt obligor), pursuant to this regulation requires that the interest paid on such guaranteed obligations be included in the gross income of the Holder for the purposes of Chapter 1 of the Internal Revenue Code of 1954, as amended, in accordance with Internal Revenue Service Revenue Ruling 80-161 of June 16, 1980. For such transactions, the Secretary shall pay to the issuer of the debt or other appropriate party that portion of the interest which is found to be appropriate after consultation with the Secretary of the Treasury, regarding current market yield on other obligations which have similar terms and conditions. Payment under this subsection shall be made to the issuer or the appropriate party in accordance with the guaranty agreement.

[44 FR 75080, Dec. 18, 1979, as amended at 45 FR 67308, Oct. 10, 1980]

§ 790.5 Definitions.

For purposes of this regulation:

(a) "Applicant" means any party who has filed an application for a loan guaranty authorized under these regulations and who believes it is a qualified borrower as defined in paragraph (l) of this section;

(b) "Byproduct" means any mineral or minerals or gases which are found in solution or in association with geothermal or geopressured resources and which have a value of less than 75 percent of the value of the geothermal steam and associated geothermal resources or are not, because of quantity, quality, or technical difficulties in extraction and production, of sufficient value to warrant extraction and production by themselves;

(c) "Default" means only the actual failure by the borrower to make payment of interest or principal in accordance with a schedule in the loan agreement, or to meet other requirements specified as a default condition in the guaranty agreement or collateral documents or other agreements relating to the guaranteed debt;

(d) "Estimated aggregate cost of the project" means those reasonable and customary costs incurred or to be paid in behalf of the project, including construction and start-up costs but excluding costs specified in § 790.22(c);

(e) "Federal Financing Bank" means that organization in the United States Department of the Treasury having the authority to purchase federally guaranteed debt;

(f) "Geothermal resources" means (1) all products of geothermal processes, including indigenous steam, geopressured fluids, hot water, and brines, (2) steam and other gases, hot water and hot brines resulting from water, gas, or other fluids artificially introduced into geothermal formations, and (3) any byproduct derived from a geothermal resource;

(g) "Guaranty fee" means a charge made by DOE for its administrative cost for processing and monitoring guaranteed loans, for interest differential payments, and for probable guaranteed loan losses;

(h) "Holder" means the entity that lawfully holds all or any part of the guaranteed loan;

(i) "Lender" means any entity engaged in the business of lending money, or the Federal Financing Bank. Loan servicing functions required by this regulation can be performed by the lender or a servicing agent acceptable to the Manager;

(j) A "loan" is an obligation involving a borrower and a lender, evidenced in writing, which makes available to the borrower money at a specified rate of interest for a limited period of time;

(k) "Manager" means the Manager of the Department of Energy's San Francisco Operations Office, 1333 Broadway, Oakland, California 94612, or a representative authorized by the Manager;

(l) "Qualified borrower" means any public or private agency, institution, association, partnership, corporation, political subdivision, or other legal entity which (as determined by the Secretary) has presented satisfactory evidence of an interest in geothermal resources and is capable of performing research or completing the development and production of energy in an acceptable manner;

(m) "Project" means an undertaking to develop geothermal resources at a specific site which when completed will result in an identifiable product, system, or resource for which a market potentially exists. Examples of a project include, but are not limited to, exploration and full-field development well drilling, power plant construction, equipment manufacturing, research and development, construction of transmission lines from a geothermal power plant, and ventures to utilize geothermal energy in conjunction with other energy resources or as a resource in direct heat applications such as crop drying and greenhousing;

(n) "Secretary" means the Secretary of Energy or the Assistant Secretary for Resource Applications when authorized or their designees or any other party specified in an executed written contract or other written agreement with the Department of Energy;

(o) A "small public or private electric utility, including its affiliates," is a business concern primarily engaged in the generation, transmission or distribution of electric energy for sale whose total electric output for its preceding fiscal year did not exceed four million megawatt-hours; and

(p) A "small business, including its affiliates," is a concern which is independently owned and operated, is not dominant in its field of operation, and which does not have assets exceeding $9 million, or a net worth in excess of $4 million, and does not have an average net income, after Federal income taxes, for the preceding two years in excess of $400,000 (average net income to be computed without benefit of any carryover loss).

§ 790.6 Loan guaranty criteria.

In addition to meeting the requirements for eligibility set forth in § 790.4(a), a guaranty or commitment to guaranty may be made only if the following conditions are met as determined by the Secretary on the written recommendation by the Manager (criteria applicable to the lender may not pertain to guarantees in which the Federal Financing Bank is the lender):

(a) The application form is signed by an authorized representative of the prospective borrower and, when applicable, by an authorized representative of the lender;

(b) The project proposed by the applicant meets program objectives stated in § 790.2 and conforms to program priorities set forth in § 790.4(b);

(c) The applicant has furnished acceptable reasons why the loan would not be made without a Federal loan guaranty;

(d) There is satisfactory evidence demonstrating that the lender or a servicing agent is competent to administer the contractual terms and conditions applicable to the lender or servicing agent specified in the loan transaction documents;

(e) The maximum guaranty shall apply only to that amount of a loan that does not exceed 75 percent of the estimated aggregate cost of the project. However, any guaranty made for a loan to an electric, housing, or other cooperative, or to a municipality (as defined in section 3(7), Part I, of the Federal Power Act), may apply to that amount of the loan that does not exceed 90 percent of the estimated aggregate cost of the project.

(f) When the amount of the guaranty requested is equal to 100% of the loan made by the lender, the lender must set forth reasons fully establishing why it is unwilling to undertake a loan having less than the maximum guaranty;

(g) The loan bears interest at a rate not to exceed an annual percent on the principal obligation outstanding as the Secretary determines, in consultation with the Secretary of the Treasury, to be reasonable, taking into account the range of interest rates for similar loans and risks which are guaranteed by the full faith and credit of the United States;

(h) The term of the loan requires, as determined by the Secretary, the lesser of (1) full repayment over a period of no more than 30 years, (2) full repayment no longer than the expected average useful life of major physical assets essential to the project, or (3) full repayment represented by the borrower's ability to repay the loan based on the project's cash flow projection;

(i) The amount of the loan together with other funds available to the applicant will be sufficient to carry out the project;

(j) There is reasonable assurance of repayment of the guaranteed portion of the loan from the project's income received by the borrower, and assurance that loan repayment is not dependent on interest or principal assistance;

(k) The amount of a guaranty for any loan for a project does not exceed $100,000,000, however, any loan in excess of $50,000,000 must comply with the Community Impact Assistance requirements in section 205 of Pub. L. 95-238.

(l) The total dollar amount of guarantees made under this regulation for any combination of outstanding loans to any single borrower does not exceed $200,000,000, unless the Secretary determines in writing that a guaranty in excess of these amounts is in national interest and does not adversely impact competition. Such determinations shall be submitted to the Speaker of the House and the Chairman of the Committee on Science and Technology of the House of Representatives, and to the President of the Senate and the Chairman of the Committee on Energy and Natural Resources of the Senate, accompanied by a full and complete report on the proposed project and guaranty. The proposed guaranty or commitment to guarantee will not be finalized prior to the expiration of 30 calendar days (not including any date on which either House of Congress is not in session) from the date on which the report is received by the Speaker of the House and the President of the Senate;

(m) The project is to be performed in the United States, its territories or possessions, or on property owned or leased by the United States Government outside the United States, its territories or possessions;

(n) The project is technically feasible, and that each major milestone event contains acceptable criteria;

(o) There is acceptable evidence that the applicant will initiate and complete the project in a timely and efficient manner;

(p) There is a sufficiency of geophysical, geological, hydrological and geochemical data to reasonably assure successful project completion;

(q) The applicant agrees to make available to the Manager on a timely basis specified technical and economic information, and, subject to provisions in § 790.20(b)(2), further agrees to the public dissemination of specified project information;

(r) There is satisfactory evidence of the applicant's interest in geothermal resources;

(s) There is satisfactory evidence that the project will be carried out by the use of environmentally acceptable processes in such a manner as to prevent or mitigate adverse environmental impact to the maximum extent practicable, and to comply with any applicable environmental protection and pollution control requirements;

(t) The terms and conditions set forth in the loan agreement and other documents related to the transaction are acceptable;

(u) The terms and conditions set forth in other loans relating to the project are acceptable;

(v) The Secretary of the Treasury has insured to the maximum extent feasible that the timing, interest rate, and terms and conditions of any guaranty exceeding $25,000,000 will have the minimum possible impact on the capital market of the United States taking into account other Federal direct and indirect commercial securities activities;

(w) There are not significant adverse competitive impacts from cumulative guarantees in excess of $50,000,000 to any single applicant;

(x) There is satisfactory evidence of the applicant's right to explore and develop the geothermal resource through deed, lease, permit, license, or other entitlement.

(Title II of the Geothermal Energy Research, Development, and Demonstration Act of 1974, Pub. L. 93-410, 88 Stat. 1086 (30 U.S.C. 1141 et seq.), as amended; Title VI of the Energy Security Act, Pub. L. 96-294, 94 Stat. 763 (30 U.S.C. 1501 et seq.); Department of Energy Organization Act, Pub. L. 96-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.))

[44 FR 75080, Dec. 18, 1979, as amended at 48 FR 20000, May 3, 1983]

§ 790.7 Interest and principal assistance.

(a) Whenever the borrower is unable to pay required interest or principal, the Manager, upon approval by the Secretary, may enter into interest or principal assistance contracts with the borrower to pay the lender for and on behalf of the borrower the interest charges or principal payments which become due and payable if the Secretary finds that:

(1) The borrower is unable to meet such payments and is not in default;

(2) That it is in the public interest to permit the borrower to continue to pursue the purposes of the project; and

(3) That the probable net cost to the Federal Government in paying such amounts will be less than that which would result in the event of a default.

(b) The amounts which the Manager is authorized to pay under an interest or principal assistance agreement shall be no greater than the amount of interest or principal which the borrower is obligated to pay under the loan agreement.

(c) The principal or interest assistance agreement shall provide that the borrower repay the amounts received on terms and conditions, including interest, which are satisfactory to the Secretary.

§ 790.8 Grace period.

The loan agreement shall provide specific dates for the payment of principal and interest and shall provide a period of grace of not less than 30 days for the making of any payment. The loan agreement may provide that repayment of principal may be deferred when approved by the Secretary. The lender or servicing agent shall not grant the borrower any further extension of time over and above any grace period without the prior written consent of the Manager.

§ 790.9 Period of guaranty and assistance contracts.

No loan guaranty agreement or commitment to guaranty will be made or interest or principal assistance contract entered into after September 30, 1990. Guaranty agreements in effect at that time will continue until the term of the loan is completed or until the guaranteed portion of the loan is repaid in full with accrued interest, or is otherwise terminated. Interest or principal assistance contracts in effect on September 30, 1990, will remain in effect until the contract term expires or is otherwise terminated.

(Title II of the Geothermal Energy Research, Development, and Demonstration Act of 1974, Pub. L. 93-410, 88 Stat. 1086 (30 U.S.C. 1141 et seq.), as amended; Title VI of the Energy Security Act, Pub. L. 96-294, 94 Stat. 763 (30 U.S.C. 1501 et seq.); Department of Energy Organization Act, Pub. L. 96-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.))

[44 FR 75080, Dec. 18, 1979, as amended at 48 FR 20001, May 3, 1983]

§ 790.10 Information for States and Indian Tribes.

The Secretary, the Manager, or a Regional Representative of the Secretary will, as appropriate, meet with Governors of directly affected States, regional associations of Governors, heads of State agencies and commissions responsible for energy or environmental matters, and Indian Tribes for the purpose of:

(a) Discussing the status of projects guaranteed under this regulation;

(b) Identifying means to remove or mitigate legal and regulatory barriers to the accelerated use of geothermal resources;

(c) Evaluating plans to encourage growth in the geothermal industry;

(d) Discussing community impacts which may result from projects receiving a loan guaranty under this regulation; or

(e) Considering other appropriate areas.

§ 790.11 Full faith and credit and incontestability.

The full faith and credit of the United States is pledged to the payment of all guarantees issued in accordance with these regulations and such guarantees shall be valid and incontestable by the Government. The guaranty agreement entered into under these regulations shall be conclusive evidence that the guaranty and the underlying loan are in compliance with applicable law and these regulations, and that such loan has been approved.

§ 790.12 Loan funding.

(a) Loans guaranteed in accordance with these regulations may be funded through private lenders or the Federal Financing Bank. Funding by private lenders, especially during the project's construction milestones, will have preference, except in the following cases:

(1) Whenever the Secretary is required to make payments of interest differential; or,

(2) Whenever the Secretary determines, after consultation with the Secretary of the Treasury and discussion with the private lender, if any, or another lender, that the interest rate, maturity, lending fees, or other terms and conditions available to the applicant do not reflect the value of a guarantee backed by the full faith and credit of the United States.

(b) Whenever a loan is funded through the Federal Financing Bank, the loan will be serviced in accordance with the loan servicing requirements of these regulations by parties acceptable to the Manager. Reasonable servicing costs shall be paid by the borrower in addition to the guaranty fee, and the servicing cost may be included in the estimated aggregate cost of the project.

§ 790.13 Deviations.

To the extent that such requirements are not specified in Pub. L. 93-410 as amended or other applicable statutes, the Secretary may authorize deviations on an individual application basis from the requirements of this regulation (except § 790.23) upon a finding that such deviation is essential to program objectives and the special circumstances in the guaranty application make such deviation clearly in the best interest of the Government. Recommendation for any deviation shall be submitted in writing by the Manager or the Secretary. Such recommendations shall include a supporting statement which indicates briefly the nature of the deviation requested and the reasons therefore.

Subpart B—Applications

§ 790.20 Filing.

(a) A completed application for a loan guaranty under this regulation must be on a form provided by the Manager and be signed by the prospective borrower and submitted to the Manager who is responsible for processing the application. If the application involves a private lender, the form shall be signed by the lender. Application forms and information regarding the filing of applications may be obtained from the Director, Geothermal Loan Guaranty Program Office, San Francisco Operations Office, Department of Energy, 1333 Broadway, Oakland, California 94612. Telephone (415) 273-7151.

(b)(1) Prior to receipt of an application, the Manager is authorized to conduct preliminary discussions with prospective lenders, borrowers or other interested parties wishing to obtain information or advice regarding eligibility for a loan guaranty and compliance with this regulation, and whether a lender should be obtained by the borrower prior to the submission of an application. To the maximum extent practical, and applicant should be advised (prior to the submission of an application) of all information which will be required by the Manager in processing the application. The date of filing shall be the date, as determined by the Manager, when all such required information has been submitted by the applicant. A final decision on the application shall be made by the Secretary within no more than four months of the date of filing established by the Manager.

(2) Subject to the requirements of law and applicable regulations, information such as trade secrets, commercial and financial information, geological, geophysical and geographic information and data (including maps) concerning wells which the borrower or lender submits to DOE during the preliminary discussion or at any other time throughout the duration of the project on a privileged or confidential basis, will not be publicly disclosed by DOE without prior notification to the submitter. Information asserted by the submitting party to be privileged or confidential shall be appropriately identified and marked.

(c) Supporting information and cost data submitted by the applicant shall be updated and furnished to the Manager whenever changes occur during DOE's consideration of the guaranty application.

(Title II of the Geothermal Energy Research, Development, and Demonstration Act of 1974, Pub. L. 93-410, 88 Stat. 1086 (30 U.S.C. 1141 et seq.), as amended; Title VI of the Energy Security Act, Pub. L. 96-294, 94 Stat. 763 (30 U.S.C. 1501 et seq.); Department of Energy Organization Act, Pub. L. 96-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.))

[44 FR 75080, Dec. 18, 1979, as amended at 48 FR 20001, May 3, 1983]

§ 790.21 Supporting information.

(a) The applicant shall provide information, as prescribed by the Manager, to supplement the guaranty application. The following items are provided to illustrate the range of supporting information which may be required to enable the Manager to prepare a recommendation with respect to any pending application.

(1) Full description of the scope, nature, extent, milestones and location of the proposed project;

(2) A detailed budget-type breakdown of both the estimated aggregate cost of the project and the amount to be borrowed;

(3) Evidence showing that the amount of the loan together with equity or other financing will be sufficient to complete the project and its startup period, and provide sufficient working capital;

(4) The applicant's plan to repay the loan, including cash flow projections, assumptions regarding marketability of the project's results or product, and descriptions of the project's technical and economic feasibility and environmental acceptability;

(5) The aggregate outstanding amount of guaranty commitments or guaranteed loans previously made to the applicant under the provisions of these regulations;

(6) Where relevant to the purpose of the loan guaranty, a copy of the applicant's title or lease agreement to the property on which the project is to be carried out, supported by title opinion or other acceptable evidence of the applicant's ownership interest;

(7) Subject to § 790.20(b)(2), technical information and reports, geophysical data, well logs and core data, financial statements, milestone schedules, and maps and charts;

(8) Information covering the management experience of each officer or key person in the applicant's organiza-

tion who will be associated with the project and a description of salaries (and other financial remuneration including profit sharing and stock options) to be paid to officers and employees that are, or will be, directly associated with the project;

(9) A description of the applicant's management concept, and business plan or plan of operations, to be employed in carrying out the project;

(10) A description of the intended sources and amount of capital and its form (equity, loans from principals, loans from the lender, outside financing, or factoring) together with evidence of a commitment from these sources and a copy of each such agreement, and evidence of the financial ability of each source to honor its commitment;

(11) A listing of assets associated or to be associated with the project, including appropriate data as to value and useful life of major assets essential to the project, and a description of any other security offered as collateral for the loan;

(12) A listing all permits or authorizations required by Federal, State and local government agencies to conduct the project and a copy of each application for approval of such permits or authorizations when issued or statement of planned filing dates and expected date of approval;

(13) A description of the applicant's organization and, as applicable, a copy of the business certificate, partnership agreement or corporate charter, bylaws, and appropriate authorizing resolutions;

(14) The lender's written assessment of all aspects of the borrower's loan application in such detail as would be expected by prudent lenders considering a loan without a guaranty, together with copies of the proposed loan agreement, the applicant's financial statements, investigations from credit bureaus, references, bank, inquiries, and professional organizations;

(15) A copy of all loan agreements pertaining to the project and written assurance from any existing lenders of project funds that the loan amounts as well as terms and conditions imposed by lenders on such loans will not be altered in any significant respect without the prior approval of th
Manager;

(16) Evidence of consultation co
ducted by the applicant with appropi
ate agencies of any affected State r
garding the proposed project, and
description of any adverse social
economic impacts which may occur
the community in which the proje
will be located;

(17) A disclosure by the lender ar
the servicing agent of (i) whether ar
of its officers, directors, major stoc
holders or other major owners have
financial interest in the applicant ar
(ii) whether any of the applicant's o
ficers, directors, major stockholders
other major owners have a financi
interest in the lender or the servicir
agent;

(18) Any other information require
by the Manager to fully evaluate th
guaranty application;

(19) Environmental informatio
which will identify probable enviro
mental impacts resulting from co
struction and operation of the pr
posed project. Applicants should co
sult with DOE as early as possible
their planning process to obtain gui
ance with respect to the appropria
level and scope of environmental i
formation to be submitted as part
their application.

(b) In addition to supporting info
mation illustrated in paragraph (a)
this section, the Manager may ind
pendently obtain or may require th
submisson of certain information r
garding the lender or servicing agen
as deemed necessary by the Manage
to include but not be limited to:

(1) A description of the lender's
servicing agent's organization and
copy of the business certificate, par
nership agreement or corporate cha
ter, bylaws, and appropriate authori
ing resolutions;

(2) Copies of investigation report
obtained from credit bureaus, refe
ence and bank inquiries, and profe
sional associations;

(3) A description of the managemen
experience of each officer or ke
person in the lender's or servicin
agent's organizations who will be ser
icing the loan;

(4) A description of the managemen
techniques and plan to be employe

by the lender or servicing agent in monitoring and servicing the loan; and

(5) A copy of the lenders' conditional loan commitment document, if any, issued to the applicant.

(c) The Manager shall consider the application and other relevant information and shall be responsible for: (1) Determining whether the application is in compliance with these regulations; (2) assessing and evaluating the financial, technical, environmental, legal, management, and marketing aspects of the project; (3) assessing the availability of the project's financing, other than that provided by the proposed guaranty for the project, and assessing whether such financing is adequately committed; and, (4) recommending to the Secretary approval or disapproval of the application. The Manager shall include with a recommendation for approval a description of proposed pertinent terms and conditions that have been previously discussed and negotiated by the Manager with the applicant. When not approved by the Secretary, the Manager will provide the applicant with a written statement setting forth the basis for disapproval of the guaranty application.

§ 790.22 Project costs.

(a) Project costs will be recorded in accordance with generally accepted accounting principles and practices which are consistently applied.

(b) Except a set forth in paragraph (c) of this section, reasonable and customary project costs that are directly required for the project are permitted in computing the estimate aggregate cost of the project. These costs include, but are not limited to the following:

(1) Employees' salaries and wages, consultant fees and other outside assistance;

(2) Land purchase or lease payments, including reasonable real estate commissions;

(3) Engineering fees, surveys, plats, title insurance, recording fees and legal fees incurred in connection with land acquisition;

(4) Site improvements, site restoration and abandonment costs, access roads and fencing;

(5) Drilling of exploration wells, shallow heat-flow wells, and test, production and reinjection wells;

(6) Buildings, transmission lines, power plant equipment, and machinery;

(7) Taxes (including tax advances associated with community impact planning) to be paid to Federal, State and local government agencies and other taxing authorities;

(8) Insurance, including flood insurance, and bonds of all types;

(9) Engineering, geological, and architectural fees paid in connection with drilling, machinery selection, design, acquisition and installation;

(10) Research, exploration or development necessary to complete the project;

(11) Professional services and fees necessary to obtain licenses and permits and to prepare environmental reports and data;

(12) Interest costs charged by the lender and, except as provided in § 790.22(c)(5), interest payments to other lenders;

(13) Costs incurred for the benefit of the project prior to approval of the guaranty agreement that are directly connected with the project, including costs to prepare the loan guaranty application and its supporting data;

(14) Technical and socio-economic information dissemination costs, and community impact assistance costs;

(15) Costs to provide safety and environmental protection equipment, facilities and services;

(16) Travel and transportation costs;

(17) Bond or private placement financing cost and trustee fees;

(18) Fees for royalties and licenses;

(19) Costs associated with acquiring geophysical and other technical data;

(20) Financial and legal services costs;

(21) Costs to comply with terms and conditions specified in the guaranty agreement or with applicable laws, rules and regulations;

(22) Expenses associated with an initial period of starting operations; and

(23) A contingency reserve.

(c) Costs which are not considered as part of the estimated aggregate cost of the project are illustrated below:

(1) Company organizational expenses not directly related to the project;

(2) Parent corporation general and administrative expenses and other parent corporation assessments;

(3) Dividends and profit sharing to stockholders, employees and officers;

(4) Goodwill, franchises, or trade or brand name costs;

(5) Except as provided in § 790.31, fees or commissions charged to the borrower for finding a loan and interst costs and associated fees on loans to cover the applicant's equity in the project;

(6) Operating expenses (including interest costs) incurred after an initial period of start-up; and

(7) Costs that are excessive or are not directly required to carry out the project.

(d) Independently, or at the direction of the Secretary, the Manager may review any or all cost elements included by the applicant in the estimated aggregate project cost. The applicant shall make available records and other data necessary to permit the Manager to conduct this review. In carrying out this review responsibility, the Manager may utilize employees of Federal agencies or may direct the applicant to submit to a review performed by an independent public accountant or other competent authority.

(e) When costs incurred prior to the approval of the guaranty agreement, as provided in § 790.22(b)(14), are included in the estimated aggregate project cost, the applicant, if requested by the Manager, shall make available to auditors selected by the Manager financial and other records necessary to complete an audit of such costs.

(f) In the case of a guaranty for the purposes specified in § 790.4(a)(5), the estimated aggregate cost of the project can only be that portion of the total cost which is directly related to the utilization of geothermal energy within the structure or facility. However, the estimated aggregate cost of the project may include construction and start-up operations when the facility or structure is to be located near a geothermal energy resource predominantly for the purpose of utilizing geothermal energy, or as determined by the Secretary, the economic viability of the project is substantially dependent on the performance of the geothermal reservoir.

(g) The estimated total aggregate cost of a project shall exclude the estimated cost of constructing electric transmission lines to the extent that such construction cost exceeds 25 percent of the estimated total aggregate cost of the project. In determining this 25 percent limitation, the amount used in the denominator shall be the estimated total aggregate cost of the project including the estimated total cost of constructing the electric transmission line.

(h) The Secretary may waive or limit the 25 percent limitation imposed by paragraph (g) of this section for projects located in the State of Hawaii upon finding that the project is remote from the area of primary consumption, that a transmission line is required before the geothermal reservoir can be developed, and that the transmission line will be used for more than the plant which is the subject of the loan guaranty.

(Title II of the Geothermal Energy Research, Development, and Demonstration Act of 1974, Pub. L. 93-410, 88 Stat. 1086 (30 U.S.C. 1141 et seq.), as amended; Title VI of the Energy Security Act, Pub. L. 96-294, 94 Stat. 763 (30 U.S.C. 1501 et seq.); Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.))

[44 FR 75080, Dec. 18, 1979, as amended at 48 FR 20001, May 3, 1983]

§ 790.23 Environmental considerations.

(a) The issuance of a Federal guaranty for a loan under these regulations is subject to the provisions of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C 4321 et seq. Pub. L. 91-190) and applicable regulations, rules and guidelines implementing NEPA. The Secretary shall ensure, to the maximum extent possible, that any action undertaken pursuant to section 102(2)(C) of NEPA which is associated with the granting of a loan guaranty under this regulation takes maximum cognizance allowable under law of any other action previously undertaken pursuant to NEPA section

102(2)(C) with respect to the project which is the subject of such loan guaranty. No action associated with the loan guaranty shall duplicate any action previously undertaken under NEPA section 102(2)(C) in connection with the project, so long as all requirements which are applicable to the project under NEPA section 102(2)(C) have been or will be satisfied.

(b) As part of the NEPA review to be accorded individual applications, DOE shall review and consider the environmental impacts associated with the commercial operation of the project throughout its useful life. Such considerations shall be carried out even where the proposed guaranty may be limited to only a small or preliminary segment of the entire commercial project. (For example, if the guaranty is for a project to complete a steam supply system for a future powerplant, the environmental impacts of construction and operation of the powerplant and related transmission lines over the useful life of the plant would be evaluated along with the impacts associated with drilling and surface gathering construction.) Approval of a disbursement under a guaranty, shall not be made unless the applicable requirements of the NEPA have been met.

(c) The issuance of a loan guaranty under this regulation is subject to the provisions of Executive Orders 11988—Floodplain Management, and 11990—Protection of Wetlands. Applicants for loan guarantees under this regulation should familiarize themselves with these Orders and with the DOE regulations implementing them (proposed 10 CFR Part 1022, published at 43 FR 31108, July 19, 1978).

(Title II of the Geothermal Energy Research, Development, and Demonstration Act of 1974, Pub. L. 93-410, 88 Stat. 1086 (30 U.S.C. 1141 et seq.), as amended; Title VI of the Energy Security Act, Pub. L. 96-294, 94 Stat. 763 (30 U.S.C. 1501 et seq.); Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.))

[44 FR 75080, Dec. 18, 1979, as amended at 48 FR 20001, May 3, 1983]

§ 790.24 Mandatory purchase of flood insurance.

The Flood Disaster Protection Act of 1973 (Pub. L. 92-234) may require purchase by the applicant of flood insurance as a condition of receiving a guaranty on loans for acquisitions or construction purposes in an identified flood plain area having special flood hazards. Applicants having questions regarding compliance with provisions of the Flood Disaster Protection Act and guidelines of the Federal Insurance Administration should refer them to the Manager.

Subpart C—Servicing and Closing

§ 790.30 Loan servicing by lender or servicing agent.

The lender may not assign to another lender or servicing agent those loan servicing functions required by these regulations unless prior written approval is obtained from the Manager. Except when the loan is funded through the Federal Financing Bank, a private lender or a servicing agent shall agree that:

(a) Loan servicing is a responsibility of the lender who shall exercise such care and diligence in the disbursement, servicing and repayment of the loan as would be exercised by a reasonable and prudent lender in dealing with a loan without guaranty;

(b) When the lender is a private entity that normally does not service loans, or is the Federal Financing Bank, the Secretary may waive the lender's loan servicing requirements and permit the loan to be serviced by a servicing agent acceptable to the Manager.

(c) The lender or servicing agent shall notify the Manager in writing without delay:

(1) That disbursement for the first project milestone is ready to be made, together with evidence from the borrower that the project has commenced or is about to commence;

(2) Of the date and amount of disbursement for each subsequent project milestone under the loan;

(3) If, excluding any grace period, the lender or servicing agent has not received payment within 10 days after

the date specified for payment in the loan agreement, together with evidence of appropriate notifications made by the lender or servicing agent to the borrower;

(4) Of any failure, known to the lender or servicing agent, by an intended source of capital to honor its commitment;

(5) Of any failure by the borrower, known to the lender or servicing agent, (i) to comply with terms and conditions as set forth in the loan agreement or (ii) to comply with terms and conditions in the guaranty agreement that the lender or servicing agent has agreed to monitor;

(6) If the lender or servicing agent has information that the borrower may be violating or about to violate any of the default conditions set forth in the loan agreement or that the borrower may not be able to meet any future scheduled payment of principal or interest;

(7) Of any liens or any other encumbrances recorded subsequent to execution of the loan documents; or

(8) Of all material changes from the project's cash flow projections in effect at the time the loan guaranty application is approved.

(d) The lender or servicing agent will not demand accelerated repayment unless the borrower had defaulted in the payment of principal or interest or, in other cases as specified in the guaranty agreement, if such demand has been approved in writing by the Manager.

(e) The guaranty agreement or collateral documents shall require the lender or servicing agent to submit to the Manager periodic reports on the financial status and condition of the guaranteed loan. The Manager shall prescribe the frequency, format and content of these reports. However, such reports shall, as a minimum, be required annually and shall be furnished to the Manager until such time as the guaranteed portion of the loan and interest or principal assistance is repaid.

§ 790.31 Guaranty fee.

(a) A guaranty fee of not more than one percent shall be paid annually by the lender or servicing agent at a rate specified in the guaranty agreement or collateral documents. Fees collected by the Manager shall be deposited in the Geothermal Resource Development Fund. The fee shall be imposed on the average amount of the guaranteed portion of the loan outstanding during the year. The fee requirement may be passed to the borrower by the lender or servicing agent and in such instances may be included in the estimated aggregate cost of the project. When the Federal Financing Bank is the lender, the borrower shall pay the guaranty fee directly to the Manager.

(b) At the time the guaranty agreement is concluded, as set forth in § 790.45(d), the lender shall present to the Manager payment of the first year's guaranty fee. Subsequent payments of the fee shall be made yearly by the lender or servicing agent on the anniversary date of closing. If an interest or principal assistance contract is in effect, payments of this fee, if passed by the lender or servicing agent to the borrower, may be deferred by the Manager for an appropriate time.

(c) The Secretary shall periodically determine whether the existing guaranty fee is sufficient to cover aniticipated administrative expenses, interest differential payments, and probable default costs, and when appropriate, establish a revised fee rate, not to exceed one percent, to be applied to current and new quaranty agreements.

§ 790.32 Geothermal resources development fund.

(a) As provided in Section 204(a) of Pub. L. 93-410, there is established in the Treasury of the United States a Geothermal Resources Development Fund, which is available to the Secretary in carrying out any loan guaranty, interest or principal assistance, and interest differential payments. Balances in the Fund are available for necessary administrative expenses incurred by or on behalf of DOE in carrying out the provisions of this regulation.

(b) Appropriations to the Geothermal Resources Development Fund that are made available through legislation, or repayments made by borrowers in accordance with terms and conditions in interest or principal assistance contracts, or amounts returned through recoveries by the U.S. Attorney General, or amounts collected as guaranty fees shall be deposited in the Fund.

(c) If at any time balances in the Fund are insufficient to enable the Secretary to discharge DOE's obligations and responsibilities under this regulation, the Secretary, subject to provisions in appropriations acts, may borrow funds from the Secretary of the Treasury upon the issuance of notes or other obligation instruments containing terms and conditions prescribed by the Secretary of the Treasury.

§ 790.33 Project monitoring.

The guaranty agreement or collateral documents shall provide that employees and representatives of DOE shall, with the Manager's approval, have access at reasonable times and under reasonable circumstances to the project site. Further, the agreement shall provide that auditors selected by DOE or the U.S. Comptroller General shall have access to, and the right to examine any directly pertinent documents and records of the borrower. The lender or servicing agent, to the extent lawful and within their control, and borrower will assure availability of information related to the project as is necessary to permit the Manager to determine technical progress, soundness of financial condition, management stability, compliance with environmental protection requirements, and other matters pertinent to the guaranty.

§ 790.34 Loan disbursements and drawdowns.

(a) Unless otherwise approved by the Manager, the guaranty agreement or collateral documents shall provide that the lender or servicing agent shall not permit the borrower to drawdown any funds under the loan agreement until the lender or servicing agent has:

(1) Provided the notification set forth in § 790.30(c) (1) and (2) and has received written notice from the Manager that disbursement for the applicable milestone is approved; and

(2) Received from the borrower satisfactory documentary evidence, as provided in § 790.35, that loan drawdowns requested will be used to pay allowable project costs incurred or to be incurred by the borrower.

(b) The Manager is authorized to disapprove loan disbursement requests and in such instances shall provide the borrower and lender or servicing agent with a written statement setting forth reasons for the Manager's disapproval.

(c) When the loan is fully guaranteed, the lender or servicing agent will not withhold loan drawdowns from the borrower except upon written notification from the Manager, or in the absence of satisfactory documentary evidence.

§ 790.35 Satisfactory documentary evidence.

The loan agreement shall provide that the borrower furnish to the lender or servicing agent a written statement in support of each request by the borrower for loan drawdowns. This statement shall set forth, in such detail as the lender, servicing agent or Manager may require, the purposes for which drawdown is requested and an attestation that such disbursements will be used only for those purposes. Each drawdown request shall be signed by a person authorized to order the expenditure of the borrower's funds. The manager shall be notified by the lender or servicing agent whenever the borrower's documentary evidence is judged by the lender to be unsatisfactory.

§ 790.36 Reduction or withdrawal of guaranty.

(a) The Secretary, may, upon the written recommendation of the Manager, withdraw the guaranty by written notice to the lender and the borrower if it is determined that initiation of the project has not occurred within the period of time set forth in the guaranty agreement or collateral documents. Within 60 days after the written notice is issued, the Manager shall reimburse the lender for the full amount of the guaranty fee paid by the lender if the fee has not been passed to the borrower.

(b) The Secretary may, upon the written recommendation of the Manager, reduce the guaranty by written notice to the lender and the borrower if it is determined that:

(1) The borrower has failed to acquire capital from intended or alternate sources, or has failed to comply with material terms and conditions as set forth in the loan or guaranty agreement. The Manager will notify the borrower and the lender that the guaranty shall be reduced only to the amount that has been received by the borrower as of the date of the written notice;

(2) The lender has failed to comply with any material term or condition set forth in the guaranty or loan agreement. The guaranty may be reduced to the amount that has been received by the borrower as of the date the Manager's notice of reduction of the guaranty. Notice of the Manager's finding that a material term has not been complied with by the lender shall be sent by the Manager to the borrower and the lender. Following notification, the borrower will be allowed reasonable time to acquire a substitute lender that is capable of complying with provisions in the loan and guaranty agreements. When the borrower obtains a substitute lender satisfactory to the Manager a new guaranty agreement will be executed and the original lender be reimbursed by the borrower for unpaid principal outstanding and accrued interest; or

(3) The project's economic success or environmental acceptability is no longer achievable as determined by the Secretary. The guaranty shall be reduced to amounts which have been received by the borrower as of the date that the notice is received by the lender. Any guaranteed funds held by a servicing agent shall be returned to the lender.

(c) The guaranty agreement or collateral documents shall provide that the lender will obtain a substitute servicing agent whenever the Manager, by written notice to the lender, determines that the current servicing agent has failed to comply with a material term or condition in the guaranty agreement or collateral document. Any failure by a servicing agent shall not result in a withdrawal or reduction of the guaranty.

§ 790.37 Default, demand, payment and collateral liquidation.

(a) In the event that the borrower has defaulted in the making of required payments of principal or interest on any portion of a loan guaranteed in accordance with these regulations, and such default has not been cured within the period of grace provided in the loan agreement, the lender, or any other holder, or nominee or trustee empowered to act for the lender or holder (referred to in this section collectively as "holder"), may make written demand upon the Manager for payment pursuant to the guaranty agreement.

(b) In the event that the borrower is in default as a result of a breach of one or more of terms and conditions of the guaranty agreement, note, loan agreement, or other contractual obligation related to the transaction, other than the borrower's obligation to pay principal or interest, as provided in § 790.37(a) the holder shall not automatically be entitled to make demand for payment pursuant to the guaranty, unless the Secretary agrees in writing that such default has materially affected the rights of the parties, and finds that the holder should be entitled to receive payment of the outstanding guaranteed debt.

(c) No provision of these regulations shall be construed to preclude forbearance by the lender and the Secretary for the benefit of the borrower.

(d) Upon the making of demand for payment as provided in § 790.37 (a) or (b), the holder shall provide, in conjunction with such demand or immediately thereafter, at the request of the Manager, such supporting documentation as may be reasonably required to justify such demand.

(e) Payment of the guaranteed debt shall be made 60 days after receipt by the Manager of written demand for payment, provided the demand is in compliance with terms of the guaranty agreement, applicable law, and these regulations. The guaranty agreement will provide that interest shall accrue during that 60 day period at the same rate as is stated in the loan agreement. Upon expiration of the 60 day period, interest shall accrue at a rate specified in the guaranty agreement.

(f) Upon payment of the guaranteed debt pursuant to these regulations, the holder shall transfer and assign to the Secretary all rights held by the holder in the guaranteed portion of the debt. Such assignment shall include the guaranteed portion of the loan and related security and collateral rights. Through such payments and assignment, the Secretary shall be subrogated to the rights of the recipient of the payment and shall have superior rights in and to the property acquired from the recipient of the payment.

(g) When so provided, the lender or servicing agent and the Manager may jointly agree to a plan of liquidation of the collateral pledged to secure the guaranteed debt, and thereafter the lender or servicing agent may undertake such liquidation and make application of the proceeds derived thereby in accordance with terms and conditions in the loan agreement or the written plan of liquidation.

(h) Where payment of the guaranteed debt has been made and the lender or servicing agent has not undertaken a plan of liquidation, the Secretary, in accordance with the rights received through subrogation and acting through the U.S. Attorney General, shall seek to foreclose on the collateral assets and take such other legal action as necessary for the protection of the Government.

(i) If the Secretary is awarded title to collateral assets as a result of a foreclosure proceeding, the Secretary may take action to complete, maintain, operate, lease, or otherwise dispose of the project facilities, or to permit the borrower to continue the project if the Secretary determines this to be in the public interest.

(j) In addition to foreclosure and sale of collateral, the U.S. Attorney General shall take appropriate action in accordance with rights contained in the guaranty agreement or collateral documents to recover costs incurred by the Government as a result of the defaulted loan. Any recovery so received by the U.S. Attorney General on behalf of the Government shall be applied in the following manner: First to the expenses incurred by the U.S. Attorney General and DOE in effecting such recovery; second to reimbursement of any amounts paid by DOE as a result of the loan guaranty; third to any amounts owed to DOE under related principal and interest assistance contracts; and fourth to any other lawful claim held by the Government on such proceeds. Any sums remaining after full payment of the above shall be available for the benefit of other parties lawfully entitled to claim them.

§ 790.38 Perfection of liens and preservation of collateral.

(a) The guaranty agreement or collateral documents shall provide that the lender or servicing agent will take those actions necessary to perfect and maintain liens, as applicable, on assets which are collateral for the guaranteed portion of the loan. Upon default by the borrower, the holder of collateral shall take actions as required in the guaranty agreement or such as the Manager may reasonably require to provide for the care, preservation, protection and maintenance of such collateral so as to enable the United States to achieve maximum recovery upon default of the loan. The Manager shall reimburse the holder of collateral for reasonable and appropriate expenses incurred in taking actions required by the Manager. Except as provided in § 790.37, the lender or servicing agent shall not waive or relinquish, without the consent of the Manager, any collateral for the loan to which the United States would be subrogated upon payments under the guaranty agreement.

(b) In the event of a default the Manager may enter into contracts as required to preserve the collateral for the loan and to complete unfulfilled environmental requirements. The cost of such contracts may be charged to the Geothermal Resource Development Fund.

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§ 790.39 Treatment of payments.

When the lender holds a guaranteed and non-guaranteed portion of the same loan, payments of principal under the loan agreement made by the borrower shall be applied by the lender to reduce the guaranteed and non-guaranteed portions of the loan on a proportionate basis.

§ 790.40 Assignment and participation in the guaranteed loan.

(a) The lender may sell all or part of the guaranteed loan or provide other parties with participating shares in the guaranteed loan without the prior consent of the Manager or Secretary. However, the original lender or servicing agent shall continue to be responsible for and perform the duties and obligations of the lender as set forth in the guaranty agreement, unless the Manager approves a substitute lender or servicing agent.

(b) If participating shares in the guaranteed loan are sold by a lender, or if the lender assigns any portion of the guaranteed loan, written notice shall be given by the lender or servicing agent to the Manager and the borrower in a manner prescribed by the guaranty agreement or collateral documents.

(c) The guaranty agreement may provide for the transfer, by the lender, of any part of the guaranteed loan to other parties and provide the conditions under which the guaranty will accompany the transfer.

§ 790.41 Survival of guaranty agreement.

Any guaranty agreement shall be binding upon the lender, the borrower and the Secretary and upon their successors and assigns. No delay or failure of the Secretary or the Manager in the exercise of any right or remedy and no single or partial exercise of any right or remedy shall preclude the exercise of any further rights; and no action taken or omitted by the Secretary or the Manager shall be deemed a waiver of any right or remedy of the United States.

§ 790.42 Modifications to existing guaranty agreements.

The Manager may approve modifications to terms and conditions in existing guaranty agreements and collateral documents pertaining to the project only upon determining that such modifications will not (a) substantially change the project's scope, cost and purpose; (b) deviate from provisions in this regulation; or (c) compromise the loan agreement schedule for loan repayment. When the Manager finds that a substantive modification to existing terms and conditions is desirable or necessary, or a substantive modification is requested in writing by the borrower and lender or servicing agent, a written recommendation shall be forwarded for approval by the Secretary.

§ 790.43 Other Federal assistance.

(a) Nothing in these regulations shall be interpreted to deny or limit the borrower's right to seek and obtain other Federal financial assistance (e.g., contracts, grants, cooperative agreements, direct loans or guaranteed loans). For purposes of this section, other financial assistance does not include revenue sharing funds or any tax benefits. However, the total amount of Federal financial assistance, including guarantees made under these regulations, obtained by the borrower for the benefit of the project, shall not exceed 75 percent of the estimated aggregate cost of the project to be undertaken by the borrower.

(b) After concluding a loan guaranty agreement, the borrower shall not undertake any work in connection with the project for a Federal agency without the Manager's written approval.

§ 790.44 Inventions and other intellectual property.

(a) Inventions and other intellectual property (including copyrights, trademarks, and proprietary data) accruing to the borrower and resulting from the project will remain with the borrower. In the case of default, such property shall be treated as project assets in accordance with terms and conditions in the guaranty agreement.

(b) Where the principal purpose of the loan is for research and development with respect to extraction and utilization technologies, or for the development or demonstration of new and unique facilities or equipment, the guaranty agreement may provide that inventions and other intellectual property resulting from the project, which are owned or controlled by the borrower, shall be made available for use within the United States upon reasonable terms and conditions including provisions, if necessary, which protect the confidentiality thereof, if such action is determined by the Secretary to be in the public interest. This requirement will normally not be imposed where the principal purpose of the loan to be guaranteed is to utilize generally available technology to explore and evaluate a geothermal resource base, or to acquire rights in geothermal resources. The applicant (borrower) agrees:

(1) Not to discriminate against any person on the grounds of race, color, national origin, sex, handicap, or age, in the carrying out or completion of any project where a loan guarantee is issued under this regulation and to comply with the DOE "Nondiscrimination in Federally Assisted Programs" regulations implementing the Civil Rights Requirements of Title VI of the Civil Rights Act of 1964; Section 16 of the Federal Energy Administration Act of 1974; Section 401 of the Energy Reorganization Act of 1974; Title IX of the Higher Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; and the Civil Rights Requirements administered pursuant to the DOE Organization Act; and

(2) To incorporate or cause to be incorporated into all construction contracts under the guaranteed loan the provisions prescribed by 41 CFR Part 60 pursuant to the provisions prescribed for Government contracts by Section 202 of Executive Order No. 11246, September 28, 1965, 30 FR 12319 (regarding nondiscrimination in employment by Government contractors and subcontractors).

§ 790.45 Closing.

(a) When an application for a loan guaranty has been approved by the Assistant Secretary, the Manager shall notify the lender and the applicant and provide them with a copy of the terms and conditions underlying DOE's approval of the guaranty;

(b) A preclosing conference will be arranged by the Manager, if the lender or applicant requests one, to discuss the terms and conditions;

(c) Requests by the lender or applicant for substantive modification of the terms and conditions in the guaranty agreement or collateral documents shall be submitted by the Manager for the Assistant Secretary's consideration, supported by such documentation and facts as would justify the requests; and,

(d) Immediately after approval of all terms and conditions by the parties, the Manager shall arrange with the lender and the applicant for the preparation and review of necessary documents and agree upon a dated for execution of the guaranty agreement and collateral documents and payment of the guaranty fee.

§ 790.46 Nondiscrimination in Federally assisted programs.

(a) Applicants and recipients of Federal assistance from DOE are obligated to comply with civil rights requirements of the following public laws: Title VI of the Civil Rights Act of 1964; Title IX of the Higher Education Amendments of 1972; Section 16 of the Federal Energy Administration Act of 1974; Section 401 of the Energy Reorganization Act of 1974; Section 504 of the Rehabilitation Act of 1973; and the Age Discrimination Act of 1975. The Energy Conservation and Production Act of 1976, as amended, Pub. L. 94-385, 90 Stat. 1158, 42 U.S.C. 6870.

(b) To be in compliance with civil rights requirements, an applicant/recipient, among other obligations, must submit a written assurance that the program will be operated in a manner which does not exclude from participation in or deny the benefits or services to that it does not discriminate on the basis of race, color, national origin, sex, age, or handicap.

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§ 790.47 Suspension, termination or cancellation of operations or production on Federal land and leases administered by the Secretary of the Interior.

(The terms of this section which apply to the "Supervisor" of the United States Geological Survey or the "authorized officer" of the United States Bureau of Land Management shall apply, when applicable, to the appropriate "Forest Supervisor" when projects are located on National Forest Service lands.)

(a) The Manager shall inform the Supervisor (as defined in 30 CFR 270.2 (c)) when a loan guaranty is approved involving a Federal lease, so as to provide for future coordination of the loan guaranty program and lease administration.

(b) Under regulations issued by the Department of Interior, a leaseholder may, as provided in 43 CFR 3205.3-8 and 30 CFR 270.17, apply for suspension of operations or production, or both, under a producing geothermal lease (or for relief from any drilling or producing requirements of such a lease). When a loan guaranty has been issued under this regulation for a project to be conducted by a qualified borrower who is a lessee under the above cited regulation, the borrower shall submit a copy of any suspension application to the Manager, together with a statement setting forth complete information showing the effect of such suspension on the borrower's ability to comply with terms and conditions set forth in the loan and guaranty agreements. The Manager shall notify the borrower and the Secretary in those situations when approval of any such application might cause default by the borrower. Except in cases where potential environmental safety or reservior damage is imminent, the borrower shall obtain the Manager's approval prior to submitting a suspension application to the Supervisor.

(c) 43 CFR 3204.3 requires that each geothermal lease issued by the Department of the Interior provide for the readjustment of terms and conditions at not less than 10-year intervals beginning 10 years after the date geothermal steam is produced. When a guaranty under this regulation has been issued for a loan on a project to be conducted by a borrower who is a lessee, and the borrower files an objection to any proposed readjustment with the Authorized Officer (as defined in 43 CFR 3000.0-5(f)) a copy of the objection shall be submitted without delay by the borrower to the Manager. The Manager shall foward a copy of the objection to the Secretary and to those lenders concerned and shall consult with the Authorized Officer regarding any final action by the Authorized Officer which might terminate the lease. The Manager shall prepare an assessment on the effect of the proposed readjustment of lease terms and conditions that would substantially limit the borrower's ability to comply with the terms and conditions set forth in the loan agreement. The manager shall forward his assessment in writing to the Secretary, the Authorized Officer and the Supervisor.

(d) Upon receipt by the lessee of notice of a proposed cancellation of a lease by the Authorized Officer, the lessee with a loan guaranteed under this regulation will provide the Manager and the lender with notice of such proposed action. Upon receipt of such notice the Manager will consult with the Supervisor and Authorized Officer for the purpose of determining whether the public interest can best be served by an acceptable alternative arrangement, such as obtaining assignments for a party qualified to hold geothermal leases who is a qualified borrower and who is willing to assume the original lessee's loan agreement and related undertaking, so that operation and production can continue.

§ 790.48 Appeals.

The guaranty agreement or collateral documents shall provide that any dispute concerning a question of fact arising under a guaranty agreement shall be decided in writing by the Manager. The borrower, lender or servicing agent, as appropriate, may within seven days after receipt of any such decision request reconsideration by the Manager. If not satisfied with the final written decision, the borrower, lender or servicing agent may appeal the decision within 30 days, in writing, to the Chairman, Board of Contract Appeals (CA-1), Department of Energy, Washington, D.C. 20585. That Board, when functioning to resolve such a dispute under a loan guaranty, shall proceed in the same general manner as when it presides over appeals involving contract disputes. The decision of the Board with respect to such appeals shall be the final decision of the Department.

PART 791—ELECTRIC AND HYBRID VEHICLE RESEARCH, DEVELOPMENT, DEMONSTRATION, AND PRODUCTION LOAN GUARANTIES

Subpart A—General Provisions

Sec.

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791.49 Appeals.

AUTHORITY: Electric and Hybrid Vehicle Research, Development, and Demonstration Act of 1976, Pub. L. 94-413, as amended by the Federal Energy Administration Act of 1978—Civilian Applications, Pub. L. 95-238; Energy Reorganization Act of 1974, Pub. L. 93-438; and Department of Energy Organization Act, Pub. L. 95-91, E.O. 12009 (42 FR 46267)

SOURCE: 43 FR 20476, May 12, 1978, unless otherwise noted.

Subpart A—General Provisions

§ 791.1 Purpose.

The purpose of this regulation is to set forth policies and procedures under which lenders may obtain a Federal guaranty backed by the full faith and credit of the United States on loans to qualified borrowers for purposes related to the research, development, demonstration, and commercial production of electric or hybrid vehicles in an environmentally acceptable manner.

[44 FR 31510, May 31, 1979]

§ 791.2 Objectives.

The objectives of the Electric and Hybrid Vehicle Loan Guaranty Program are:

(a) To encourage and assist qualified borrowers to accelerate development, employing environmentally acceptable processes, of electric and hybrid vehicles for introduction into the Nation's transportation fleet;

(b) To assure that qualified small business concerns and other qualified borrowers are not excluded from participation in such development due to lack of adequate capital by enabling the Secretary of Energy to effectively reduce the lender's financial risk associated with new electric or hybrid vehicle technology; and

(c) To develop normal borrower-lender relationships which will, in time, encourage the flow of credit so as to assist in the continued development and production of electric and hybrid vehicles without the need for Federal guaranties.

§ 791.3 Definitions.

For the purposes of this regulation:

(a) "Aggregate net cost" means all project costs, less those costs excluded in paragraph (b) of § 791.22, "Project cost illustrations", and less any potential tax savings from investment tax credits and other tax benefits through the first year of operations;

(b) "Default" means the nonpayment of principal, interest, or user charge (if the user charge is passed to the borrower) by the borrower within the time period allowed in § 791.31, "Loan servicing by lender";

(c) "Electric vehicle" means a vehicle, which is powered by an electric motor drawing current from rechargeable storage batteries, fuel cells, or other portable sources of electrical current, and which may include a nonelectrical source of power designed to charge batteries and components thereof;

(d) "Hybrid vehicle" means a vehicle, propelled by a combination of an electric motor and an internal combustion engine or other power source and components thereof;

(e) "Lender" means any individual, partnership, corporation, or other legal entity formed for the purpose of or engaged in the business of lending money and having the capability to have the loan serviced as required in § 791.31, "Loan servicing by lender". Examples of lenders may include, but are not limited to, commercial banks, savings and loan institutions, insurance companies, factoring companies, investment banking organizations, institutional investors, venture capital investment companies, trusts, or entities designated as trustees acting on behalf of bondholders or other lenders;

(f) "Production" means the conversion of raw materials into products and components or both through a series of manufacturing processes. Production is also characterized by the investment of capital for manufacturing equipment and facilities or both which will be recovered over time from planned product sales, and by the existence of provisions for product distribution and, when applicable, for product servicing. It includes the functions of production engineering, production control, quality assurance, and determination of resource requirements. It does not include product improvement of existing models, unless contemplated production is in commercial quantities, nor production of demonstration models only;

(g) "Program" means the Electric and Hybrid Vehicle Loan Guaranty Program;

(h) "Prototype" means a model suitable for evaluation of design, performance, and production potential of electric or hybrid vehicle technology and is capable of performing research and development or production of electric or hybrid vehicles or components thereof;

(i) "Qualified borrower" means any individual, partnership, corporation, or other legal entity having authority to enter into a loan agreement which, as determined by the Secretary, has presented satisfactory evidence of an interest in electric or hybrid vehicles or components thereof in an acceptable manner. A borrower seeking a guaranty must be a citizen or national of the United States. A corporation, partnership, firm, or association shall not be deemed to be a citizen or national of the United States unless the Secretary determines that it satisfactorily meets all the requirements of Section 2 of the Shipping Act of 1916 (46 U.S.C. 802), for determining such citizenship, except that the provisions in Subsection (a) of such Section 2 concerning (1) the citizenship of officers or directors of a corporation, and (2) the equity interest required to be owned in the case of a corporation, association, or partnership operating a vessel in the coastwise trade, shall not be applicable. The Secretary, in consultation with the Secretary of State, may waive such requirements in the case of a corporation, partnership, firm, or association in which controlling interest is owned by citizens of countries which are participants in the International Energy Agreement;

(j) "Research and development" means theoretical analysis, exploration, or experimentation directed toward increasing knowledge and understanding in those fields of the physical, engineering, and environmental sciences as they relate to electric or hybrid vehicles, or electric or hybrid vehicle component technology, including the experimental production and testing of models, devices, equipment, materials, and processes;

(k) "Secretary" means the Secretary of Energy; and

(l) "Small business concern" means an entity which satisfies the criteria established in 13 CFR 121.310, which generally defines a small business as one which is independently owned and operated; is not dominant in its field; and meets applicable employment and sales standards.

§ 791.4 Program management.

Program management responsibility is vested in the Chief, Demonstration and Incentives Branch, Division of Transportation Energy Conservation, Department of Energy, Washington, D.C. 20545. Specific questions regarding this regulation or electric and hybrid vehicle loan guaranties should be directed to the program manager.

§ 791.5 Eligible loans.

(a) The Secretary may enter into agreements to guaranty lenders against the loss of principal and accrued interest on loans made by such lenders to qualified borrowers. Any such agreements shall be made subject to the application of priorities and preferential considerations for guaranties as set forth in § 791.6, "Priorities", and § 791.7, "Preferential consideration", and also subject to the criteria in § 791.9, "Loan guaranty criteria". Such guaranty agreements may be entered into only for the purposes of:

(1) Construction or purchase of capital equipment related to research, development, and production of electric or hybrid vehicles or components thereof;

(2) Initial operating expenses associated with the development and production of electric or hybrid vehicles or components thereof;

(3) Prototype development for electric or hybrid vehicles or components thereof; or

(4) Research and development related to electric or hybrid vehicle technology.

§ 791.6 Priorities.

In complying with the objectives of the Electric and Hybrid Vehicle Loan Guaranty Program, the Secretary will invoke priorities for loan guaranty applications in the following order:

(a) First priority consideration will be given to those applications which directly relate to projects which will result in the early commercial production of electric or hybrid vehicles or components thereof.

(b) Second priority consideration will be given to those applications which are related to projects for the development of prototype electric or hybrid vehicles or components thereof.

(c) Third priority consideration will be given to those applications related to projects for research and development activities involving electric or hybrid vehicle technology.

§ 791.7 Preferential consideration.

Within each priority category described above, the Secretary shall give preferential consideration to qualified applicants in the following order:

(a) The borrower provides greater than 10 percent of the aggregate net costs;

(b) The lender is providing a portion of the project debt for which a guaranty is not requested, i.e., the lender does not require that 100 percent of the loan be guarantied;

(c) The Federal government will receive royalty payments or the planned project is based upon technology previously developed under federally sponsored research and development;

(d) The Federal government will receive the rights to the results of the project; or

(e) The applicant is a small business concern as defined in paragraph (l) of § 791.3, "Definitions".

§ 791.8 Ineligibility.

Applicants will not be considered for a loan guaranty if any of the following conditions prevail:

(a) A loan application meets the lender's standards without a Federal guaranty;

(b) An applicant is not a citizen or a national of the United States as defined in paragraph (i) of § 791.3, "Definitions";

(c) The project will not be performed in the United States, its territories or possessions; or on property owned or leased by the United States, its territories or possessions;

(d) The source of funds is derived directly or indirectly from an instrumentality which is financed mainly by borrowings in the tax exempt securities market; or

(e) The borrower is a public body whose borrowings associated with the project are tax exempt.

§ 791.9 Loan guaranty criteria.

In addition to meeting the requirements for eligibility set forth in § 791.5, "Eligible loans", a loan guaranty may be made only if the following conditions are met as determined by the Secretary:

(a) When proposals addressing only research and development efforts are submitted, the application is subjected to detailed review based on the policy for unsolicited research proposals in effect at DOE at the time the application is received. This review, which is to be completed prior to any consideration under this loan guaranty program, will consider, among other factors, the soundness of the proposed research effort, the plan by which it will be accomplished, the technical competence of personnel conducting the research, and a determination that the research is in fact original and does not duplicate existing projects;

(b) The loan is to be made only to a qualified borrower as defined in paragraph (i) of § 791.3, "Definitions";

(c) The loan is made by a lender as defined in paragraph (e) of § 791.3, "Definitions";

(d) Except as provided in § 791.43, "Other Federal assistance", the maximum amount of any guaranty shall not exceed 90 percent of the aggregate net cost of the project for which the loan is made. However, there is no prohibition against the guaranty being equal to 100 percent of the loan to be made by the lender;

(e) The lender has set forth reasons why the loan would not be made to the borrower without a Federal loan guaranty;

(f) There is satisfactory evidence that the lender is competent to administer loan terms and conditions, and is competent to administer the terms and conditions of the guaranty agreement that are applicable to the lender;

(g) When the maximum permissible guaranty is requested as stated in paragraph (d) of this section, the lender has set forth the reasons for being unwilling to undertake a loan having less than the maximum permissible guaranty;

(h) The loan bears interest at a rate not to exceed an annual percentage, on the principal obligation outstanding, as determined by the Secretary to be reasonable, taking into account the range of interest rates prevailing in the private sector for similar government obligations of comparable risk;

(i) The terms of such loans require full repayment over a period not to exceed 15 years, or 75 percent of the expected average useful economic life of the major physical assets, or other collateral securing such loans, whichever is less;

(j) The amount of the loan, when combined with funds available to the qualified borrower from other sources, will be sufficient to carry out the project for which the loan is made;

(k) There is reasonable assurance of payment of interest and the guarantied portion of the loan by the qualified borrower and the Secretary finds that sufficient collateral has been pledged by the borrower;

(l) The amount of the guaranty on any loan shall not exceed $3,000,000 principal unless the Secretary finds that a higher guaranty level for specific loan guaranties is necessary in order to carry out the purposes of Pub. L. 94-413, as amended by Pub. L. 95-238;

(m) The total principal amount of guaranties made under this regulation, for any combination of outstanding loans for separate projects, to any single qualified borrower, may not exceed $6,000,000;

(n) The project is to be performed in the United States, its territories or possessions, or on property owned or leased by the United States, its territories or possessions;

(o) The project is believed to be technically feasible, uses environmentally acceptable processes and, if applicable, results in environmentally acceptable products;

(p) There is sufficient evidence that the borrower will initiate and complete the project in a timely, efficient, and acceptable manner and the borrower agrees that no material change of project ownership will occur without prior written consent of the Secretary;

(q) The terms and conditions set forth in the loan agreement are acceptable to the Secretary;

(r) The borrower and any lender having a nonguarantied loan with the borrower shall agree in writing that:

(1) The terms and conditions set forth in a nonguarantied loan agreement relating to the project shall be acceptable to the Secretary; and

(2) The guarantied loan shall not be subordinate to the nonguarantied loan and shall be in first lien position regarding all assets acquired or produced with the proceeds of the guarantied loan;

(s) No loan shall be guarantied by the Secretary under this regulation unless the Secretry finds that no other reasonable means of financing or refinancing is realistically available to the applicant;

(t) The borrower must show evidence of valid application to and rejection by lenders, or evidence of unreasonable terms proposed by lender(s); and

(u) The aggregate amount of guaranties outstanding at any one time under this regulation shall not exceed $60,000,000.

[43 FR 20476, May 12, 1978, as amended at 44 FR 31510, May 31, 1979]

§ 791.10 Principal and interest assistance.

With respect to any loan guaranteed pursuant to this regulation, the Secretary may enter into a principal and interest assistance contract with the borrower to pay the lender, on behalf of the borrower, the principal and interest charges which become due and payable on the unpaid balance of any such loan if the Secretary finds:

(a) That the borrower is unable to meet principal and interest payments, and that it is in the public interest to permit the borrower to continue to pursue the purposes of the project, and that the probable net cost to the Federal Government in paying such principal and interest will be less than that which would result in the event of a default;

(b) That the amount of such principal and interest charges which the Secretary is authorized to pay is no greater than the amount of principal and interest which the borrower is obligated to pay under the loan agreement; and

(c) That the borrower has agreed to repayment of principal and interest charges paid by the Federal Government, to the payment of any deferred user charge as provided in § 791.32, "User charge," and to the payment of interest on such principal, interest, and deferred user charges at an annual rate to be set by the Secretary and as stated in the principal and interest assistance contract.

[44 FR 31511, May 31, 1979]

§ 791.11 Default payment.

In the event of default by a borrower, as defined in paragraph (b) of § 791.3, "Definitions," with respect to any loan guaranteed pursuant to this regulation, and except as provided in § 791.10, "Principal and interest assistance," and paragraph (b) of § 791.31, "Loan servicing by lender," the Secretary will, as provided in § 791.37, "Default and demand," make payment of principal and accrued interest in accordance with the terms and conditions of the guaranty contract. Thereupon, the Attorney General of the United States shall take such action as deemed necessary to recover the amounts of such payments including any obligations under paragraph (c) of § 791.10, "Principal and interest assistance," from such assets of the defaulting borrower as are associated with the project or as specified in the guaranty agreement. This includes patent and proprietary rights resulting from the project as provided in § 791.44, "Patent and proprietary rights," or from any other surety, security, collateral, guaranty, asset, or bond included in the terms of the guaranty. Any recovery achieved by the Attorney General, which exceeds the cost of recovery amounts included in paragraph (c) of § 791.10, "Principal and interest assistance," and the amount paid to the lender including principal and interest on any nonguaranteed portion, in accordance with the guaranty agreement or principal and interest assistance contract, shall be returned to the borrower, unless the guaranty agreement provides otherwise.

[44 FR 31511, May 31, 1979]

§ 791.12 Period of guaranties and principal and interest assistance.

No loan guaranty agreements will be made, or principal and interest assistance contracts entered into, after September 17, 1983. Guaranty agreements in effect at that time will continue until the term of the loan is completed or until the guaranteed portion of the loan is repaid in full with accrued interest, whichever occurs first. Principal and interest assistance contracts in effect on that date will remain in effect thereafter until the contract term expires or the contract is terminated in accordance with its provisions

[44 FR 31511, May 31, 1979]

Subpart B—Applications

§ 791.20 Filing.

Loan guaranty applications shall be filed in accordance with the following procedures:

(a) An application, in authorized format for a loan guaranty, must be signed by the prospective borrower and lender, or their authorized representatives, and jointly submitted to the Secretary.

(b) Prior to receipt of a loan guaranty application, the Secretary is authorized to conduct preliminary discussions with prospective borrowers or lenders, or both, who wish to obtain information or advice regarding eligibility for a loan guaranty, and requirements for compliance with filing instructions, including the submission of supporting information as illustrated in § 791.21, "Supporting information".

(c) Subject to the requirements of law and this regulation, trade secrets, commercial information, financial information, and other data which the borrower or lender, or both, makes available to DOE during preliminary discussion, or at any other time during the project, and for which they claim privilege or confidentiality, will be so treated by DOE. Information deemed to fall into one of the foregoing categories shall be clearly marked or otherwise appropriately identified to DOE by the borrower or lender, or both.

§ 791.21 Supporting information.

The applicant shall provide information in support of the application such as prescribed by the Secretary.

(a) The following items illustrate the range of information which may be required, dependent upon the type, complexity, and cost of the project:

(1) Full description of the scope, nature, extent, and location of the proposed project;

(2) A description of the project's technical and economic feasibility;

(3) A description of the borrower's organization and a copy of the business certificate, partnership agreement or corporate charter, by-laws, and appropriate authorizing resolutions;

(4) Evidence of the borrower's previous and current interest in electric or hybrid vehicles, or related technologies;

(5) Evidence supporting the borrower's ability to complete the project;

(6) A description of the borrower's management concept and business plan, or plan of operations to be employed in carrying out the project;

(7) Information covering the management experience of each officer or key person in the borrower's organization who is to be associated with the project;

(8) A description of salaries and other financial remuneration, including profit sharing and stock options, to be paid to officers and employees of the borrower who are, or will be, directly associated with the project;

(9) Evidence showing that the amount of the loan, together with equity or other financing, will be sufficient to carry out and complete the project;

(10) A detailed, budget-type cash flow breakdown of both the estimated cost of the project and the amount to be borrowed;

(11) The past financial history of the firm, including financial statements and projections as to the firm's future financial status;

(12) A listing of assets associated or to be associated with the project, including appropriate data as to the value and useful life of any physical assets; financial statements of any party or firm that will guaranty the repayment of indebtedness; and a description including the value of any other associated security;

(13) The borrower's plan of interest charge payments and principal repayment;

(14) The borrower's assumptions regarding marketability of the project's results or product;

(15) The original aggregate amount of any previous or currently outstanding guaranty commitments or guarantied loans, or both, made to the borrower under the provisions of this regulation;

(16) A description of other Federal financial assistance (e.g., direct loans, guarantied loans, grants, contracts) available or expected to be made available to the borrower in connection with the project;

(17) A description of the intended sources and amount of capital and its form (equity, loans from principals, loans from the lender, outside financing, factoring, etc.) together with evidence of a commitment from these sources, a copy of each such agreement, and evidence of the financial ability of each source to honor its commitment;

(18) A written affirmation by the lender supporting the necessity for a Federal loan guaranty;

(19) The lender's written assessment of all aspects of the borrower's loan application, in sufficient detail as would be completed by any prudent lender considering a loan without a guaranty, together with copies of investigations from credit bureaus, references, bank inquiries, and professional organizations;

(20) Written assurance from guarantied and, when appropriate to the project, nonguarantied lenders that the loan amounts, as well as terms and conditions imposed by such lenders, will not be altered in any significant respect without prior approval of the Secretary;

(21) The amount and maturity of the loan, and the percentage of the aggregate net cost to be guarantied;

(22) Interest rate to be charged by the lender;

(23) A copy of the loan agreement executed by the borrower and lender;

(24) Copies of all applications, when filed, and approvals when issued by Federal, State, and local government agencies, for permits and authorizations to conduct operations associated with the project;

(25) A description of the processes and methods the borrower plans to utilize so as to comply with acceptable environmental considerations; and

(26) A written affirmation by the borrower that he will adhere to Equal Employment Opportunity policies throughout the life of the project.

(b) In addition to supporting information illustrated in paragraph (a) of this section, the Secretary may independently obtain, or may require the lender to include with the guaranty application, information regarding the lender as deemed necessary by the Secretary, including but not limited to:

(1) Description of the lender's organization and a copy of the business certificate, partnership agreement or corporate charter, by-laws, and appropriate authorizing resolutions;

(2) Copies of investigations obtained from credit bureaus, references, inquiries, and professional associations;

(3) Information covering the management experience of each officer or key person in the lender's organization who is or will be associated with the loan;

(4) A description of the management concept to be employed by the lender in administration of the loan; and

(5) When appropriate to the project, evidence of the lender's experience in surveying the financial aspects of new technology projects.

(c) The Secretary shall review the application and other relevant information and shall be responsible for:

(1) Determining whether the application is in compliance with all applicable provisions of this regulation;

(2) Assessing and evaluating the financial, technical, environmental, management, marketing, and legal aspects of the project; and

(3) Approving or disapproving of the application.

(d) The Secretary will provide the borrower and lender with a written statement setting forth the basis for the Secretary's disapproval of an application.

§ 791.22 Project cost illustrations.

The cost elements set forth in paragraphs (a) and (b) of this section are only for the purpose of illustrating the manner by which the estimated aggregate net cost of the project, before subtracting tax savings as described in paragraph (a) of § 791.3, "Definitions", may be determined. It is expected that costs will be accumulated in accordance with generally accepted accounting principles and practices which are consistently applied.

(a) Except as set forth in paragraph (b) of this section, reasonable and customary costs paid by the borrower that are directly connected to the project are generally permitted in computing the estimated aggregate net cost. These costs include, but are not limited to:

(1) Costs incurred by the borrower prior to approval of the guaranty agreement that are directly connected with the project;

(2) Professional services and fees necessary to obtain licenses and permits and to prepare environmental reports and data;

(3) Financial and legal services costs;

(4) Costs to provide safety and environmental protection equipment, facilities, and services;

(5) Fees for royalties and licences negotiated through "arms length" transactions;

(6) Bond financing costs and trustee fees;

(7) Any current or fixed assets directly related to the project including cash reserves and other forms of working capital;

(8) Taxes to be paid to Federal, State, and local government agencies, and other taxing authorities;

(9) Research and development necessary to complete the project;

(10) Employees' salaries and wages, consultant fees, and other outside assistance;

(11) Travel and transportation costs;

(12) Necessary and appropriate insurance and bonds of all types;

(13) Interest costs and other normal charges affixed by the lender;

(14) Interest payments to other lenders;

(15) Other normal operating expenses, such as production costs, building costs, plant equipment, and machinery; and

(16) Costs to comply with terms and conditions specified in the guaranty agreement or required by regulations and issuances by Federal, State, and local government agencies.

(b) Costs which are not considered as allowable project costs include, but are not limited to, the following:

(1) Company organizational expenses;

(2) Parent corporation general and administrative expenses and other parent corporation assessments;

(3) Dividends and profit sharing to stockholders, officers, and employees;

(4) Goodwill, franchises, or trade or brand name costs;

(5) Except as provided in § 791.32, "User charge", fees and commissions charged to the borrower for obtaining Federal assistance;

(6) Finder's fees;

(7) Expenses not paid or incurred by the borrower; and

(8) Costs that are excessive or are not directly required to carry out the project as determined by the Secretary.

(c) The Secretary may initiate a review of any or all cost elements included by the borrower in the estimated aggregate net cost. The borrower shall make available records and other data necessary to permit the Secretary to carry out such review. In carrying out this responsibility, the Secretary may utilize employees of Federal agencies or may direct the borrower to submit to a review performed by an independent certified public accountant, or by an independent public accounting, licensed to practice by the regulatory authority of a State or other political subdivision of the United States.

(d) When costs incurred prior to the approval of the guaranty agreement, as provided in paragraph (a)(1) of this section, are included in the estimated aggregate net cost, and when requested to do so by the Secretary, the borrower will make available to auditors selected by the Secretary, financial and other records necessary to complete and audit of such costs.

§ 791.23 Mandatory purchase of flood insurance.

The Flood Disaster Protection Act of 1973, Pub. L. 92-234, may require purchase by the borrower of flood insurance as a condition of receiving a guaranty on loans for acquisition of real estate or construction purposes in an identified flood plain area having special flood hazards. Questions emanating from borrowers or lenders regarding compliance with provisions of the Flood Disaster Protection Act and guidelines should be referred to the Department of Housing and Urban Development's Federal Insurance Administration. When the purchase of flood insurance is required, such costs can be included by the borrower in the estimated aggregate net cost.

Subpart C—Closing and Servicing

§ 791.30 Closing.

The major activities leading to the closing of the guaranty agreement include the following:

(a) When an application for a loan guaranty has been approved by the Secretary, the Secretary will so notify the borrower and the lender and provide them with a copy of the approved guaranty agreement.

(b) A preclosing conference will be arranged by the Secretary, if the borrower or lender, or both so request, to discuss the terms and conditions contained in the guaranty agreement.

(c) Requests by the borrower or lender, or both for modification of the terms and conditions set forth in the guaranty agreement shall be submitted to the Secretary, supported by such documentation and facts as would justify the requests.

(d) Immediately after a determination has been made on requested modifications and after agreement to terms and conditions has been reached, the Secretary shall arrange with the borrower and the lender for the preparation and review of necessary documents, and agree upon a date for execution of the guaranty agreement and payment of the user charge. In accordance with § 791.32, "User charge", payments shall be made at the time each disbursement is made and on the anniversary date of closing, or at other intervals to be determined by the Secretary.

§ 791.31 Loan servicing by lender.

Loan guaranty agreements approved in accordance with this regulation shall provide that:

(a) The lender shall exercise such care and diligence in the disbursement, servicing, and collection of the loan as would be exercised by a prudent lender in dealing with a loan without guaranty.

(b) The loan agreement shall provide a period of grace of sixty days for the making of any payment of principal or interest. The lender shall not grant to the borrower any further extension of time over and above the specified period of grace for the making of any payment in whole or in part under the loan agreement without the prior written consent of the Secretary. This consent will be readily granted and it will be the policy of the Secretary to extend the full support of DOE to lenders and borrowers who earnestly attempt to rectify default situations and salvage worthwhile projects. Should such attempts fail, the lender retains the option to call default. However, where remedial actions are successful, the lender's right to call default ceases when payments become current.

(c) The lender shall notify the Secretary in writing without delay;

(1) That the first disbursement is ready to be made, together with evidence from the borrower that the project has commenced or is about to commence;

(2) The amount and date of each subsequent disbursement under the loan;

(3) Of any nonpayment by the borrower of principal or interest as re-

quired by the loan agreement, if such nonpayment is not rectified within the grace period, together with evidence of appropriate notifications made by the lender to the borrower;

(4) Of any failure, known to the lender, by an intended source of capital to honor its commitment;

(5) Of any failure by the borrower, known to the lender, to comply with material terms and conditions as set forth in the loan agreement or guaranty agreement; or

(6) When the lender has reason to believe that the borrower may not be able to meet any future scheduled payment of principal or interest.

(d) The lender will not release to the borrower any disbursements without the written authorization of the Secretary.

(e) The lender will not withhold from the borrower any authorized disbursements without the written authorization of the Secretary.

(f) If the loan agreement so provides, the guaranty agreement shall permit the borrower to defer payments of principal until such time that income from the project is sufficient to meet this obligation.

(g) Lenders will pass on to the Secretary periodic reports from the borrower on the status and condition of the loan guarantied under this regulation. The Secretary will prescribe the frequency, format, and content of such statements. However, a report on each loan guaranty agreement entered into under this regulation shall, as a minimum, be submitted to the Secretary annually. The initial report will be submitted 60 days after the borrower's year-end closing. Reports will be furnished to the Secretary until such time as the guarantied portion of the loan or interest assistance is repaid.

(h) The lender will perfect and maintain all necessary first liens on assets associated with or pledged to secure the loan.

§ 791.32 User charge.

User charges imposed on the guaranteed portion of the loan are computed at a rate of one percent per annum on the estimated outstanding balance. Payments of the user charge will be made by the lender at the time each disbursement is made and annually on the anniversary date of closing, or at other intervals to be determined by the Secretary. The user charge will be collected from the lender and used for the purposes of defraying the cost of administration and possible Federal loss associated with the program. The user charge may be passed from the lender to the borrower, and, in such instances, may be included in the aggregate net cost. If principal and interest assistance is in effect, payments of this charge, if passed from the lender to the borrower, may be deferred for the term of the principal and interest assistance contract.

[44 FR 31511, May 31, 1979]

§ 791.33 Project monitoring.

The guaranty agreement shall provide that authorized employees and representatives of DOE shall, with the Secretary's approval, have access to the project site. The lender and the borrower, to the extent lawful and within their control, will assure availability of information related to the project as is necessary to permit the Secretary to determine technical progress, soundness of financial condition, management stability, compliance with the environmental protection requirements, and other matters pertinent to the guaranty.

§ 791.34 Loan disbursements by lender.

Unless otherwise provided in the guaranty agreement, the lender shall not make any disbursement on the loan until:

(a) Notification requirements as set forth in § 791.31, "Loan servicing by lender", have been accomplished; and

(b) Satisfactory documentary evidence, as provided in § 791.35, "Satisfactory documentary evidence", has been received.

§ 791.35 Satisfactory documentary evidence.

The borrower shall furnish to DOE, through the lender, a written statement in support of each request by the borrower for loan disbursements setting forth, in such detail as the lender or Secretary may require, the purposes for which disbursement is requested and an attestation that such disbursements will be used only for such purposes. At the time of the first request for disbursement, the borrower will also attest, in writing, that all capital from all sources, other than those guarantied by the Secretary, has been received. Signature on the requesting document shall be made by a person authorized to order the expenditure of the borrower's funds.

§ 791.36 Withdrawal of guaranty.

The Secretary shall not authorize disbursements pursuant to any guaranty agreement and shall notify the borrower and the lender of the withholding of disbursements if he finds that any of the following conditions exists:

(a) Initiation of activity on the project has not occurred within the period of time set forth in the guaranty agreement;

(b) There is failure by the borrower to acquire capital from intended sources, and the borrower is unable to acquire alternate sources within a reasonable time as may be approved by the Secretary;

(c) The borrower has failed to comply with any material term or condition set forth in the guaranty or loan agreement, in which case the Secretary shall notify the borrower and the lender that the guaranty shall be reduced to the amount that has been disbursed by the lender as of the date of the notice. Disbursements made by the lender after such notification is received will not be covered by a guaranty; or

(d) The lender has failed to comply with any material term or condition set forth in the guaranty or loan agreement. Notice of the Secretary's finding that any material term has not been complied with shall be served by the Secretary upon the borrower and the lender. Following notification, the borrower will be allowed reasonable time to acquire a substitute lender that is capable of complying with the provisions in this regulation. If the borrower obtains a substitute lender satisfactory to the Secretary, a new guaranty agreement will be negotiated. Upon issuance of the new guaranty to the substitute lender, the original lender shall be reimbursed by the borrower for unpaid principal and accrued interest. In any event, excluding fraud, misrepresentation, or gross negligence, the first lender shall be reimbursed for unpaid principal and accrued interest.

§ 791.37 Default and demand.

If the borrower defaults in making payment of principal, interest, or user charge (if the user charge is passed to the borrower), and the lender calls the loan and has complied with the requirements placed on it as set forth in § 791.31, "Loan servicing by lender", and § 791.34, "Loan disbursements by lender", the lender may make demand in writing upon the Secretary for payment pursuant to the guaranty, subject to the conditions described in paragraphs (a), (b), and (c) of this section.

(a) The Secretary shall, pursuant to the provisions of § 791.10, "Principal and interest assistance," determine whether a principal and interest assistance contract shall be executed. In the event that principal and interest assistance is not warranted, the Secretary shall so notify the borrower and the lender. The lender shall make available without delay such documents and certifications as the Secretary may reasonably require, evidencing the lender's compliance with notification provisions of the guaranty agreement.

(b) Upon default by the borrower and notification by the lender:

(1) The Secretary shall pay to the lender in full or on a proportionate basis, in accordance with the guaranty agreement, the guarantied amount of unpaid principal and accrued interest outstanding at the date of demand by the lender. Such payment will normally be made within sixty days; and

(2) During the period beginning from the date of demand and until payment is made by the Secretary, interest payable by the United States will accrue on the guarantied debt at a rate to be determined by the Secretary.

(c) The lender shall, concurrently with payment in full of all amounts guarantied by the United States, assign to the United States and transfer and deliver to the Secretary the loan documents, together with all collateral documents evidencing any and all security for any guaranties of the loan then held by the lender as set forth in the loan or guaranty agreement.

[43 FR 20476, May 12, 1978, as amended at 44 FR 31511, May 31, 1979]

§ 791.38 Security with respect to borrower's assets.

Each loan guarantied under this regulation will be secured by liens or assignments of rights in assets associated with the project, or such other security specified in the guaranty agreement as may be reasonably required to protect the interests of the United States. Upon default by the borrower, as set forth in § 791.11, "Default payment", the Attorney General shall seek recovery from the assets that are associated with the project or specified in the guaranty agreement.

§ 791.39 Preservation of collateral.

Upon default by the borrower, the holder of collateral associated with the project shall take such actions as the Secretary may reasonably require to provide for the care, preservation, and maintenance of such collateral so as to achieve maximum recovery upon liquidation of collateral, security, and guaranties for the loan. Except as provided in § 791.37, "Default and demand", and § 791.41, "Assignment and incontestability", the lender shall not waive or relinquish, without the consent of the Secretary, any collateral or guaranty for the loan to which the Government would be subrogated upon payment under the guaranty agreement to the lender.

§ 791.40 Treatment of payments.

When the lender holds a guarantied and nonguarantied portion of a loan, payments of principal made by the borrower in accordance with the loan agreement shall be applied by the lender to reduce the guarantied and nonguarantied portions of the loan on a basis that reflects the proportions which the guarantied and nonguarantied portions bear to the total loan.

§ 791.41 Assignment and incontestability.

Except as may be required by law, the lender may assign to another lender rights and obligations under the loan or guaranty agreement only with the prior written consent of the Secretary or as follows:

(a) The lender may provide other lenders with participating shares in the loan without the prior consent of the Secretary. Written notice shall be given by the lender to the Secretary when participating shares are so provided. However, the original lender shall continue to be responsible for and perform the provisions of the guaranty agreement pertaining to the lender, unless the Secretary approves a substitute lender; and

(b) The guaranty agreement shall be conclusive evidence that the guaranty and the underlying loan are in compliance with the provisions of this regulation, and that such loan has been approved and is legal as to principal, interest, and other material loan terms. Such a guaranty shall be valid and incontestable by the Government, except for fraud or misrepresentation by the holder of the obligation.

§ 791.41a Electric and hybrid vehicle demonstration fund.

(a) As provided in section 603(a)(1) of Pub. L. 95-238, there is established in the Treasury of the United States an Electric and Hybrid Vehicle Development Fund (hereinafter referred to as the fund), which is available to the Secretary in carrying out the loan guaranty and principal and interest assistance program, including the payment of administrative expenses incurred in connection therewith.

(b) That part of the amounts appropriated pursuant to section 16 of Pub. L. 94-413, as amended by Pub. L. 95-238, as the Secretary deems necessary to carry out the purposes of the program and any amounts which may be returned to the United States pursuant to § 791.11 shall be paid into the fund.

(c) Moneys in the fund not needed for current operations may, with the approval of the Secretary of the Treasury, be invested in bonds or other obligations of, or guaranteed by, the United States.

(d) The amounts in the fund shall remain available until expended, except that after September 17, 1983, such amounts in the fund which are not required to secure outstanding guaranty obligations shall be paid into the general fund of the Treasury of the United States.

(e) If at any time the moneys available in the fund are insufficient to enable the Secretary to discharge his responsibilities under the program, he shall issue, to the Secretary of the Treasury, notes or other obligations in such forms and denominations bearing such maturities, and subject to such terms and conditions, as may be prescribed by the Secretary of the Treasury. This borrowing authority shall be effective only to such extent or in such amounts as are specified in appropriation acts. Such authority shall be without fiscal year limitation. Redemption of such notes or obligations shall be made by the Secretary from appropriations or other moneys available for the program. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall not be less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the notes or other obligations. The Secretary of the Treasury shall purchase any notes or other obligations issued hereunder, and for that purpose he is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under that act are extended to include any purchase of such notes or obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of such notes or other obligations shall be treated as public debt transactions of the United States.

(f) Business-type financial reports covering the operations of the fund shall be submitted to the Congress by the Secretary annually upon the completion of the appropriate accounting period.

[44 FR 31511, May 31, 1979]

§ 791.42 Survival of guaranty agreement.

The guaranty agreement shall be binding upon the lender, the borrower, the Secretary, and upon their successors and assignees. No delay or failure of the Secretary in the exercise of any right or remedy and no single or partial exercise of any such right or remedy shall preclude any further exercise thereof; and no action taken or omitted by the Secretary shall be deemed a waiver of any such right or remedy.

§ 791.43 Other Federal assistance.

Nothing in this regulation shall be interpreted to deny or limit the borrower's right to seek and obtain other Federal financial assistance (e.g., contracts, grants, direct loans or guarantied loans) providing:

(a) The total amount of Federal financial assistance, including guaranties made under this regulation, obtained by the borrower for the project, shall not exceed 90 percent of the estimated aggregate net cost of the project to be undertaken by the borrower; and

(b) After closing of the loan guaranty agreement, the borrower will not undertake any work in connection with the project, by contract or grant, for a Federal agency without the Secretary's written finding that performance of the work will not adversely affect the borrower's ability to comply with pertinent terms and conditions in the loan and guaranty agreement.

§ 791.44 Patent and proprietary rights.

Patents and other proprietary rights accruing to the borrower and resulting from the project will remain with the borrower, except:

(a) Such rights shall be, in the case of default, treated as project assets in accordance with the terms and conditions in the guaranty agreement.

(b) The guaranty agreement may provide that patents or other proprietary rights utilized in, or resulting from, the project, which are owned or controlled by the borrower, shall be made available to other domestic parties, upon reasonable terms and conditions which protect the confidentiality of information, if such action is determined by the Secretary to be in the public interest.

§ 791.45 Appeals.

All decisions by the Secretary relating to disputes arising under a guaranty agreement or loan agreement, made under and entered into pursuant to this regulation, shall be in writing. The borrower or lender, as applicable, may request the Secretary to reconsider any such decision. If not satisfied with the final decision made by the Secretary, the borrower or lender, upon receipt of such written decision, may appeal the decision within 30 days, in writing, to the Chairman, Board of Contract Appeals, Department of Energy, Washington, D.C. 20545. That Board, when functioning to resolve such loan guaranty disputes, shall proceed in the same general manner as when it presides over appeals involving contract disputes. The decision of the Board with respect to such appeals shall be the final decision of DOE.

PART 792—LOANS FOR RESERVOIR CONFIRMATION PROJECTS

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AUTHORITY: Title VI of the Energy Security Act, Pub. L. 96-294, 94 Stat. 611 et seq. (42 U.S.C. 8701 et seq.); and the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.).

SOURCE: 47 FR 34771, Aug. 11, 1982, unless otherwise noted. Redesignated at 48 FR 7573, Feb. 23, 1983.

Subpart A—General Provisions

§ 792.1 Purpose and scope.

The purpose of this part is to establish policies and procedures for the receipt, evaluation, and approval of applications requesting loans for the financing of exploration and confirmation of geothermal reservoirs. This part also sets forth the terms and conditions of loan agreements issued for these purposes.

§ 792.2 Eligibility requirements.

Any person as defined in § 792.3 of this subpart is eligible for a loan under this part.

§ 792.3 Definitions.

For purposes of this part:

"Act" means the Geothermal Energy Act of 1980, which is Title VI of the Energy Security Act, Pub. L. 96-294.

"Applicant" means any person who has filed an application for a loan under this part.

"Borrower" means any person who enters into a loan agreement under this part.

"Byproduct" means any mineral or minerals or gases which are found in solution or in association with geothermal or geopressured resources and which have a value of less than 75 percent of the value of the geothermal steam and associated geothermal resources or are not, because of quantity, or technical difficulties in extraction and production of sufficient value to warrant extraction and production by themselves.

"Cancellation agreement" means a contractual instrument executed between DOE as lender and a borrower, which sets forth the terms and conditions for terminating the borrower's obligations to repay the loan described in the agreement between DOE and the borrower.

"Closing" means the delivery by a borrower and acceptance by DOE of the executed debt instruments and any required security instruments, together with all necessary supporting documentation; and the disbursement by DOE of all or a portion of the loan proceeds.

"Confirmed reservior" means a geothermal reservoir for which it has been established by the Secretary that fluids can be produced in sufficient quantity, quality and temperature to support an economic use.

"Contracting officer" means the Department of Energy official warranted an authorized to contractually obligate the Department of Energy and execute written agreements that are binding on the Department.

"Default" means the failure by the borrower to make payment of principal or interest in accordance with the terms and conditions of a loan issued under this part, or the failure of the borrower to meet any other term or condition of the loan agreement.

"DOE" means the Department of Energy.

"Electric cooperative" means any association eligible to receive loans under Section 4 of the Rural Electrification Act of 1936 (7 U.S.C. 904).

"Exploratory well" means a well drilled for the purpose of determining the existence of a geothermal reservoir.

"Geothermal direct heat application project" means the use of geothermal heat as a direct energy source for a project that is proposed to be located at a site in the United States, its territories or possessions. Also referred to as a "nonelectric" project.

"Geothermal resource" means a resource in the United States including (a) all products of geothermal processes embracing indigenous steam, hot water, and hot brines; (b) steam and other fluids artificially introduced into geothermal formations; (c) heat or other associated energy found in geothermal formations; and (d) any byproducts derived from them.

"Indian Tribe" means any federally or state recognized Indian Tribe including any band, Nation, Pueblo, Rancheria, or otherwise organized and functioning Indian Tribe, and any Alaskan Village, including Alaskan Native Organizations organized under the Alaskan Native Claims Settlement Act (85 Stat. 688).

"Industrial development agency" means any agency which is permitted to issue obligations the interest on which is excludable from gross income under Section 103 of the Internal Revenue Code of 1954.

"Loan agreement" means a written agreement and all collateral documents related to such agreements between DOE as lender and a borrower, which sets forth the terms and conditions for provision for funds by DOE to the borrower.

"Municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing heat energy.

"Non-profit organization" means any organization described in Section 501(c)(2) or 501(c)(4) of the Internal Revenue Code of 1954 and exempt from tax under Section 501(a) of such code (but only with respect to a trade or business carried on by such organization which is not an unrelated trade or business, determined by applying Section 513(a) to such organization).

"Person" means an individual, corporation, company joint stock company, partnership, association, business trust, or organized group of persons (whether incorporated or not), including municipalities, electric co-operatives, industrial development agencies, non-profit organizations and Indian Tribes.

"Reservoir confirmation loan" means a loan to assist in defraying a percentage of the costs associated with exploration, drilling and testing to confirm a geothermal reservoir.

"Reservoir confirmation project" means surface exploration, drilling and testing of one or more exploratory wells.

"Secretary" means Secretary of Energy or a designated representative.

"Small Business" is a concern which is independently owned and operated, is not dominant in its field of operation, and which does not have assets exceeding $9 million or a net worth in excess of $4 million and does not have average net income after Federal income taxes for the preceding two years in excess of $400,000 (average net income to be compiled without benefit of any carryover loss).

"Statutory interest rate" means a discount or interest rate equal to the rate in effect at the time the loan is made for water resources planning project under Section 80 of the Water Resources Development Act of 1974 (42 U.S.C. 1962d-17(a)).

Subpart B—Application Process

§ 792.20 Solicitation of applications.

(a) As funds are available, DOE may issue a Solicitation Announcement requesting applications for loans under this part which shall, as a minimum, be noticed and summarized in the FEDERAL REGISTER and the Commerce Business Daily. Loan applications shall be evaluated on a noncompetitive basis, in the order they are received. Presubmission discussions between prospective applicants and DOE are encouraged.

(b) A Solicitation Announcement shall include the following information:

(1) The place for application submission;

(2) The information requirements for applications;

(3) A technical definition or identification of the project eligible under the Solicitation Announcement;

(4) Identification of the issuing office;

(5) Identification of statutory authority and relevant regulations;

(6) Any special requirements not contained in the regulations;

(7) Identification of the time period during which written questions regarding the preparation of applications may be submitted;

(8) Identification of DOE representative for the purpose of presubmission discussions.

§ 792.21 Application information requirements.

(a) An applicant is expected to provide information in the application which is similar to that required by a private financial institution which might consider a similar project for debt financing. The application must contain the most current data available and be adequate for proper evaluation of the project.

(b) The Solicitation Announcement shall set forth the application information requirements which may include, but not be limited to, the following:

(1) The total cost of the project and the loan amount requested;

(2) A description of the major tasks required, including proposed schedule for completing each major task and estimates of the cost of each major task;

(3) A description of the applicant that reveals its history, the kind and size of its business, and its experience with projects of the nature proposed in the application;

(4) Financial statements for the most recent 3 years (if available) that includes income statements and balance sheets; if possible the financial statement should be audited;

(5) A description of any other financial assistance (e.g., direct loans, guaranteed loans, grants) expected to be applied for, already applied for or obtained by the applicant in connection with the project;

(6) A list of all key personnel who will be directly involved with the project and a description of their responsibilities and qualifications; and

(7) Documentation as to the applicant's authority to undertake the activities contemplated by the applica-

tion. Such documentation should take substantially the following form:

(i) If an applicant is a municipality, a state registration number or other documentation is required indicating that the municipality is properly and duly certified with the approved body;

(ii) If an applicant is a corporation, a copy of the charter or certificate and article of incorportion, with any amendments, duly certified by the Secretary of State of the State where organized, and a copy of the by-laws. If the project would be located in a State other than that in which the corporation is organized, a certificate shall be included from the Secretary of State of the State in which the project would be located showing compliance with the laws relating to foreign corporations. There shall also be included a copy of all minutes, resolutions of stockholders or directors or other representatives of the applicant, properly attested, authorizing the filing of the application;

(iii) Environmental considerations have been given adequate attention, particularly the area of fluid disposal;

(iv) If an applicant is an association, a verified copy of its articles of association, if any, with an attested copy of the resolution of its governing board authorizing the filing of the application;

(v) If an applicant is a business trust, a verified copy of the trust instrument and an attested copy of the resolution or other authority under which the application is made;

(vi) If an applicant is a joint stock company, a verified copy of the articles of association;

(vii) If an applicant is an Indian Tribe or organization, a certification of the official governing body authorizing the filing of the application, or documentation that the applicant has the authority to proceed with the application;

(viii) For purposes of this regulation, verification may be by affidavit of an authorized representative of an applicant; attestation shall be by an authorized officer;

(8) Documentation that:

(i) There is a user who intends to use the resource if discovered and a written agreement of intended use between the borrower and the user if the user is not the borrower;

(ii) The user or developer has or can obtain legal rights to the required land and geothermal fluid and heat;

(iii) Other required permits can be obtained; and

(iv) Environmental considerations have been given adequate attention.

(9) A description of the proposed project that covers technical and economic potential. The description should address, but not necessarily be limited to the following:

(i) A general description of the total geothermal project including exploration, drilling, full field development, completion, testing, and end use;

(ii) A comprehensive geological description of the resource including reasonable evidence that a resource adequate to support the intended end use exists at the site proposed;

(iii) Specific details concerning the end use to be made of geothermal fluids along with an analysis of the engineering and economic feasibility of the project. Engineering items to be discussed include energy requirements (e.g., temperature, flow, load factor, peak load) and system design. Economic data to be furnished include plant costs, working capital requirements, replacement costs, annual costs and taxes for the follow-on utilization system (i.e., enough information for a cash flow analysis);

(10) An exploration program description that includes geologic, geochemical and/or geophysical techniques proposed to specifically locate and size the exploratory well;

(11) A drilling plan that briefly describes anticipated rig type, well depth, well diameter, casing schedule, drilling fluid, logging plan, etc. Later in the project, before actual drilling begins, a more detailed plan for each well will be required that complies with the applicable portions of 30 CFR Part 270;

(12) A preliminary plan for reservoir testing and analysis of test results. The plan must be grounded in accepted geohydrology and reservoir engineering techniques and must basically determine usability and longevity of the geothermal resource. Items to be specified include testing methods, du-

ration, flow rate, measurements to be made and accuracy of same, and the techniques to analyze test data;

(13) A project management plan that:

(i) Provides a concise and definitive Statement of Work that defines the individual key work tasks and lists them in a logical sequence;

(ii) Describes the planned organizational elements and shows the reporting relationships of all key personnel who will be involved in the project;

(iii) Identifies all consultants and contractors and explains the nature and extent of their efforts in support of the proposed project;

(iv) Provides a work schedule for the project that indicates the phasing and interrelationship of the various tasks as defined by the Statement of Work and identifies key milestones and decision points through testing and well completion; and

(v) Provides a cost schedule for the key work tasks identified in (b)(13)(i) above.

(14) A description of the environmental implications of the exploration and confirmation of potential geothermal reservoirs as well as full development of the project including potential impacts of the proposal on air, land, water resources and on endangered or threatened species of animals and plants or critical habitats in the project area.

(15) Information submitted by loan applicants shall be subject to disclosure and withholding in accordance with DOE's rules implementing the Freedom of Information Act (5 U.S.C. 552) at Part 1004 of this title.

§ 792.22 Project costs.

(a) Project costs will be recorded in accordance with generally accepted accounting principles that are consistently applied.

(b) Except as set forth in paragraph (c) of this section, those reasonable and customary costs that have been incurred, or are expected to be incurred, and which are directly related to the project shall be used to estimate the total costs of the project. Examples of these costs include, but are not limited to, the following:

(1) Exploration including thermal gradient or other shallow test hole drilling leading to the selection of a production drill test site;

(2) Environmental report preparation and permit application;

(3) Drill site preparation and restoration;

(4) Modification to preliminary well and testing designs and plans as required prior to the drilling and testing phases;

(5) Actual well drilling and associated drilling expenses;

(6) Testing during and after drilling;

(7) Fluid disposal during drilling and testing;

(8) Completion of the well, which could include well stimulation;

(9) Plugging and abandonment of an unsuccessful well;

(10) Workover necessary to re-entry and testing an existing well;

(11) Drilling and testing of an injection well, if necessary; and

(12) Program management, consultants, and supervision required through completion of well testing and analysis.

(c) Costs that are not considered as allowable project cost include the following:

(1) Fees and commissions charged to the borrower, including finder fees, for obtaining the Federal loan;

(2) Parent corporation general and administrative expenses, including company organization expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Expenses not paid or incurred by the applicant;

(6) Costs that are excessive or are not directly required to conduct the project, as determined by DOE.

(d) DOE may audit any or all cost elements included in the estimated project cost, and reserves the right to exclude or reduce the amount of any costs which DOE determines to be unnecessary or excessive. The borrower will make available records and other data necessary to permit DOE to carry out such an audit. For the purpose of such an audit, DOE may utilize employees of other Federal agencies or independent public accountants or other competent authority.

§ 792.23 Evaluation of applications.

(a) DOE shall determine the eligibility of applicants and projects, and shall evaluate applications in accordance with applicable program requirements.

(b) DOE shall conduct a preliminary review and screening of applications to determine if an application should be comprehensively evaluated. DOE will review the application to determine whether it:

(1) Complies with statutory requirements for project eligibility;

(2) Complies with the eligibility requirements of this part and any set forth in the Solicitation Announcement; and

(3) Is signed by an authorized official of the applicant organization.

Any application which does not comply with the requirements of this paragraph shall be returned to the applicant.

(c) Those applications meeting the requirements of paragraph (b) of this section shall be comprehensively evaluated according to the following evaluation criteria:

(1) Ability of the applicant to comply with the requirements of the Solicitation Announcement and this part;

(2) Technical project feasibility and likelihood of success;

(3) Market potential and economic feasibility;

(4) Financial—

(i) Credibility of cost estimates;

(ii) Adequacy of capitalization, cash flow, working capital, and other measures of financial capability;

(iii) Financial condition of applicant and other principals to the project:

(5) Financing structure—

(i) Financial commitment of applicant and other principals to the project;

(ii) Debt financing plan;

(iii) Other factors which are relevant to a full description of the financing structure of the proposed project:

(6) The degree of risk to DOE during both the interim and permanent financing stages of the project, including the length of time over which the proposed borrower will repay the loan (with regard to the anticipated cash flow and useful life of the project);

(7) Management plan—

(i) Corporate and personnel experience;

(ii) Management organization and interrelationship; and

(8) Environmental, health, safety and socioeconomic impacts of the proposed project; and

(9) Such additional evaluation criteria as may be set forth in the Solicitation Announcement.

(d) In selecting an application for a loan agreement, DOE shall consider the results of the evaluation described in subsection (c) of this section, the policy considerations specified in § 792.24 and such other information as DOE determines to be relevant.

(e) After an application is selected for a loan assignment, the contracting officer may be authorized to issue a loan agreement for the selected project. The loan agreement shall identify the terms and conditions of the loan, including those which must be satisfied prior to closing and any additional requirements to be placed upon the applicant as a condition of the loan.

§ 792.24 Policy considerations.

The following policy considerations may be utilized by DOE in the selection of applicants for loan agreements:

(a) The size of the loan requested from DOE and its percentage of total project cost. Applications in which the borrower is contributing more than the minimum requirement will be given more favorable consideration than other applications where the borrower intends to provide only the minimum investment.

(b) The potential of the contemplated end use to displace or save oil or natural gas. Projects that have the potential to replace an existing or planned demand for oil or natural gas will be given more favorable consideration than a project which does not.

(c) The viability of the project, i.e., the likelihood and speed with which the project will be carried through to completion. Those projects demonstrating a high degree of viability will be given favorable consideration over a project which can not make such demonstration.

(d) The potential of the reservoir to support additional wells or uses beyond the intended end use. DOE will consider market factors as well as geothermal resource factors in making this determination.

(e) The extent of the participation of Indian Tribes or disadvantaged or small business concerns in the project. DOE encourages the participation of such groups in this program.

§ 792.25 Required findings.

A loan may be made only after DOE makes the following findings:

(a) There is a lack of funds from other sources at reasonable terms and conditions with which to finance the project;

(b) There is a reasonable assurance of repayment of principal and interest of the loan by the borrower;

(c) There is a reasonable likelihood that the applicant and others participating in the project have the management and technical capability to initiate and complete the project in a timely and efficient manner;

(d) There are no known unresolvable environmental impacts that will prevent the completion of the project or the development of the intended end use. All loan approvals shall be conditioned upon compliance with the National Environmental Policy Act and other applicable environmental requirements;

(e) There is a reasonable likelihood that a geothermal resource potential exists to support the intended use of the geothermal resource;

(f) The amount of the loan together with other funds available to the applicant will be sufficient to carry out the project;

(g) There is reasonable evidence that the contemplated end use of the geothermal resource will be found to be technically and economically feasible; and

(h) The borrower has secured or will be able to secure the right, title or interest in the necessary land and resource rights for the reservoir confirmation project.

Subpart C—Loan Execution and Administration

§ 792.30 Pre-closing requirements.

(a) If, within a reasonable period of time, the Contracting Officer determines that the borrower has failed to meet the terms and conditions established as prerequisites to loan closing, the Contracting Officer shall so advise the borrower in writing. DOE shall determine whether to continue negotiations, authorize modification or termination of the loan agreement, or take other appropriate action.

(b) If the Contracting Officer determines that the borrower has met the terms and conditions established as prerequisites to closing of the loan, the loan closing shall be authorized by the appropriate DOE official. The date, time, and place for closing shall be fixed by mutual agreement. Nothing in the section shall restrict the authority of the Contracting Officer to require additional documentation from the borrower.

§ 792.31 Amount of loan.

The amount of a loan made under this part shall not exceed 50 percent of the total cost of the project. If the applicant proposes to use a geothermal resource primarily for space heating or cooling or process heat, for one or more structures then existing or under construction, the loan may be in any amount up to 90 percent of the total cost of the project. However, in any event, no loan shall be made in excess of $3,000,000 for any single project. Each loan shall be for a term which the Secretary determines to be appropriate, except that no loan term shall exceed 20 years beyond the date on which production of energy begins from the reservoir involved.

§ 792.32 Loan agreement terms and conditions.

A loan agreement issued by DOE under this part shall contain or meet the following requirements and conditions:

(a) The following requirements concerning patents, technology, inventions, and other proprietary rights:

(1) A requirement that any inventions conceived or first actually reduced to practice in the course of or under the project, any patents or patent applications thereon, except for those in which title vests in the United States Government, as well as all technology and other proprietary rights developed under the project shall be the property of the borrower (or its participants or its contractors) and shall be collateral for the loan. The provisions of this paragraph shall apply to and be binding on the borrower's contractors and participants, and the borrower shall obtain the written agreement of such parties to these provisions.

(2) A requirement that the borrower agree to grant non-exclusive licenses in all patents, technology and other proprietary rights owned or controlled by the borrower which are necessary for completion and operation of the project or which have been utilized in the project:

(i) In the event of default, royalty free to the entities selected to complete and operate the project only for the purpose of completing and operating the project; and

(ii) Regardless of whether there is a default, on equitable terms, including due consideration to the amount of the loan, to the United States Government and its designees for the purpose of constructing and operating similar projects. The provisions of this paragraph shall apply to and be binding on the borrower's participants, and the borrower shall obtain the written agreement of such parties to these provisions.

(3) A requirement that the borrower agree to secure a license in any patents, technology or other proprietary rights of third parties which are bought or licensed for the project on behalf of the project, and inuring to the benefit of successor owners and/or operators of the project under terms and conditions no less favorable than applicable to the borrower.

(4) A requirement that the term "participants" shall mean the owners of the borrower, the members of a consortium or other legal entity comprising the borrower, and others with a financial or equity interest in the borrower. The term "contractor" shall mean the party being awarded a contract, regardless of tier.

(b) A requirement that no charge of project ownership or financial arrangement occur without the prior written consent of DOE.

(c) A requirement that the term of the loan not exceed 20 years beyond the date on which production of energy from the reservoir beings. Repayment of the loan shall commence no later than one year after the date on which production of energy from the reservoir begins.

(d) A requirement that the annual repayment rate not exceed 20 percent of annual gross revenue from the sale or equivalent value of either electrical energy or direct energy from geothermal resources from the confirmed reservoir.

(e) A requirement that the loan agreement provide DOE the option to impute revenue for the purpose of repayment as provided in § 792.41.

(f) Requirements that comply with § 792.36 regarding default and demand;

(g) A requirement that the borrower keep and make available adequate records and documents concerning the construction and operation of the project in order that DOE may determine the technical and financial conditions of the project and its compliance with the requirements of the loan agreement;

(h) A requirement for the borrower to prepare and deliver to DOE annual audited financial statements prepared according to generally accepted accounting principles;

(i) A requirement that duly authorized representatives of the Secretary shall have access to the project site at reasonable times during construction and operation of the project;

(j) A requirement that the borrower agree to protect and preserve at all times the project assets and other collateral serving as security for the loan;

(k) A requirement that performance of contractors engaged in the construction of the project for which the loan is made be fully bonded or that other acceptable arrangements are made that assure adequate performance by contractors;

(l) A requirement that the borrower execute all documents necessary to perfect and maintain liens on collateral pledged as security for the loan;

(m) A requirement that the project be operated in full compliance with all applicable laws and regulations;

(n) A requirement that the invalidity of any clause, part, or provision of the loan agreement shall not affect the validity of the remaining portions of the loan;

(o) An option on the part of the borrower to prepay the loan at any time without prepayment penalties;

(p) A requirement that the borrower shall furnish DOE, in writing, the name(s) of the individual(s) authorized to act on behalf of the borrower and shall notify DOE, in writing, of any change in its representatives;

(q) A requirement that the borrower keep the assets of the project insured in an acceptable amount from risk of loss, and acceptable provisions for control over any insurance proceeds paid in the event of such loss to assure that such proceeds are appropriately utilized for the repair, reconstruction or replacement of the project assets or to repay the principal and interest on the loan;

(r) A requirement that the borrower shall be in default if the borrower at any time prior to the completion of the project abandons or ceases work on the project for more than 30 days;

(s) A requirement that the borrower shall not permit any judgement, lien, or other encumbrance to be placed against any asset of the project, excluding those liens obtained pursuant to the loan agreement or with prior written consent of DOE;

(t) When appropriate, a requirement for control over project revenue which ensures that profits above a predetermined level are made available to the project for the future requirements of the project or for repayment of the loan; and

(u) Such other terms and conditions as determined to be reasonable and necessary for the protection of the interests of the United States.

§ 792.33 Interest rate.

Each loan made under this part shall bear interest at a discount or interest rate equal to the rate, in effect at the time the loan is made, for water resources planning projects under Section 80 of the Water Resources Development Act of 1974 (42 U.S.C. 1962(d) 17(a)).

§ 792.34 Project monitoring and audit.

Employees and representatives of DOE or the U.S. Comptroller General shall have access to, and the right to examine, at reasonable times and under reasonable circumstances, all relevant documents and records of the borrower. The borrower will assure availability of information related to the loan and the project as is necessary to permit the Secretary to determine technical progress, soundness of financial condition, management stability, and other matters pertinent to the loan.

§ 792.35 Cost overruns.

(a) A cost overrun is any cost which exceeds the estimated total cost of the project established by DOE prior to or at the time of execution of a loan agreement;

(b) When an overrun is anticipated, DOE must be notified promptly and provided with the reasons for the overrun;

(c) At the discretion of DOE and subject to the availability of loan funds, a loan agreement may be amended to increase the amount of the loan in the event that either the estimated cost to complete the project or the actual project cost incurred exceeds the originally estimated project costs;

(d) The borrower must submit all of the following information before DOE may determine whether to increase the loan to cover cost overruns:

(1) A revised expected completion date, if applicable, and a revised cost estimate for the project;

(2) A plan indicating how the borrower's share of the cost overrun will be funded;

(3) A description of the additional collateral, if any, to be pledged for the increased loan; and

(4) Updated information on the project economics indicating that a reasonable assurance of repayment of

the loan (including the requested increase) still exists.

(e) Subject to the requirements of paragraph (d) of this section, DOE may agree to increase the loan for the project if DOE finds that:

(1) The continuation of the project is worthwhile to meet the program's objectives and is in the public interest; or

(2) The probable net costs to the Government in increasing the loan will be less than that which would result from a default.

(f) In no event may the loan be increased to an amount that exceeds the maximum amount or percentage share of costs set forth in § 792.31 of this part.

§ 792.36 Default, demand, payment and collateral liquidation.

(a) If a borrower fails to make payment of principal or interest within the time period specified in the loan agreement, or fails to comply with other material terms and conditions specified as default conditions in the loan agreement or related documents, the borrower shall be in default and the Secretary shall have the right, at the Secretary's option, to accelerate the indebtedness and demand full payment of all amounts outstanding, both principal and interest, under the loan.

(b) No failure on the part of the Secretary to make demand at any time shall constitute a waiver of any rights held by the Secretary.

(c) Upon demand by the Secretary, the borrower shall have a period of not more than 30 days from the date of demand to make payment in full because of default.

(d) Should the borrower fail to pay after demand, as provided in subsection (c) of this section, the Secretary shall undertake collection in accordance with terms of the loan agreement and applicable law.

(e) The loan agreement shall specify the rights of DOE with respect to the liquidation of assets securing the loan and other actions that may be taken by DOE in the event of default.

§ 792.37 Nondiscrimination in federally assisted programs.

Applicants who apply for loans under this part shall be required to comply with the Department's rules on Nondiscrimination in Federally Assisted Programs Regulation, 10 CFR Part 1040 (45 FR 40514, June 13, 1980).

§ 792.38 Deviations and loan agreement modifications.

To the extent that such requirements are not specified by statute, the Secretary may authorize a deviation for an individual applicant or borrower from the requirements of this part upon a finding that such deviation is necessary and warranted in the individual case in relation to the accomplishment of program objectives and is in the best interests of the Government.

§ 792.39 Compliance with other statutes.

Nothing in this regulation shall be construed to modify requirements imposed on the borrower by Federal, State, Tribal, regional and local government agencies in connection with permits, licenses, or other authorizations to drill wells or construct a geothermal facility.

§ 792.40 Cancellation of the loan.

(a) DOE may cancel the unpaid balance of principal and any accrued interest on a loan made under this part if the geothermal reservoir is determined to be technically, economically, or evironmentally unacceptable for commercial development. The determination to cancel the loan may be made prior to the completion of the project or afterwards.

(b) If, in DOE's opinion, the geothermal reservoir is not suitable for the intended end use but is acceptable for commercial development of an alternative use, a portion of the unpaid balance on the loan may be cancelled.

(c) DOE may cancel the unpaid balance and any accrued interest on a loan to a borrower who, in DOE's judgment, has been or will be unable to obtain a necessary license respecting the project, or any right necessary to construct and operate the project, for a reason beyond the borrower's control and despite the borrower's good faith effort to do so.

(d) DOE shall not cancel the unpaid balance and accrued interest of any loan if DOE finds that the borrower applying for the loan:

(1) Failed to provide information reasonably available to such borrower that would have disclosed that there was not reasonable assurance the project would be technically, economically and environmentally acceptable, or

(2) Withheld information indicating that the borrower would be unable to obtain a license, approval or right necessary to the project.

(e) If revenues are inadequate (as determined by DOE) to fully repay the principal and accrued interest within 20 years after production begins, any remaining unpaid amounts shall be forgiven.

(f) In the event the unpaid balance of a loan is cancelled pursuant to this section:

(1) DOE's obligation to disburse funds under the loan agreement shall terminate; and

(2) All technical and economic information concerning the reservoir confirmation project shall become the property of the United States.

§ 792.41 Imputation of revenue.

(a) In any case where the reservoir has been confirmed (as determined by DOE), DOE may, after expiration of 3 years from the date of reservoir confirmation, impute a reasonable revenue for purposes of determining repayment if:

(1) A sale of energy from the geothermal reservoir is made for an unreasonably low price, as determined by DOE;

(2) The reservoir is commercially utilized without a sale of energy and no revenue is reported; or

(3) Reasonable efforts (as determined by DOE) are not made to put such reservoir into commercial production.

(b) For the purpose of subsection (a), DOE will determine a reasonable revenue on the basis of the sale price of geothermal energy from comparable projects. Comparable geothermal projects in the same field or geographic area will be considered first; if none exist, then comparable projects outside the area will be considered.

If no comparable projects exist in the United States or the borrower both produces and utilizes the geothermal resource, the imputed revenue from the geothermal resource shall be based on the value of the least expensive alternative energy source available in the same general geographic area. In making this determination, DOE shall consider:

(1) The mine mouth value of coal as adjusted for energy production,

(2) Well head price of natural gas as adjusted for energy production, and

(3) Any other competing energy source so long as it is reasonably available in the same general area as the project.

(c) If the borrower fails to put the reservoir into commercial operation within five years of the date of reservoir confirmation, DOE may (1) take action to recover the value, not to exceed the amount of the unpaid balance of the loan plus any accrued interest thereon, of any assets of the project including resource rights; or (2) allow the borrower to continue to make loan repayment based on the imputed revenue.

(d) For reservoirs that are not in commercial production, any imputation of revenue will be based on the borrower's intended end use unless the resource was not adequate for the intended end use. In that case, the imputation will be based on the reservoir capacity.

(e) If the borrower both produces and utilizes the resource, DOE may not impute a revenue that is greater than the total of: cost of developing the well, annual operation and maintenance costs and the rate of return normally associated with projects of this type.

§ 792.42 Dispute resolution procedures.

(a) At the written request of a borrower, the Contracting Officer shall decide any dispute authorized for review under paragraph (d) of this section, and any dispute concerning a loan agreement with the borrower under this part. The decision of the Contracting Officer may be appealed to the Financial Assistance Appeals Board (the Board) in accordance with Part 1024 of this title. The Contracting Officer's authority under this subsection shall not extend to any DOE action taken under Part 1040 of this title.

(b) Within 30 days after receiving a dispute resolution request under subsection (a) of this section, the Contracting Officer shall mail (by certified mail) to the requesting party a brief written decision containing the following information:

(1) A summary of the requesting party's complaint;

(2) The Department's response or demand; and

(3) The factual, legal, and policy reasons for the Department's final decision.

(c) Each written decision issued by the Contracting Officer under paragraph (b) shall include the following paragraph or similar language approved by the Office of General Counsel:

> This is the final decision of the Contracting Officer. This shall be the final decision of the Department of Energy unless, within 60 days from the date you receive this letter, you deliver or mail (by certified mail) a written notice of appeal to the Financial Assistance Appeals Board at the address indicated below. Copies of your notice must be mailed (by first class mail) to the Director, Procurement and Assistance Management Directorate, and to the Office of General Counsel, GC-44, Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585. Your notice of appeal should refer to this decision, note that you intend an appeal and briefly state why you think this decision is wrong. You will be notified of further proceedings related to your appeal. A copy of DOE Procedures for Financial Assistance Appeals is enclosed for your reference.

(d) Except as otherwise provided in paragraph (a) of this section, the Contracting Officer may decide any post-loan agreement disputes including, but not limited to, the following:

(1) A determination that the borrower has failed to satisfy the terms and conditions of the loan agreement prerequisite to loan closing;

(2) A determination that the borrower is in default;

(3) Collateral liquidation;

(4) Determination and collection of deficiencies; and

(5) A determination that the borrower has failed to comply with any requirement of this part or with the terms and conditions of the loan.

(e) Review of appeal. The Board may review any final decision the Contracting Officer is authorized to make under this section, except that the Board shall have no jurisdiction to review DOE denials of requests for deviations or modifications under § 792.38 of this part. In reviewing such decisions, the Board shall be bound by all applicable laws and regulations, including the requirements of this part, and by the terms and conditions of any applicable loan agreement.

PART 794—LOANS FOR DEVELOPMENT OF WIND ENERGY SYSTEMS AND SMALL HYDROELECTRIC POWER PROJECTS

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SOURCE: 47 FR 36377, Aug. 19, 1982, unless otherwise noted.

Subpart A—General Provisions

§ 794.1 Purpose and scope.

The purpose of this part is to establish policies, requirements, and procedures for the receipt, evaluation, and approval of loan applications and for the administration of loans for the development of small hydroelectric power projects and wind energy systems. This subpart sets forth general requirements and procedures applicable to loans for both types of energy projects (wind or hydroelectric power).

§ 794.2 Definitions.

For the purposes of this part:

"Applicant" means any person who submits an application for a loan under this part.

"Application Approving Official" means the Secretary or person designated by the Secretary who is authorized to approve an application for a loan under this part.

"Application Evaluation Panel" means a panel of Federal employees appointed by an Application Approving Official to evaluate loan applications and make approval or disapproval recommendations regarding such applications.

"Borrower" means any person who enters into a loan agreement under this part.

"Closing" means the delivery by a borrower and acceptance by DOE of the executed debt instruments and any required security instruments, together with all necessary supporting documentation; and the disbursement by DOE of all or a portion of the loan proceeds.

"Competition cycle" means the period of time announced in the FEDERAL REGISTER during which applications will be received for evaluation.

"Contracting Officer" means the Department of Energy official warranted and authorized to contractually obligate the Department of Energy and execute written agreements that are binding on the Department.

"Cost overrun" means any cost that exceeds the estimated total cost of the project as established by the Application Approving Official.

"Default" means the failure by the borrower to make payment of principal or interest in accordance with the terms and conditions of a loan issued under this part, or the failure of the borrower to meet any other term or condition of the loan agreement.

"Loan agreement" means a written agreement and all collateral documents related to such agreement between the Department of Energy as lender and a borrower which sets forth the terms and conditions under which the Department will provide funds to a borrower.

"Secretary" means the Secretary of Energy or the Secretary's designee.

§ 794.3 Solicitation of applications.

(a) *Competition.* Loan applications shall be solicited and evaluated on a competitive basis. Separate Solicitation Announcements shall be used to request loan applications for Subpart B projects and Subpart C projects.

(b) *Solicitation announcement* From time to time, as funds are available, DOE may issue a Solicitation Announcement requesting loan applications for Subpart B or Subpart C projects which shall as a minimum, be noticed and summarized in the FEDERAL REGISTER and the Commerce Business Daily. A Solicitation Announcement shall include the following information:

(1) The place and time for application submission;

(2) The information requirements for applications;

(3) A technical definition or identification of the projects eligible under the Solicitation Announcement;

(4) Identification of the issuing office;

(5) Identification of statutory authority and relevant regulations;

(6) Any special requirements not contained in the regulations;

(7) Identification of the time period during which written questions regarding the preparation of applications may be submitted;

(8) Application receipt deadline and location to which applications must be delivered;

(9) Date of presubmission conference, if any, open to all interested parties.

§ 794.4 Applications.

(a) An applicant is expected to provide information in the application which is similar to that required by a private financial institution which might consider a similar project for debt financing. The application must contain the most current data available, and be adequate for proper evaluation of the project.

(b) The Solicitation Announcement shall set forth the application information requirements which may include, but not be limited to, the following:

(1) A full description of the scope, nature, extent, and location of the proposed project;

(2) The extent to which the applicant expects to apply for, or has already applied for, or is receiving any other Federal or other government financial assistance for the project;

(3) A copy of a detailed feasibility study relating to the facility that contains evidence of the facility's technical and economic feasibility and environmental acceptability;

(4) A description of prior construction, operating and other relevant experience of the applicant with the technology to be utilized in the project;

(5) Projections and analysis demonstrating the likelihood that the amount of the loan requested, together with equity and any other financing, will be sufficient to complete the facility and its startup period, and provide sufficient working capital;

(6) Detailed schedules for the project including major activity and cost milestones;

(7) Copies of proposed or actual project-related contracts together with a description of the contractor's experience and financial strength;

(8) An analysis of the market for the energy to be produced including relevant economics justifying the analysis and proposed marketing contracts or letters of intent, if any;

(9) A description of the applicant's management concept and plan of operation to be employed in carrying out the project;

(10) Information covering the management experience of each officer or key person in the applicant's organization who will be associated with the facility and a description of salaries (and other financial remuneration including profit sharing and stock options) to be paid to officers and key employees that are, or will be, directly associated with the facility;

(11) A description of the general management experience of the applicant in organizing and undertaking projects of this nature;

(12) A description of the proposed source(s) of funds for repayment of the loan;

(13) Pro forma cash flow statements for at least the first five years of project operation including income statements and balance sheets. All such statements shall include assumptions made in their preparation;

(14) Proposed risk allocation among project participants and financial statements supporting the project participants' ability to contribute the necessary equity to the project;

(15) Financial statements for the past three (3) years of the applicant and parties relevant to the applicant's financial backing, together with a description of the business and financial

interests of principal organizations such as parent and/or subsidiary corporations or partners of the applicant;

(16) Certification of the financial statement by a certified public accountant or equivalent certification acceptable to the Secretary;

(17) A copy of the applicant's deed or lease agreement to the property on which the facility is to be constructed or installed, supported by title opinion or other acceptable evidence of the applicant's rights to the property. In the event that the applicant does not have title to or a leasehold interest in the property, a detailed discussion of the applicant's efforts to obtain rights to the property including discussion of the current status of such efforts, a detailed discussion or outline of the necessary steps to obtain such rights, and a schedule for completion of all such steps;

(18) An environmental report containing a detailed analysis of the potential environmental, health, safety and socio-economic (EHSS) impacts of the project and any necessary or proposed mitigation measures and other relevant data that may be available to the applicant to enable the Department to assess the probable EHSS impacts, and to provide the Department with any information that may be required under the National Environmental Policy Act;

(19) A list of all permit applications filed or to be filed, and permit approvals issued or to be issued by Federal, state, and local government agencies for all required permits and authorizations to undertake the project. If these approvals have not been obtained, or applications not filed, the estimated date of such filings and approvals should be provided. Explain any past, present or anticipated problems in obtaining any approvals;

(20) A description of the applicant's organization and, where applicable, a copy of the partnership agreement or corporate charter, articles of incorporation, bylaws, and appropriate authorizing resolutions or their equivalent;

(21) The amount of the loan requested, proposed repayment schedule, servicing procedures, security or collateral, and other terms and conditions of the loan;

(22) A copy of any existing or proposed lending commitment or agreement for any loan;

(23) A listing of assets associated with the project and any other asset which will serve as collateral for the loan, including appropriate data as to the value and useful life of any physical assets and a description of any other associated security and its value;

(c) Receipt and handling of application. (1) Applications for loans shall be filed at the address specified in the Solicitation Announcement.

(2) An application received at the location of filing after 4:30 p.m. on the last day of the competition cycle will not be considered unless:

(i) It is received before the selection of applications by the Application Approving Official under that competition cycle; and

(ii) It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of the application.

(d) An applicant shall not be permitted to modify applications after the close of the competition cycle, except as provided in paragraph (e) of this section, in § 794.5(d) or in § 794.6(b).

(e) When information submitted by the applicant under this rule or in response to a request for additional information made by the Secretary is significantly changed as a result of new circumstances which make the originally submitted information inaccurate or incomplete, the applicant shall promptly notify DOE in writing.

(f) Information submitted by loan applicants shall be subject to disclosure and withholding in accordance with DOE's rules implementing the Freedom of Information Act (5 U.S.C. 552) at Part 1004 of this title.

§ 794.5 Evaluation of applications.

(a) The Application Evaluation Panel or other appropriate DOE officials designated by the Application Approving Official shall determine the eligibility of applicants and projects, and shall evaluate and rank applications in accordance with the applicable program requirements.

(b) The Panel shall conduct a preliminary review and screening of all applications to determine which applications should be considered in comparative evaluations. The Panel shall review the applications to determine whether each application:

(1) Complies with statutory requirements for project eligibility;

(2) Complies with the eligibility requirements of this part and any set forth in the Solicitation Announcement; and

(3) Is signed by an authorized official of the applicant organization.

Any application which does not comply with the requirements of this paragraph shall be returned to the applicant.

(c) Those applications meeting the requirements of paragraph (b) of this section shall be comparatively evaluated and ranked by the Panel. The Panel shall consider the following evaluation criteria in comparatively ranking application:

(1) Ability of the applicant to comply with the requirements of the Solicitation Announcement and this part;

(2) Technical project feasibility and likelihood of success;

(3) Market potential and economic feasibility;

(4) *Financial.* (i) Credibility of cost estimates;

(ii) Adequacy of capitalization, cash flow, working capital, and other measures of financial capability;

(iii) Financial condition of applicant and other principals to the project;

(5) *Financing structure.* (i) Financial commitment of applicant and other principals to the projects;

(ii) Debt financing plan;

(iii) Other factors which are relevant to a full description of the financing structure of the proposed project;

(6) The degree of risk to DOE during both the interim and permanent financing stages of the project, including the length of time over which the proposed borrower will repay the loan (with regard to the anticipated cash flow and useful life of the project);

(7) *Management plan.* (i) Corporate and personnel experience;

(ii) Management organization and interrelationship; and

(iii) Key personnel and associated responsibilities;

(8) Environmental, health, safety and socioeconomic impacts of the proposed project; and

(9) Such additional evaluation criteria as may be set forth in the Solicitation Announcement.

(d) The Panel may, in the course of evaluating the application, request additional information of the applicant that may be necessary to complete its evaluation.

(e) The Panel shall submit a written report to the Application Approving Official on its evaluation of the applications together with its findings and recommendations concerning final selections.

§ 794.6 Selection of applications.

(a) The Application Approving Official may, in his or her discretion, select any number of the competing applications, subject only to the requirement that appropriations be available for the total amount of the loans selected for approval.

(b) If, prior to making a decision, the Application Approving Official determines that additional project information is required, a written request for the information shall be sent to the applicant.

(c) The Application Approving Official shall consider the report of the Panel, such other information as the Application Approving Official determines to be relevant and the policy considerations specified in § 794.7 and applicable subparts of this part in selecting applications for loan agreements.

(d) When the Application Approving Official determines that competitive negotiations are appropriate, DOE shall negotiate with all or a subset of competing applicants for the purpose of clearly defining the comparative merits of the competing applications prior to final selection. The Panel report to the Application Approving Official, shall be revised to reflect the results of such negotiations.

(e) Upon the completion of the procedures contained in this section, the Application Approving Official may authorize the Contracting Officer to issue a loan agreement for the project proposed by a selected applicant. The loan agreement shall identify the terms and conditions of the loan, including those which must be satisfied prior to closing, and any additional requirements to be placed upon the applicant as a condition of the loan.

§ 794.7 Policy considerations.

The following policy considerations and other policy considerations set forth in relevant subparts of this part, may be utilized by the Application Approving Official in the selection of applications from among those applications recommended by the Application Evaluation Panel:

(a) The degree to which the borrower is investing equity funds into the project which were not provided through the issuance of debt, and the extent to which responsible financial parties affiliated with or constituting the legal entity of the borrower are liable for repayment of the debt;

(b) The length of time over which the proposed borrower will repay the debt, with regard to the anticipated cash flow of the project and the degree of risk to the Government;

(c) Competition factors associated with the concentration and control of energy production that may result from the issuance of a loan in connection with a particular energy project; and

(d) The extent of other Federal financial assistance the project is receiving or is eligible to receive.

§ 794.8 Required findings and determinations.

A loan may be made only after DOE makes the following findings and determinations:

(a) The amount of the loan, when combined with other funds available to the applicant, shall be sufficient to carry out the project, including adequate contingency funds and working capital;

(b) There is a reasonable assurance of repayment of principal and interest of the loan by the borrower;

(c) The project assets or other acceptable forms of collateral or surety, as determined by the Secretary to be necessary, are pledged by the borrower as security for the repayment of the loan and a valid first and superior lien or other acceptable lien position will exist on such assets, collateral, or surety for the benefit of DOE;

(d) The terms, conditions, maturity, security, and repayment provisions with respect to the loan are reasonable and sufficient to protect the interest of the United States;

(e) The disbursement schedule for advancing loan proceeds to the borrower is satisfactory;

(f) The applicant is capable of constructing and competently operating the project for which the loan is made; and

(g) The findings and determinations required under Subpart B or C of this rule, as appropriate, have been made.

§ 794.9 Pre-closing requirements.

(a) If, within a reasonable period of time, the Contracting Officer determines that the borrower has failed to meet the terms and conditions established as prerequisites to loan closing the Contracting Officer shall so advise the Application Approving Official in writing. A copy of such determination shall be sent to the borrower. The Application Approving Official shall determine whether to continue negotiations, authorize modification or termination of the loan agreement, or take other appropriate action.

(b) If the Contracting Officer determines that the borrower has met the terms and conditions established as prerequisites to closing of the loan, the Application Approving Official shall authorize the loan closing. The date, time and place for closing shall be fixed by mutual agreement. Nothing in the section shall restrict the authority of the Contracting Officer from requiring additional documentation from the borrower.

§ 794.10 Unsolicited applications.

Because DOE will evaluate applications on a competitive basis, unsolicited applications for loans under this part will not be considered and will be returned to the applicants.

§ 794.11 Discussion with unsuccessful applicants.

Upon written request by an applicant whose application did not result in a loan, representatives of the Application Approving Official may explain to an unsuccessful applicant why the application was disapproved.

§ 794.12 Non-written representations.

No representation shall be binding on the Department unless it is reduced to writing and signed by a Contracting Officer. No instrument or modification thereof shall be considered approved by the Department unless it is signed by a Contracting Officer.

§ 794.13 Loan agreement terms and conditions.

A loan agreement issued by DOE under this part shall contain or meet the following requirements and conditions:

(a) The following requirements concerning patents, technology, inventions, and other proprietary rights:

(1) A requirement that any inventions conceived or first actually reduced to practice in the course of or under the project, any patents or patent applications thereon, except for those in which title vests in the United States Government, as well as all technology and other proprietary rights developed under the project shall be the property of the borrower (or its participants or its contractors) and shall be collateral for the loan. The provisions of this paragraph shall apply to and be binding on the borrower's contractors and participants, and the borrower shall obtain the written agreement of such parties to these provisions.

(2) A requirement that the borrower agree to grant nonexclusive licenses in all patents, technology and other proprietary rights owned or controlled by the borrower which are necessary for completion and operation of the project or which have been utilized in the project: (i) In the event of default, royalty free to the entities selected to complete and operate the project only for the purpose of completing and operating the project; and (ii) regardless of whether there is a default, on equitable terms, including due consideration to the amount of the United States Government default payment, to the United States Government and its designees for the purpose of constructing and operating similar projects. The provisions of this paragraph shall apply to and be binding on the borrower's participants, and the borrower shall obtain the written agreement of such parties to these provisions.

(3) A requirement that the borrower agree to secure a license in any patents, technology or other proprietary rights of third parties which are bought or licensed for the project on behalf of the project, and inuring to the benefit of successor owners and/or operators of the project under terms and conditions no less favorable than applicable to the project.

(4) A requirement that the term "participants" shall mean the owners of the borrower, the members of a consortium or other legal entity comprising the borrower, and others with a financial or equity interest in the borrower. The term "contractor" shall mean the party being awarded a contract, regardless of tier.

(b) A requirement that no change of project ownership or financial arrangement occur without the prior written consent of DOE;

(c) A requirement that the project be built and operated at a site approved by DOE;

(d) A requirement that the borrower not obtain credit from any creditor without the written consent of the Contracting Officer, unless such creditor agrees to subordinate, in a manner acceptable to the Contracting Officer, its rights to receive payment in the event that such creditor would, without such subordination, receive by contract or otherwise a lien on the assets securing the loan issued by DOE;

(e) A requirement that the loan agreement contain provisions that comply with § 794.15 regarding default and demand;

(f) A requirement that the borrower keep and make available adequate records and documents concerning the construction and operation of the project in order that DOE may determine the technical and financial conditions of the project and its compliance with the requirements of the loan agreement;

(g) A requirement for the borrower to prepare and deliver to DOE annual audited financial statements prepared according to generally accepted accounting principles;

(h) A requirement that duly authorized representatives of the Secretary shall have access to the project site at reasonable times during construction and operation of the project;

(i) A requirement that the borrower agree to protect and preserve at all times the project assets and other collateral serving as security for the loan;

(j) A requirement that performance of contractors engaged in the construction of the project for which the loan is made be fully bonded or that other acceptable arrangements are made that assure adequate performance by contractors;

(k) A requirement that the borrower execute all documents necessary to perfect and maintain liens on collateral pledged as security for the loan;

(l) A requirement that the project operate in full compliance with all applicable laws and regulations;

(m) A requirement that the invalidity of any clause, part, or provision of the loan agreement shall not affect the validity of the remaining portions of the loan agreement;

(n) A requirement that the loan agreement shall provide an option on the part of the borrower to prepay the loan at any time without prepayment penalties;

(o) A requirement that the borrower shall furnish DOE, in writing, the name(s) of the individual(s) authorized to act on behalf of the borrower and shall notify DOE, in writing, of any change in its representatives;

(p) A requirement that the borrower keep the assets of the project insured in an acceptable amount from risk of loss, and acceptable provisions for control over any insurance proceeds paid in the event of such a loss to assure that such proceeds are appropriately utilized for the repair, reconstruction or replacement of the project assets or to repay the principal and interest on the loan;

(q) A requirement that the borrower shall be in default if the borrower at any time prior to the completion of the project abandons or ceases work on the project for more than 30 days;

(r) A requirement that the borrower shall not permit any judgment, lien, or other encumbrance to be placed against any asset of the project, excluding those liens obtained pursuant to the loan agreement or with the prior written consent of DOE;

(s) When appropriate, a requirement for control over project revenue which ensures that profits above a predetermined level are made available to the project for the future requirements of the project or for prepayment of the loan; and

(t) Such other terms and conditions as determined by DOE to be reasonable and necessary for the protection of the interests of the United States.

§ 794.14 Access to records and project site.

Employees and authorized representatives of DOE shall have access at reasonable times and under reasonable circumstances to the project site. Auditors selected by DOE or the Comptroller General of the United States shall have access to, and the right to examine, all relevant documents and records of the borrower. The borrower shall assure availability of information to permit DOE to determine technical progress, soundness of financial condition, management stability, compliance with environmental protection requirements, the requirements of this part and other matters pertinent to the loan.

§ 794.15 Default, demand, payment and collateral liquidation.

(a) In the event that the borrower defaults in the making of required payments of principal or interest on the loan, and such default is not cured within the grace period provided in the loan agreement, or in the event that the borrower fails to comply with any term or condition of the loan agreement, or other contractual obligation relating to the transaction, the borrower shall be in default and DOE shall have the right to accelerate the indebtedness and demand full payment of all amounts outstanding, both principal and interest, under the loan.

(b) The borrower shall have a period of not more than 30 days from the date of demand to make payment in full. Unless the Secretary issues a written waiver of default, the Secretary's failure to make demand at any time shall not constitute a waiver of any rights or remedies available to the Secretary.

(c) Should the borrower fail to pay after demand, as provided in paragraph (b) of this section, the Secretary shall undertake collection in accordance with the terms of the loan agreement and applicable law.

(d) The loan agreement shall specify the rights of DOE with respect to the liquidation of assets securing the loan and other actions that may be taken by DOE in the event of default.

§ 794.16 Nondiscrimination in federally assisted programs.

Applicants who apply for loans under this part shall be required to comply with the Department's rules on Nondiscrimination in Federally Assisted Programs, 10 CFR Part 1040 (45 FR 40514, June 13, 1980).

§ 794.17 Deviations.

To the extent that such requirements are not specified by statute, the Secretary may authorize a deviation for an individual applicant or borrower from the requirements of this part upon a finding that such deviation is essential to program objectives and is in the best interests of the United States.

§ 794.18 Compliance with other statutes.

Nothing in this part shall be construed to modify requirements imposed on the borrower by Federal, State, regional and local government agencies in connection with permits, licenses, or other authorizations required to construct and operate the project.

§ 794.19 Project costs.

(a) Project costs shall be recorded in accordance with generally accepted accounting principles which are consistently applied.

(b) Those reasonable and customary costs that have been incurred, are expected to be incurred, and which are directly related to the project shall be used to estimate total project costs.

(c) DOE may audit any or all cost elements included in the estimated project costs, and reserves the right to exclude or reduce the amount of any cost which is determined to be unnecessary or excessive. The borrower will make available records and other data necessary to permit DOE to carry out such an audit. In carrying out this responsibility, DOE may utilize employees of other Federal agencies or may direct the borrower to submit to a review performed by an independent public accountant or other competent authority.

§ 794.20 Cost overruns.

(a) A cost overrun is any cost which exceeds the estimated total cost of the project established by DOE prior to or at the time of execution of a loan agreement.

(b) When an overrun is anticipated, DOE must be notified promptly and provided with the reasons for the overrun.

(c) At the discretion of DOE and subject to the availability of loan funds, a loan agreement may be amended to increase the amount of the loan in the event that either the estimated cost to complete the project or the actual project cost incurred exceeds the originally estimated project cost.

(d) The borrower must submit all of the following information before DOE may determine whether to increase the loan to cover cost overruns:

(1) A revised expected completion date, if applicable, and a revised cost estimate for the project;

(2) A plan indicating how the borrower's share of the cost overrun will be funded;

(3) A description of the additional collateral, if any, to be pledged for the increased loan; and

(4) Updated information on the project economics indicating that a reasonable assurance of repayment of the loan (including the requested increase) still exists.

(e) Subject to the requirements of paragraph (d) of this section, DOE may agree to increase the loan for the project if DOE finds that:

(1) The continuation of the project is worthwhile to meet the program's objectives and is in the public interest; or

(2) The probable net costs to the Government in increasing the loan will be less than that which would result from a default.

(f) In no event may the loan be increased to an amount that exceeds the maximum amount or percentage share of costs set forth in the applicable subpart of this part.

§ 794.21 Dispute resolution procedures.

(a) At the written request of a borrower, the Contracting Officer shall decide any dispute authorized for review under paragraph (d) of this section, and any dispute concerning a loan agreement with the borrower under this part. The decision of the Contracting Officer may be appealed to the Financial Assistance Appeals Board (the Board) in accordance with Part 1024 of this title. The Contracting Officer's authority under this subsection shall not extend to any DOE action taken under Part 1040 of this title.

(b) Within 30 days after receiving a dispute resolution request under paragraph (a) of this section, the Contracting Officer shall mail (by certified mail) to the requesting party a brief written decision containing the following information:

(1) A summary of the requesting party's complaint;

(2) The Department's response or demand; and

(3) The factual, legal, and policy reasons for the Department's final decision.

(c) Each written decision issued by the Contracting Officer under paragraph (b) of this section shall include the following paragraph or similar language approved by the Office of General Counsel:

> This is the final decision of the Contracting Officer. This shall be the final decision of the Department of Energy unless, within 60 days from the date you receive this letter, you deliver or mail (by certified mail) a written notice of appeal to the Financial Assistance Appeals Board at the address indicated below. Copies of your notice must be mailed (by first class mail) to the Director, Procurement and Assistance Management Directorate, and to the Office of General Counsel, GC-44, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585. Your notice of appeal should refer to this decision, note that you intend an appeal and briefly state why you think this decision is wrong. You will be notified of further proceedings related to your appeal.
>
> A copy of DOE Procedures for Financial Assistance Appeals is enclosed for your reference.

(d) Except as otherwise provided in paragraph (a) of this section, the Contracting Officer may decide any post-loan agreement disputes including, but not limited to, the following:

(1) A determination that the borrower has failed to satisfy the terms and conditions of the loan agreement prerequisite to loan closing;

(2) A determination that the borrower is in default;

(3) Collateral liquidation;

(4) Determination and collection of deficiencies; and

(5) A determination that the borrower has failed to comply with any requirement of this part or with the terms and conditions of the loan.

(e) Review on appeal. The Board may review any final decision the Contracting Officer is authorized to make under this section, except that the Board shall have no jurisdiction to review DOE denials of requests for deviations or modifications under § 794.17 of this part. In reviewing such decisions, the Board shall be bound by all applicable laws and regulations, including the requirements of this part, and by the terms and conditions of any applicable loan agreement.

§ 794.22 Generally applicable requirements.

A borrower shall comply, as specified in 10 CFR 600.12, with all generally applicable requirements identified in 10 CFR Part 600, Appendix A, to which, by the terms of such requirements, the borrower is subject.

Subpart B—Wind Energy Systems

§ 794.100 Proposed scope.

This subpart sets forth the special procedures and requirements for awarding and administering direct loans for the purchase and installation of wind energy systems. This subpart also prescribes requirements for recording and reporting operation and maintenance data.

§ 794.101 Definitions.

For purposes of this subpart—

"Act" means the Wind Energy Systems Act of 1980, Pub. L. 96-345.

"Conventional energy source" means energy produced from oil, gas, coal, or nuclear fuels.

"Feasibility study" means a study to determine the technical and economic feasibility and institutional and environmental acceptability of undertaking a project to purchase and install a wind energy system at a specific site.

"Large wind energy system" means a system consisting of at least one large wind machine.

"Large wind machine" means a wind machine which is designed to produce a peak generating capacity of more than 100 kilowatts.

"Normal operation" means the unattended operation of the wind energy system after installation and debugging and putting energy from the system on line.

"Operating and maintenance costs" means those costs incurred after commencement of normal operation associated with operating and with maintaining a wind energy system so that it continues to perform satisfactorily over its design lifetime.

"Peak generating capacity" means the maximum power output a wind system is capable of producing in normal operation.

"Public and private entity" means any individual, corporation, partnership, firm, association, agricultural cooperative, public or investor owned utility, public or private institution or group, and state or local government agency, or any other non-Federal domestic entity.

"Small wind energy system" means a system consisting of one or more small wind machines.

"Small wind machine" means a wind machine which is designed to produce a peak generating capacity of 100 kilowatts or less.

"State" means the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the territories and possessions of the United States, including the Trust Territory of the Pacific Islands.

"Wind machine" means a system of components which converts the kinetic energy of the wind into electricity or mechanical power and which comprises all necessary components including energy storage, power conditioning, control systems, and transmission systems, where appropriate, to provide electricity or mechanical power for residential, agricultural, commercial, industrial, utility or governmental use.

§ 794.102 Funding limitations.

(a) Except as otherwise provided by statute enacted subsequent to the effective date of this subpart, a loan for a maximum of 75 percent of the total allowable purchase and installation costs of a wind energy system may be made, provided—

(1) The loan is consistent with the requirement in section 6 of the Act that DOE make a minimum of four loans for projects involving a total combined capacity of not more than 320 megawatts; and

(2) The amount of the loan does not exceed 50 percent of the total fiscal year appropriation for the DOE wind energy program.

(b) DOE shall not issue a solicitation for or enter into any loan agreement under this subpart after September 30, 1988 or after the Secretary determines that wind energy systems have become economically competitive with conventional energy sources, whichever occurs first.

§ 794.103 Eligibility requirements.

Any public or private entity is eligible to receive a loan under this subpart for the purchase and installation of a wind energy system in a State, provided—

(a) The proposed small wind energy system would provide an aggregate peak generating capacity of at least one megawatt; or

(b) The proposed large wind energy system includes a minimum of five large wind machines and would not exceed an aggregate peak generating capacity of 80 megawatts; and

(c) The purchase and installation of the proposed wind energy system are not supported by a grant or cooperative agreement under Part 417 of this title.

§ 794.104 Application requirements.

An application for a loan under this subpart shall contain—

(a) A project description as prescribed in § 794.4 of Subpart A of this part;

(b) A feasibility study as described in § 417.23(a) of this title;

(c) The number and type of proposed wind machines, including existing and proposed meteorological equipment;

(d) The names, addresses, and qualifications and experience of the manufacturers, designers, and installers of the principal components of the proposed wind energy systems, including meteorological equipment;

(e) The number, length, voltage, interconnection, age, condition and location of any transmission lines to be constructed or modified as part of the project, including any new facilities required to put energy from the wind system on line;

(f) Topographical maps, diagrams, site plan, and photographs showing the location of the proposed project;

(g) A title report or other documentary evidence that the applicant will have access to and be authorized to use the proposed site for at least 30 years following the end of the project period.

§ 794.105 Allowable project costs.

(a) Allowable project costs under this subpart shall include all reasonable and necessary expenses of purchasing and installing a wind energy system. Such costs shall include expenses incurred for site preparation and for purchase, delivery, storage, assembly, installation, and start-up testing of all essential system components, and for the monitoring and reporting required under § 794.104 of this subpart.

(b) Allowable transmission system costs may not exceed 10 percent of total allowable wind energy systems costs. If the applicant demonstrates that the existing transmission system is inadequate to transport electricity from a wind energy system to an electric power grid, the costs of such transmission system may be allowed up to a maximum of 25 percent of total allowable system costs.

§ 794.106 Evaluation criteria.

(a) Applications for loans for large and small wind energy systems under this subpart shall be evaluated on the basis of the criteria set forth in § 794.5 of Subpart A of this part and § 417.25(a) of this title.

(b) Loan applications for projects proposing wind energy systems with an aggregate peak generating capacity of not more than 30 megawatts shall be evaluated competitively against each other. Applications proposing projects designed to generate 30 megawatts or more of power shall be competitively evaluated against each other.

§ 794.107 Monitoring and reporting requirements.

The borrower shall comply with the monitoring and reporting requirements set forth in § 417.26 of this title.

§ 794.108 Visitation.

The borrower shall comply with the visitation requirement set forth in § 417.27 of this title.

Subpart C—Small Hydroelectric Power Projects

§ 794.200 Purpose and scope.

This subpart sets forth the special procedures and requirements for awarding and administering loans for the construction of small hydroelectric power projects at existing dams.

§ 794.201 Definitions.

For purposes of this subpart,

"Electric cooperative" means any cooperative association eligible to receive loans under section 4 of the Rural Electrification Act of 1936 (7 U.S.C. 904).

"Existing dam" means any dam, the construction of which was completed on or before April 20, 1977, and which does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) in connection with the installation of any small hydroelectric power project.

"Industrial development agency" means any agency which is permitted to issue obligations the interest on which is excludable from gross income under section 103 of the Internal Revenue Code of 1954.

"Municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.

"Nonprofit organization" means any organization described in section 501(c)(3) or 501(c)(4) of the Internal Revenue Code of 1954 and exempt from tax under section 501(a) of such Code (but only with respect to a trade or business carried on by such organization which is not an unrelated trade or business, determined by applying section 513(a) to such organization).

"Person" means an individual, corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing.

"Small hydroelectric power project" means any hydroelectric power project which is located at the site of any existing dam, which uses the water power potential of such dam, and which has not more than 30,000 kilowatts of installed capacity.

"State" means a State, the District of Columbia, and Puerto Rico.

§ 794.202 Funding limitations.

(a) Loans made pursuant to this subpart shall be for a maximum of 75% of the project costs of small hydroelectric power projects.

(b) Each such loan shall be for such term as the Secretary deems appropriate, but not in excess of 30 years.

§ 794.203 Eligibility requirements.

Any municipality, electric cooperative, industrial development agency, nonprofit organization, or other person is eligible to receive a loan under this subpart.

§ 794.204 Application requirements.

In addition to the application requirements set forth in § 794.4 of Subpart A of this part, an application for a loan under this subpart shall contain—

(a) A description of the proposed dam and penstock condition or natural water feature, and a description of the condition of any in-place equipment, including fish ladders;

(b) Evidence of the date of construction of the dam; its electric power output when last used, and its type of construction;

(c) A description of recreational or other uses placed on water to be used by the project;

(d) A complete description of the applicant's renovation plan and schedule, and a description of the type and rating of any turbine-generator to be placed in the project;

(e) A description of the dam's head, water flow, and expected kwh production (including assumptions used in its computation), and a description of existing transmission lines and distance to the proposed buyer of the project's electric output; and

(f) An estimate of the cost of constructing any fish ladders.

§ 794.205 Allowable project costs.

Allowable project costs under this subpart shall include the cost of acquisition or construction of all facilities and services and the cost of acquisition of all land and interests in land used in the design and construction and operation of a small hydroelectric power project.

§ 794.206 Findings and determinations.

(a) In selecting applicants for loans under this subpart, preference shall be given to applicants who do not have available alternative financing in an amount which is deemed appropriate by DOE to complete the project and whose project will provide useful information as to the technical and economic feasibility of the generation of electricity by the project and the use of energy produced by the project.

(b) In addition to the requirements set forth in § 794.8 of Subpart A of this part, a loan may be made under this subpart only after DOE finds—

(1) That the project will be constructed in connection with an exisiting dam or that it will utilize a natural water feature;

(2) That all licenses and other required Federal, State, regional and local government agency approvals necessary for development of the project have been issued. However, the Secretary may enter into a commitment to issue a loan to an applicant who has not met this requirement. The commitment period shall not exceed 3 years unless the Secretary in consultation with the Federal Energy Regulatory Commission, extends the commitment period for good cause shown by the applicant. Despite the existence of any such commitment, no loan shall be approved by the Secretary before the applicant has fully complied with the requirement of this paragraph;

(3) That the project will have no significant adverse environmental effects, including adverse effects on fish and wildlife, on recreational or any other use of the water to be used by the project, or on stream flow; and

(4) That the estimated total cost of the project includes the cost of constructing fish ladders when required by a government agency.

§ 794.207 Project monitoring and audit.

The borrower shall keep such records concerning the project as are required by generally accepted accounting principles, and such other records as DOE deems necessary. Representatives of DOE may have access, for the purpose of audit and examination, to any pertinent records or other documents of the borrower during the regular business days, and may require that copies of such documents be provided to DOE by the borrower.

PART 796—FEDERAL LOAN GUARANTEES FOR ALTERNATIVE FUEL DEMONSTRATION FACILITIES

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AUTHORITY: Sec. 19(i), Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. 93-577, 92 Stat. 61 (42 U.S.C. 5919); sec. 644 et seq., Dept. of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254 et seq.).

SOURCE: 45 FR 15473, Mar. 10, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 796.1 Purpose.

The purpose of this regulation is to set forth policies and procedures under which qualified applicants may obtain financial assistance backed by the full faith and credit of the United States for financing the construction, startup, and related costs for demonstration facilities for the conversion of domestic coal, oil shale, biomass, and other domestic resources into alternative fuels. It is also the purpose of this regulation to set forth policies and procedures for providing community impact assistance for planning and essential community development to eligible states, political subdivisions, and Indian tribes, appropriately, which would be adversely impacted by the siting, construction and operation of such demonstration facility(ies).

§ 796.2 Objectives.

The objectives of the Loan Guarantees for Alternative Fuel Demonstration Facilities Program (AFDP) are:

(a) To assure Federal support to foster a demonstration program to produce alternative fuels from domestic coal, oil shale, biomass, and other domestic resources;

(b) To authorize assistance, through loan guarantees, for the construction, startup, and related costs for commercial or modular size facilities for the demonstration of the conversion of domestic coal, oil shale, biomass and other domestic resources into alternative fuels in an environmentally acceptable manner;

(c) To authorize assistance, through cooperative agreements, for construction, startup, and related costs for modular size facilities for the conversion of domestic oil shale into alternative fuels in an environmentally acceptable manner;

(d) To gather information about the technological, economic, environmental, and social costs, benefits, and impacts of such demonstration facilities;

(e) To assure that the adequate planning and financing of essential community development is available to eligible states, political subdivisions and Indian tribes, as appropriate, for adverse community impacts resulting from the siting, construction and operation of a demonstration facility. Grants, loans guarantees, direct loans, or the requirement that the applicant obtaining financial assistance for its demonstration facility to internalize the socioeconomic costs into the demonstration project, may be provided to such states, political subdivisions, and Indian tribes for such planning and essential community development.

§ 796.3 Definitions.

For the purposes of this regulation:

(a) "Act" means the Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. 93-577, as amended by section 207 of Title II of Pub. L. 95-238.

(b) "Alternative fuel" means those oils, gases, and other energy forms produced or synthesized from shale, coal, and biomass and other domestic resources.

(c) "Biomass" shall include, but is not limited to, oceanic and terrestrial crops, residues, and waste therefrom; animal wastes; and industrial waste.

(d) "Demonstration" means the establishment of a facility to exhibit the technical, economic, and environmental feasibility, normally under commercial conditions, of a device, technique, or process which converts domestic coal, oil shale, biomass, and other domestic resources (to the extent specified in solicitation announcements or appendices to this regulation) into alternative fuel.

(e) "Modular size facility" means a facility integrating one or more modular units using commercial sized components; in the case of the conversion of oil shale into alternative fuel, a modular size facility is one that can produce between 6,000 and 10,000 barrels of oil equivalent per day.

(f) "Project" means a group of interrelated tasks undertaken, or intended, by the prospective applicant for a demonstration facility which, when completed, will result in the production of alternative fuels.

(g) "Applicant" means:

(1) For the purpose of demonstration facilities, any individual, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company, or other governmental non-Federal entity that has the authority to enter into the financial assistance agreement being sought and is requesting assistance under this regulation.

(2) For the purpose of community impact assistance, any eligible state, political subdivision, or Indian tribe, as defined below, which has the authority to enter into financial assistance agreements being sought and which is requesting assistance under this regulation.

(h) "Borrower" means:

(1) For the purpose of assistance for a demonstration facility, any applicant (as defined in § 796.3(g)(1)) who has an application approved by the Secretary and who enters into a loan which is guaranteed under this regulation.

(2) For the purpose of community impact assistance, any applicant (as defined in § 796.3(g)(2)), who has had an application approved by the Secretary and who receives a direct loan or enters into a loan which is guaranteed under this regulation.

(i) "Assistance recipient" means any borrower, grantee, or participant to a cooperative agreement for any program authorized by this regulation.

(j) "Holder" means an individual or any legal entity such as a partnership or corporation, who has lawfully succeeded in due course to all or part of the rights, title, and interest in the guaranteed portion of the loan.

(k) "Indian tribe" means any tribe, band, or community having a governing body recognized by the Secretary of Interior.

(l) "Indian lands" means all lands, including mineral interests within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent and including rights-of-way to all lands including mineral interests held in trust for or supervised by an Indian tribe.

(m) "Lender" means any individual, partnership, corporation, Federal entity or other legal entity formed for the purpose of, or engaged in the business of lending money. Examples of lenders may include, but are not limited to, commercial banks, savings and loan institutions, insurance companies, factoring companies, investment banking organizations, institutional investors, venture capital investment companies, trust, Federal entity or other entities designated as trustees or agents acting on behalf of bondholders or other lenders.

(n) "Guarantee agreement" means a written agreement by which DOE guarantees payment of principal and accrued interest on specific financial obligations of a borrower.

(o) "Loan" means any financial obligation, including, but not limited to, bonds, debentures, notes, or other financial debt instruments.

(p) "Commitment to guarantee" means a document executed by the Secretary, that sets forth, specifically, or by reference to the terms and conditions under which the Secretary will subsequently issue a loan guarantee.

(q) "Cooperative agreement" means an executed written agreement reflecting an assistance relationship between DOE and an assistance recipient in which substantial involvement is anticipated between DOE and the assistance recipient during the performance of the activity described in the cooperative agreement.

(r) "Direct loan" means a loan of funds by the Secretary to an adversely impacted political subdivision, or Indian tribe for financing essential community development as defined in paragraph (w) of this section.

(s) "Management grant" means a grant of Federal funds to a political subdivision, or Indian tribe, as appropriate, for the purpose of supporting the implementation of a detailed program of action to prevent or mitigate the adverse impacts of an approved demonstration facility and for establishing related management expertise.

(t) "Planning assessment grant" means a grant of Federal funds to a Governor of a state, or Indian tribe, as appropriate, for assessing social and economic impacts of a proposed demonstration facility and identifying any essential mitigating measures.

(u) "Adverse impact" means the actual or anticipated requirement for essential community development necessitated by the siting, construction and operation of the alternative fuel demonstration facility within the jurisdiction of a state, political subdivision or Indian tribe or adjacent thereto, and the lack of capability by such affected state, political subdivision or Indian tribe, as appropriate, to finance such essential community development from tax revenues, Federal or state financial assistance or other sources.

(v) "Equitable assistance sharing" means the sharing of community impact assistance; which may be provided under this regulation, by more than one state, political subdivision, or Indian tribe adversely impacted by the siting, construction and operation of a demonstration facility.

(w) "Essential community development" means additional community development, including public facilities, housing, and transportation required from rapid, energy-related population growth resulting from the construction and operation of demonstration facility in the affected communities.

(x) "Public facility" means a facility constructed, renovated or expanded with public funds provided by a state, political subdivision, or Indian tribes. For the purpose of this regulation, the term public facility includes, but is not limited to, the following facilities which will not serve as industrial facilities:

(1) Education;

(2) Environmental protection;

(3) Health care;

(4) Public safety and law enforcement;

(5) Recreation;

(6) Transportation;

(7) Public utilities.

(y) "Default" means the failure of a borrower to make payments of principal and interest on a loan guaranteed by the Federal Government or on a direct loan by the Federal Government for financing essential community development within the time period specified in the loan agreement, or the failure of the borrower to comply with material terms or conditions as specified in the loan guarantee or in the direct loan agreement.

(z) "Overrun costs" mean any cost that exceeds the total estimated costs of the demonstration facility as specified in the initial guarantee agreement.

(aa) "Secretary" means the Secretary of Energy or designee.

(bb) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, or any territory or possession of the United States.

(cc) "United States" means the several states, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(dd) "Disadvantaged business concern" means a concern which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals (as defined in Pub. L. 95-507).

§ 796.4 Program management.

Program management responsibility for financial assistance awarded under this regulation and under the applicable appendix(ces) to this regulation has been assigned to the Office of Resource Applications, except in the areas of biomass and municipal or industrial wastes which are currently being administered by the Office of Conservation and Solar Energy.

§ 796.5 Financial assistance—general.

The Secretary, with due regard for the need for competition, may enter into financial assistance agreements for demonstration facilities to promote the conversion of domestic coal, oil shale, biomass, and other domestic resources into alternative fuels. Such assistance may be in the form of loan guarantees or cooperative agreements in the case of a modular size oil shale facility(ies).

§ 796.6 Citizenship requirements.

An applicant for financial assistance under this regulation must be a citizen or a national of the United States. An individual, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company, or other non-Federal entity shall not be deemed to be a citizen or national of the United States unless the Secretary determines that such applicant satisfactorily meets all the requirements of section 2 of the Shipping Act of 1916 (46 U.S.C. 802) for determining such citizenship, except that the provisions in such section 2(a) concerning: (a) The citizenship of officers or directors of a corporation, and (b) the equity required to be owned in the case of a corporation, association, partnership, or firm operating a vessel in the coastwise trade shall not be applicable. The Secretary, in consultation with the Secretary of State, may waive such requirements in the case of a corporation, association, partnership, or firm in which controlling interest is owned by citizens of countries that are participants in the International Energy Agreement.

§ 796.7 Guidelines for selection of loan guarantee applications.

(a) A loan guarantee shall be issued after competition among all applicants proposing similar demonstrations to the extent feasible. It is the intention of the DOE to consider all aspects of the application, including the impact of a specific guarantee on competition and concentration in the production of energy; the resources available; status of regulatory proceeding, if applicable; labor availability; technology application; financial structure; project economics; borrower's equity; repayment assurance; collateral pledged; environmental and socioeconomic factors; the application's achievement of the goals and objectives of the demonstration program; and other competitive evaluation and selection criteria set forth in subsequent appendices or solicitation announcements made under this regulation.

(b) It is DOE policy to encourage and maximize open and fair competition in the selection of loan guarantee applications under AFDP. DOE will use two basic procedures to accomplish competitive selection:

(1) Solicitation for loan guarantee applications as described in paragraph (c) of this section;

(2) Other competitive procedures as specified in paragraph (d) of this section.

(c) DOE will follow the basic steps described in this paragraph to receive, evaluate, and select loan guarantee applications under a solicitation procedure.

(1) *Solicitation announcement.* DOE will publish an announcement in the FEDERAL REGISTER soliciting applications for loan guarantees. A synopsis of the Announcement will also be published simultaneously in the *Commerce Business Daily.* In addition, copies of the Announcement will be mailed to any person known to DOE to be interested in responding to such a Solicitation announcement. The Solicitation Announcement will contain the following information:

(i) A brief description of the size and type of projects for which loan guarantee applications are solicited;

(ii) The time period during which responses to the solicitation may be filed;

(iii) The name and address of the DOE representative who may be contacted to receive further information and a copy of the solicitation;

(iv) Such other information as determined by DOE to be relevant to the Solicitation Announcement.

(2) *Application processing.* DOE will process applications received in response to a Solicitation Announcement in accordance with the provisions of § 796.40 "Application processing for a loan guarantee for a demonstration facility," of this regulation.

(3) *Evaluation of application.* When the anticipated total cost of individual projects of the type specified in the Solicitation Announcement are estimated by DOE to exceed $50 million, application evaluation will be conducted by a specially constituted board which will use the appropriate procedures specified in the Source Evaluation Board Handbook (Procurement Regulation Handbook No. 1, 44 FR 6038, Jan. 30, 1979). When the anticipated total cost of projects is less than $50 million, applications will be evaluated by a panel appointed by the appropriate Assistant Secretary. The panel will utilize procedures similar to those specified in DOE procurement regulations for source evaluation panels. Regardless of whether a board or panel is used, each application shall receive an impartial, equitable, and thorough evaluation.

(4) *Application selection.* The formal body specified in the preceding paragraph (c)(3) will rank the applications in order of preference and forward the ranking to the selecting official. If the total cost of each individual project from which the selection is to be made is $50 million or less per project, then the selection official shall be the appropriate Assistant Secretary or designated representative. If the total cost exceeds $50 million, then the selecting official shall be the Secretary or designated representative. No application selection shall be final until the procedures specified in § 796.40 of this regulation have been fully met.

(d) Whenever the solicitation procedures described in paragraph (c) of this section do not fully meet the requirements of a particular technology to be demonstrated under AFDP, then DOE will specify alternative competitive procedures designed for such purpose. These procedures will be implemented by appendix(ces) to this regulation and will be specific with regard to both the technology to be employed and the method of solicitation, evaluation, and award of loan guarantees to be used.

(e) *Unsolicited applications.* Although it is DOE policy to solicit applications (as specified in paragraph (c) of this section), or use other competitive procedures (as specified in paragraph (d) of this section), DOE also allows innovative unsolicited applications to be presented to DOE for consideration. An unsolicited application should fall within the technologies to be demonstrated under AFDP and meet the objectives and requirements set forth in this regulation and applicable appendix(ces) to this regulation. Unsolicited applications shall be awarded in accordance with the provisions of paragraph (c)(4) of this section. The following guidelines for unsolicited applications should be considered by any potential applicant:

(1) *Advance consultation.* Organizations or individuals who are interested in submitting an unsolicited application are encouraged, before expending extensive efforts in preparing a detailed unsolicited application or submitting any proprietary information to the Government, to make preliminary inquiries of DOE program staff as to the general interest in the type of demonstration project contemplated.

(2) *An unsolicited application received when a DOE solicitation is anticipated.* If DOE has planned the solicitation of applications for the demonstration of a particular energy technology under AFDP and an unsolicited application is received on that particular energy technology, the Secretary will reject such unsolicited application and advise the applicant to file the application in response to the Solicitation Announcement.

(3) *Submission point.* All unsolicited proposals for new or renewals of financial assistance awards will be submitted to DOE, Office of Resource Applications, 12th and Pennsylvania Avenue, N.W., Room 3400, Washington, D.C. 20461.

(4) *Proprietary data.* Unsolicited applications may include data which the applicant does not want disclosed for purposes other than the evaluation of the application. (See § 796.31 (c), (d), (e) and (f) of this regulation.)

§ 796.8 Projects utilizing Federal leases.

(a) The Secretary shall inform the appropriate supervisor of the Department of Interior (DOI) (as defined in 30 CFR 211.2(x), 221.2(c) and 231.2(c)) or other appropriate DOI office with supervisory authority over operations and production (as defined in Subchapters P and Q of Title 25 CFR) when a loan guarantee is approved involving a Federal lease, in order to provide for future coordination of the loan guarantee program and DOI Federal lease administration.

(b) Under 43 CFR Parts 3100 and 3500; 30 CFR Parts 211, 221, and 231; Subchapters P and Q of title 25 CFR, and under existing oil shale leases issued by DOI, a lessee may apply for suspension of operations or production, or both (or for relief from any drilling or producing requirements) under a Federal lease. When a loan guarantee has been issued under this regulation for a project to be conducted by a borrower who is a lessee under the above cited regulations or under an oil shale lease, the borrower shall submit any such suspension application to the Secretary together with a statement setting forth complete information showing the effect of such suspension on the borrower's ability to comply with terms and conditions set forth in the loan agreement. The Secretary will notify the borrower in those situations when approval of the suspension application might cause default by the borrower. Except in cases where potential environmental safety or, if applicable, reservoir damage is imminent, the borrower shall obtain the Secretary's approval prior to submitting a suspension application to the DOI supervisor or other appropriate DOI office with supervisory authority over operations and production.

(c) Federal leases issued by DOI may provide for the readjustment of lease terms and conditions at stated intervals. When a guarantee under this regulation has been issued for a loan on a project to be conducted by a borrower who is a lessee, and the borrower files an objection to any proposed readjustment with a DOI authorized officer (as defined in 43 CFR 3000.0-5(f)), or other appropriate DOI officer with jurisdiction over leased lands (as defined in Subchapters P and Q of 25 CFR), a copy of the objection shall be submitted concurrently by the borrower to the Secretary. The Secretary shall forward a copy of the objection to those lenders concerned, and shall consult with the authorized officer or appropriate office of DOI having jurisdiction over leased lands regarding any final action that might terminate the lease. The Secretary shall prepare an assessment on the effect of the proposed readjustment of lease terms and conditions that would substantially limit the borrower's ability to comply with the terms and conditions set forth in the loan agreement. The Secretary shall forward the assessment in writing to the authorized officer or other appropriate officer of DOI having jurisdiction over leased lands, and the supervisor or other appropriate officer of DOI having jurisdiction over leased lands, and the supervisor or other appropriate officer of DOI with supervisory authority over operations and production.

(d) Upon receipt by the lessee (borrower) of notice of a proposed cancellation of a lease by the Secretary of Interior, authorized officer, or other appropriate officer of DOI with jurisdiction over leased lands, the lessee will provide the Secretary and the lender with notice of such proposed action. Upon receipt of such notice the Secretary will consult with the authorized officer of DOI to determine whether the public interest can best be served by an acceptable alternative agreement.

§ 796.9 Project costs.

(a) The cost elements set forth in this section are for the purpose of illustrating the manner by which the construction, startup, and related costs of the project may be determined. It is expected that the costs will be accumulated in accordance with generally accepted accounting principles and practices that are consistently applied. Those reasonable and customary costs that are paid, expected to be paid, and which are directly related to the project shall be used to estimate the total cost (i.e., construction, startup, and related costs) for a demonstration facility. These costs may include, but are not limited to:

(1) Financial and legal services costs, including professional services and fees necessary to obtain licenses, permits and to prepare environmental reports and data;

(2) Research, exploration or development costs, only to the extent necessary to complete the project;

(3) Interest costs and other normal charges affixed by lenders;

(4) Costs of acquisition or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition or rental, site improvements, site restoration, and abandonment costs, access roads and fencing;

(5) Necessary and appropriate insurance and bonds of all types;

(6) Engineering, architectural, legal and bond fees, and insurance paid in connection with construction of demonstration facility; and materials, labor, services, travel and transportation for facility construction, startup, and tests; and costs for the purchase of flood insurance when it is required;

(7) Equipment purchase and startup testing;

(8) A reasonable contingency reserve to cover the possibility of cost increases during the processing of the application and during construction;

(9) Costs to provide original safety and environmental protection equipment, facilities, and services;

(10) Employees' salaries, wages, consultant's fees, and other operating expenses associated with the demonstration plant startup;

(11) Where applicable, fees for royalties and licenses negotiated through "arms length" transactions that relate to the construction phase of the project;

(12) Cost of any current assets directly related to the project, including cash reserves, and other forms of working capital;

(13) Other operating expenses associated with the demonstration plant startup;

(14) Costs of data gathering (technical, environmental, economic and socioeconomic impacts) and preservation;

(15) Costs of community impact assistance (planning and essential community development costs directly resulting from the siting, construction, and operation of the proposed demonstration facility) to the extent that such community impact assistance is

to be provided by the applicant obtaining Federal funds for its demonstration facility;

(16) Other necessary and reasonable costs.

(b) Costs that are not considered as allowable project costs include the following:

(1) Fees and commissions charged to the borrower, including finder fees, for obtaining Federal funds;

(2) Parent corporation's general and administrative expenses, and other parent corporation assessments, including company organizational expenses;

(3) Goodwill, franchises, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Amounts expended for facilities and equipment used in the extraction of minerals other than coal or shale. In the case of coal, inclusion of costs for material and equipment used in extraction may only be included to the extent that the Secretary determines that the coal is to be converted into alternative fuels by the demonstration facility;

(6) Costs that are excessive or are not directly required to carry out the project as determined by the Secretary;

(7) Operating expenses incurred after startup.

(c) The Secretary may audit any or all cost elements included by the applicant in the estimated project cost and reserves the right to exclude or reduce the amount of any allowable project cost which the Secretary determines to be unnecessary or excessive. The applicant shall make available records and other data necessary to permit the Secretary to carry out such review. In carrying out this responsibility, the Secretary may utilize employees of Federal agencies or may direct the borrower to submit to a review performed by an independent public accountant or other competent authority.

§ 796.10 Demonstration facility requirements and conditions.

A guarantee or a commitment to guarantee a loan or cooperative agreement may be made only if the following demonstration facility requirements and conditions are met as determined by the Secretary:

(a) The project will be in conformance with established environmental regulations. The issuance of a guarantee under this regulation is subject to the provisions of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et. seq., Pub. L. 91-190) and applicable regulations, rules and guidelines implementing NEPA. NEPA requires the identification and environmental review of "major Federal actions significantly affecting the quality of the human environment." The environmental review to be performed by an applicant will also include an analysis of the environmental impacts associated with any essential community development to be assisted pursuant to Subpart F, "Community Impact Assistance," of this regulation.

(b) In addition to generally applicable criteria used to determine the proper scope of environmental review to be accorded individual applications, DOE shall review and consider the environmental impacts associated with the commercial operation of the project throughout its useful life. Such considerations shall be carried out even where the proposed guarantee may be limited to only a small or preliminary segment of the entire commercial project. Any specific actions under a guarantee, such as approval of a disbursement, shall not be made unless the applicable requirements of the NEPA and the DOE regulations implementing NEPA have been met.

(c) The project will conform with the provisions of Executive Orders 11988—Floodplain Management, and 11990—Protection of Wetlands, and with DOE regulations 10 CFR Part 1022, 44 FR 12594, Mar. 7, 1979.

(d) The project is considered to be technically and economically feasible, and environmentally acceptable.

(e) Any affected Indian tribe(s) has been involved in the planning of the project to the extent that the demonstration facility would be located on Indian tribe(s) lands, or where a substantial portion of the feedstock for a facility is to be obtained pursuant to an agreement with an Indian tribe.

(f) There is sufficient evidence that the applicant will initiate and complete the project in a timely, efficient, and acceptable manner.

(g) The project will be built and operated in the United States.

(h) The project is not for the manufacture of component parts for demonstration facilities eligible for assistance under this regulation.

§ 796.11 Guarantee requirements and conditions.

(a) In addition to meeting the requirements set forth in § 796.5, "Financial assistance—general," a guarantee for a loan for a demonstration facility shall be made only if the following requirements and conditions are met as determined by the Secretary:

(1) The Secretary finds that other methods of financing the demonstration facility are not reasonably available to the applicant;

(2) The amount of a loan guarantee for any demonstration facility shall not exceed 75 percent of the estimated construction, startup, and related costs for such facility; where only a partial guarantee is made by the Secretary, the guarantee agreement and underlying loan agreement will include adequate provisions regarding the rights, interests, and responsibilities of the parties in the event of a default, and disposition of any receipts obtained after liquidation;

(3) Full repayment of the guaranteed loan is to be made over the lesser of 20 years, or a period equal to 90 percent of the expected average useful economic life of the project's major physical assets. In calculating such period the Secretary shall utilize generally accepted accounting principles and practices;

(4) The amount of the loan guaranteed, when combined with other funds available to the applicant, will be sufficient to carry out the project, including adequate contingency funds;

(5) There is a reasonable assurance of repayment of principal and interest of the loan by the borrower;

(6) The project assets and other collateral or surety as determined by the Secretary to be necessary are pledged by the borrower as security for the repayment of the loan;

(7) The guarantee agreement or related documents include the following provisions with respect to patents, technology and other proprietary rights:

(i) Detailed terms and conditions as the Secretary deems appropriate to protect the interests of the United States in the case of default and to have available all the patents and technology necessary for any person selected including, but not limited to the Secretary, to complete and operate the defaulting project;

(ii) A requirement that patents, technology, and other proprietary rights which are necessary for the construction and operation of the demonstration facility are reasonably available for use by others (e.g., United States Government or other parties designated by the United States Government) on equitable terms;

(iii) A requirement that patents, including any inventions for which a waiver was made by the Secretary under Section 9 of the Act and technolgy resulting from the demonstration facility, shall be treated as project assets of such facility; and

(iv) A requirement that inventions conceived or first actually reduced to practice in the course of or under a guarantee, title to which is vested in the United States, shall not be treated as project assets for disposal purposes unless the Secretary determines in writing that it is in the best interests of the United States to treat them as project assets.

(8) The loan guaranteed bears an interest rate, determined by the Secretary in consultation with the Secretary of Treasury, to be reasonable taking into account the range of interest rates prevailing in the private sector for similar government guaranteed obligations of comparable risk.

(9) Any loan for the project which is not part of the guaranteed loan is subordinate to the guaranteed loan, and the guaranteed loan is in a first lien position regarding all assets of the project and all collateral security pledged. However, if any of the assets offered by the borrower as collateral security for the guarantee are subject to prior financing liens by other creditors, DOE will require that such prior

lien creditors be removed or an acceptable legal arrangement be made with such prior lien creditors where DOE will be protected in the event of default. An arrangement of this nature must be in the form of written agreement between DOE and the prior lien creditors, and provide the following conditions:

(i) Ample notice of default and collateral security sale;

(ii) A plan of liquidation offering mutual protection to DOE and other creditors; and

(iii) An option on the part of DOE, which would be assignable to a third party, to have the first lien debt payable according to the original installment terms (even after default) if the project operation is undertaken by DOE or an acceptable third party, or on behalf of or through DOE.

(10) The loan guarantee agreement provides that the Secretary shall, after a period of not less than 10 years from the date of such agreement, taking into consideration whether the Government's needs for information to be derived from the project have been substantially met, and whether the project is capable of commercial operation, determine the feasibility and advisability of terminating the Federal participation in the demonstration facility. In the event that a decision for termination is made, the borrower, upon notification by the Secretary, has not less than two and not more than three years to arrange for alternative financing. At the expiration of the designated period of time, if the borrower has been unable to secure alternative financing, the Secretary shall charge the borrower an additional fee of one percent per annum on the remaining principal to which the Federal guarantee applies, and the guarantee shall remain in full force and effect.

(11) When a lender holds a guaranteed and a nonguaranteed portion of a loan, payments of principal or interest made by the borrower, shall be applied by the lender to reduce the guaranteed and nonguaranteed portions of the loan on a proportionate basis.

(12) The borrower agrees that no change of project ownership or financing arrangement will occur without prior written consent of the Secretary.

(13) There is satisfactory evidence that the applicant is willing, competent and capable of performing the terms and conditions of the loan.

(14) The lender agrees not to accelerate payment of the borrower's indebtedness, except as maybe otherwise permitted in the guarantee agreement.

(15) The borrower and lender agree that provisions for servicing the loan and monitoring the project are to be provided for by the lender or other parties satisfactory to the Secretary.

(16) The guarantee agreement or related documents identify those items of information which the borrower will make available to the Secretary for public dissemination.

(17) The applicant (borrower) agrees to comply with the Flood Disaster Protection Act of 1973 (Pub. L. 92-234).

(18) Wages and rates to be paid to laborers and merchants employed by contractors or subcontractors in the performance of construction work are not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-5).

(19) The borrower agrees to carry out an acceptable plan for small business concerns and disadvantaged business concerns to participate in the project to the optimum extent feasible, consistent with the size and nature of each project.

(20) The borrower agrees not to undertake any work in connection with the project for another Federal agency without the Secretary's written approval.

(21) In the event that the indebtedness to be guaranteed pays interest which is excluded from the gross income of the holder pursuant to the provisions of the Internal Revenue Code of 1954, as amended, the debt will not be guaranteed by the Secretary unless the purchaser/holder of the debt is the Federal Financing Bank.

(b) Where the cost of a demonstration facility to be assisted with a loan guarantee or commitment to guarantee exceeds $50 million, the following procedures shall be complied with:

(1) The making of such guarantee is specifically authorized by Congress; or

(2) Both Houses of Congress pass a resolution stating in substance that they favor the making of such guarantee.

§ 796.12 Loan agreement requirements and conditions.

In addition to meeting the requirements set forth in § 796.11, "Loan guarantee requirements and conditions," a guarantee for a loan may be made only if the underlying loan agreement contains provisions satisfactory to the Secretary and which meet the following requirements:

(a) A minimum period of grace of sixty days from the date a principal or interest payment is due.

(b) Any extension of time over this grace period by the lender for the making of any payment in whole or in part must be agreed to by the parties and approved by the Secretary.

(c) The orderly and ratable retirement of the loan. This includes sinking fund provisions, installment payment provisions, or other methods of payment and reserves. To the maximum extent possible, repayment or provision therefore shall be required to be made in equal payments payable at equal intervals.

(d) Acceptable prepayment and acceleration provisions, exercised at the option of the borrower without penalty, are included.

(e) An acceptable provision for deferring payments of principal until income from the project is sufficient to meet this obligation.

(f) Such other terms and conditions necessary for the protection of the interests of the United States.

§ 796.13 Guarantee fees.

Guarantee fees shall be imposed on the guaranteed portion of the loan and are computed at a rate of one percent per annum on the outstanding principal balance. Payments of the guarantee fee shall be made at the time of the closing of the guarantee and annually, thereafter, or at other intervals to be determined by the Secretary. The guarantee fee shall be collected from the lender and shall be used for the purposes of defraying the costs of administration of AFDP. This guarantee fee is paid by the borrower and may be included in the cost of the project. If principal and interest assistance is in effect, payments of this fee may be deferred by the Secretary for the term of the principal and interest assistance contract.

§ 796.14 Cooperative agreement requirements and conditions for a modular size oil shale facility.

(a) In addition to meeting the requirements set forth in § 796.5, "Financial assistance—general", a cooperative agreement under this regulation shall be awarded only for a demonstration facility that is determined by the Secretary to be constructed at a modular size for the conversion of oil shale alternative fuel.

(b) Modular shale oil facilities supported by cooperative agreements shall meet the requirements of section 8 and other provisions of the Act and also applicable DOE regulations pertaining to cooperative agreements (See proposed DOE assistance regulation for Cooperative Agreement, 44 FR 20594, Apr. 5, 1979). The cooperative agreement shall provide for financial assistance for a portion of the construction, startup, and related costs as described in § 796.9, "Project costs", plus operation and maintenance costs, of such facility provided that:

(1) The maximum amount of such assistance does not exceed 75 percent of the estimated project costs, as well as the operation and maintenance costs of such facility;

(2) The receipts from the sale of any products produced during the operation of the demonstration facility are to be used to offset the costs incurred in the operation and maintenance of the facility and any surplus thereafter shall be shared on a pro rata basis by DOE and the parties to the cooperative agreement;

(c) The amount of the financial assistance provided for by the cooperative agreement, when combined with other funds available to the applicant from other sources, will be sufficient to carry out the project for which the cooperative agreement is made, including adequate contingency funds.

(d) Where the cost of the demonstration facility to be assisted with a cooperative agreement exceeds $50 million the following procedures shall be complied with:

(1) The making of such cooperative agreement is specifically authorized by Congress; or

(2) Both Houses pass a resolution stating in substance that the Congress favors the making of such cooperative agreement;

(e) After successful demonstration as determined by the Secretary, the assistance recipient of the modular size oil shale facility may be eligible for additional financial assistance in the form of a loan guarantee for the purposes of demonstrating a full-size oil shale facility. The assistance recipient may purchase the Federal interest in the modular size facility as represented by the Federal funds contributed under the cooperative agreement;

(1) By means of a cash payment to the United States, or;

(2) By an allocation of a share of the products or sales resulting from such expanded operation, as determined by the Secretary.

(f) If the Secretary determines that the expansion of such facility is not warranted, the Secretary may, at the option of the assistance recipient, dispose of the modular-size oil shale demonstration facility to the assistance recipient at not less than fair market value (as determined by the Secretary) as of the date of the disposal; or the Secretary may otherwise dispose of the modular-size facility in accordance with applicable provisions of law, and distribute the net proceeds thereof, after expenses of such disposal, to the assistance reicipient in proportion to the assistance recipient's share of the costs in such facility.

(g) A cooperative agreement shall be entered into by the Secretary under this regulation only if the Secretary finds that other means of project cost funding is not reasonably available to the applicant.

(h) The cooperative agreement provides that the assistance recipient will not undertake any work in connection with the project for another Federal agency without the Secretary's written approval.

§ 796.15 Principal and interest assistance contract.

(a) With respect to any loan guaranteed pursuant to this regulation, the Secretary may enter into a principal and/or interest assistance contract with the borrower to pay the lender, on behalf of the borrower, the principal and interest charges that become due and payable on the unpaid balance of such loan, if the Secretary finds that:

(1) The borrower is unable to meet principal or interest payments or both;

(2) It is in the public interest to permit the borrower to continue to pursue the purposes of the project;

(3) The probable net benefit to the Federal Government in paying such principal or interest will be less than that which would result in the event of a default for the nonpayment of principal or interest;

(4) The amount of principal or interest payment which may be made under this section will be no greater than the amount of principal or interest that the borrower is obligated to pay under the loan agreement; and

(5) The borrower agrees to reimburse the Secretary for such payment (including interest) on such terms and conditions which are satisfactory to the Secretary and executes all written contracts required by the Secretary for such purpose.

§ 796.16 Cost overruns.

(a) At the discretion of the Secretary, a guarantee agreement may be amended to increase the amount of the loan guaranteed in the event that the actual project cost incurred during the construction and/or startup phase of the project exceeds the original estimated project cost. In no event may the guarantee be increased to cover overruns that amount to more than 60 percent of the actual overrun costs. All the following conditions must be met by the borrower before the Secretary may determine whether to amend the guarantee agreement to cover such cost overruns:

(1) The Secretary must be notified as soon as overrun is anticipated, along with the reasons for such cost overrun;

(2) The borrower, when requesting overrun assistance, provides a revised expected completion date, and the construction and startup costs for the project;

(3) The borrower submits an acceptable plan indicating how the borrower's share of the cost overruns will be funded;

(4) The borrower provides a list of the additional collateral, if any, to be pledged for the increased guarantee(s) to cover the expected cost overruns; and

(5) The borrower provides updated information on the project economics to indicate that a reasonable assurance of repayment of the guaranteed loan (including the cost overruns) still exists;

(b) Based on the information submitted by the borrower and other information known to the Secretary, the Secretary may determine, at his/her discretion, to provide for the guarantee of additional loan funds for the expected cost overruns if the Secretary finds that:

(1) The continuation of the project is worthwhile to meet AFDP objectives and is in the public interest; or

(2) The probable net costs to the Government in increasing the guarantee agreement to reflect the increase in the loan guaranteed, in the event of cost overruns, will be less than that which would result in the event of default.

§ 796.17 Patent and technical data.

Title to inventions conceived or first actually reduced to practice in the course of or under any loan guarantee or commitment to guarantee or cooperative agreement authorized by these regulations shall vest in the Government, except the Secretary may waive the rights of the Government in accordance with Section 9 of the Act. Cooperative agreements and loan guarantees or commitments to guarantee entered into under this regulation shall incorporate, to the extent appropriate, the patent provisions contained in DOE's regulations on "Patents, Data and Copyrights" (41 CFR Part 9-9) and appropriate data and copyright provisions.

§ 796.18 Federal Financing Bank.

(a) The Federal Financing Bank (FFB) is an agency operating under the United States Treasury Department which has authority to purchase federally guaranteed debt. Loans guaranteed under this regulation may be funded through private lenders or the FFB. Funding through private lenders will have preference, except in the following cases:

(1) Whenever the Secretary determines, after consultation with the Secretary of Treasury and negotiation with the private lender, if any, or another private lender that the interest rate, maturity, lending fees, or other terms and conditions applicable to the borrower do not reflect the value of a guarantee backed by the full faith and credit of the United States; or

(2) The indebtedness to be guaranteed pays interest which is excluded from the gross income of the holder pursuant to the provisions of the Internal Revenue Code of 1954, as amended.

(b) Whenever a loan is funded through the FFB, the loan will be serviced in accordance with the loan servicing requirements as described in § 796.50, "Loan servicing" of Subpart D of this regulation by parties acceptable to the Secretary. The cost of servicing will be paid by the borrower. In addition, the borrower shall pay the guarantee fee directly to the Secretary. Such fee may be included as a project cost.

§ 796.19 Applicability of other laws.

Nothing in this regulation may be construed as affecting the obligations of any party to comply with Federal, state and local environmental, land use, water, health safety, antitrust laws and regulations or to obtain applicable Federal, state, and local permits, licenses and certificates.

§ 796.20 Full faith and credit and incontestability.

The full faith and credit of the United States is pledged to the payment of all guarantees, issued in accordance with this regulation, with respect to principal and interest. The guarantee agreement shall be conclusive evidence that the guarantee and the underlying loan comply with the provisions of the Act, and this regulation. Such a guarantee shall be valid and incontestable by the Government, except for fraud or misrepresentation by the holder of the loan.

§ 796.21 Deviations.

To the extent that such requirements are not specified by the Act or other applicable statutes, DOE's Assistant Secretary for Resource Applications may authorize deviations on an individual application basis from the requirements of the regulation (except environmental considerations and requirements) upon a finding that such deviation is essential to program objectives and the special circumstances in the application make such deviation clearly in the best interest of the Government. Recommendation for any deviation shall be submitted in writing to the Assistant Secretary for Resource Applications. Such recommendations should include a supporting statement, which indicates briefly the nature of the deviation requested and the reasons therefore. This deviation authority may not be redelegated.

§ 796.22 FY 80 appropriation modification.

(a) Except to the extent obviated or deemed satisfied by legislation, the procedures established by these regulations shall be applicable.

(b) Pub. L. 96-126 provides appropriations for up to $1,500,000,000 in indebtedness to be guaranteed by the Secretary for alternative fuel production facilities and further deemed that certain requirements for Congressional action pursuant to guarantees made under that appropriation were satisfied. By virtue of this language, the requirements for Congressional action specified in §§ 796.11(b) and 796.40 (g), (h) and (i) are deemed satisfied and therefore do not apply to guarantees made under the appropriations of Pub. L. 96-126.

(c) Pub. L. 96-126 also obviates, for guarantees for oil shale facilities issued under that appropriation, the requirement of section 19(b)(1) of the Act that no loan guarantee for a full sized oil shale facility shall be issued by the Secretary until after successful demonstration of a modular facility. Therefore, that portion of § 796.14(e) of this regulation requiring such modular demonstration does not apply to guarantees made under the appropriations of Pub. L. 96-126.

§ 796.23 Nondiscrimination in projects receiving Federal assistance.

All applicants receiving Federal assistance under this regulation shal agree:

(a) Not to discriminate against an person on the grounds of race, colo national origin, sex, handicap, or ag in the carrying out or completion o any project where Federal assistanc is issued under this regulation, and t comply with the DOE "Nondiscrimination in Federally Assisted Programs regulations implementing the Civ Rights Requirements of Title VI o the Civil Rights Act of 1964; section 1 of the Federal Energy Administratio Act of 1974; section 401 of the Energ Reorganization Act of 1974; Title I of the Higher Education Amendmen of 1972; section 504 of the Rehabilit tion Act of 1973; the Age Discrimin tion Act of 1975; and the Civil Righ Requirements administered pursua to the DOE Organization Act;

(b) To incorporate or cause to be i corporated into all construction co tracts related to the project the pro sions prescribed by 41 CFR Chapter pursuant to the provisions prescrib for Government contracts by Secti 202 of Executive Order 11246, Sept. 1965, 30 FR 12319 (regarding nond crimination in employment by Go ernment contractors and subcontr tors); and

(c) To take positive efforts to ma mize the utilization of small and dis vantaged business concerns in conn tion with the assistance received.

Subpart B—Applications and General Filing Instructions

§ 796.30 Applications.

Applications for loan guarantees and requests for cooperative agreements for demonstration facilities shall comply with all requirements in this regulation, applicable appendices or solicitation announcements to this regulation. DOE intends to issue an appendix(ces) or solicitation announcement under this regulation which will set forth the priorities, preferences, competition techniques, selection and evaluation criteria to be considered by it in implementing particular energy technology demonstration project(s). These documents will also provide the potential applicants with any further requirements for information (i.e., technical, financial, environment, etc.) to be submitted with their application and the time period for submission of such application. (See also § 796.7, "Guidelines for selection of loan guarantee applications").

§ 796.31 General filing instructions for a demonstration facility.

(a) A demonstration facility loan guarantee application and a request for a cooperative agreement shall be filed with the Secretary in accordance with the following general procedures:

(1) An application for a loan guarantee or a request for a cooperative agreement for a demonstration facility under this regulation must be signed by the applicant or authorized representative of the applicant and must be in such form and content as further required in an applicable appendix or solicitation announcement made under this regulation; and

(2) A guarantee application or a request for a cooperative agreement shall describe the demonstration facility for which the guarantee is sought and shall include a schedule of the construction and operation of the demonstration facility on a milestone basis that shall be utilized in assessing disbursement requests.

(b) Prior to DOE requesting the submission of loan guarantee applications for a specific demonstration or requests for a cooperative agreement for a modular-size oil shale demonstration facility, preliminary discussions may be conducted by applicable DOE program personnel with appropriate parties who wish to obtain information or advice regarding eligibility requirements for compliance with these regulations and the filing of required supporting information.

(c) Technical, financial, environmental, marketing and management information maintained by the Secretary under this regulation will be made available to the public subject to the provisions of 5 U.S.C. 552 and 18 U.S.C. 1905 and to other Government agencies in a manner that will facilitate its dissemination: *Provided*, That:

(1) Subject to the requirements of law, information such as trade secrets, commercial and financial information, and other information or data concerning the demonstration project that the applicant or lender submits to the Secretary in writing during the preliminary discussions or at other times throughout the duration of the project, on a privileged or confidential basis, will in accordance with the DOE regulations concerning public disclosure of information not be disclosed by DOE without prior notification to the submitter. Any submitter asserting that the information is privileged or confidential shall appropriately identify and mark such information.

(2) Upon a showing satisfactory to the Secretary by any person that any information or portion thereof obtained under this program by the Secretary directly or indirectly from such person would, if made public, divulge trade secrets or other proprietary information of such person, the Secretary may not disclose such information, and disclosure thereof will be punishable under 18 U.S.C. 1905; and

(3) The Secretary may, upon request, provide such information to any delegate of the Secretary for the purpose of carrying out this Act, and the Attorney General, the Secretary of Agriculture, the Secretary of the Interior, the Federal Trade Commission, the Environmental Protection Agency, the General Accounting Office, other Federal agencies, or heads of other Federal agencies, when necessary to carry out their duties and responsibilities under these regulations and other

laws, but such agencies and agency heads may not release such information to the public. This section is not authority to withhold information from Congress, or from any committee of Congress upon request of the Chairman.

(d) Except where prohibited by other provisions, information submitted by the applicant shall be updated and furnished to the Secretary whenever there are significant changes occurring during the period that DOE is considering the guarantee application.

§ 796.32 Supporting information for a demonstration facility.

(a) The lender, if applicable, and borrower, shall provide information, as prescribed by the Secretary in applicable appendices and solicitation documents, to supplement the application. The following items are provided to illustrate the range of supporting information which may be required to enable the Secretary to prepare a recommendation with respect to any pending application:

(1) A full description of the scope, nature, extent, milestones and location of the proposed project and financial assistance sought;

(2) Evidence of the applicant's previous and current interest in alternative fuels technology, as related to the application;

(3) A description of the project's technical and economic feasibility including a detailed list of construction, startup and related costs for the entire project;

(4) A description of the applicant's organization, corporate charter, bylaws, appropriate authorizing resolutions, and when applicable, a copy of the business certificate or partnership agreement;

(5) The past financial history of the firm, including financial statements and projections as to the firm's future financial status;

(6) Business and financial interests of principal organizations (e.g., parent and/or subsidiary) of the applicant;

(7) A description of salaries and other financial remuneration, including profit sharing and stock options, to be paid to principal officers and principal employees of the applicant who are or will be directly associated with the project;

(8) Evidence supporting the applicant's ability to complete the project and an analysis of the market for the product to be produced from the demonstration facility and the relevant economics justifying the analysis;

(9) A description of the management plan of operations to be employed in carrying out the project;

(10) Information covering the management experience of each officer or key person associated with the project;

(11) Evidence showing that the amount of the financial assistance, together with other financing, will be sufficient to carry out and complete the project;

(12) Credit history of the borrower and any principal party who owns or controls a five percent or greater interest in the borrower and its major affiliates, if appropriate;

(13) A description of the intended sources and amount of capital, to be provided by the applicant for the construction and initial operation of the demonstration facility together with evidence of a commitment from the intended sources of such capital, a copy of each such agreement, and evidence of the financial ability of each source to honor its commitment;

(14) A detailed, cash flow breakdown of the estimated construction, startup, and related costs, plus operating and maintenance costs, of the project, the amount of the financial assistance necessary and cash flow estimates for the first five years of project operation;

(15) The terms and conditions of the loan to be guaranteed, including the proposed interest charges and principal repayment schedule to the extent such information is known at the time of filing an application;

(16) A listing of assets, associated, or to be associated, with the project and which will serve as collateral for the loan, including appropriate data as to the value and useful life of any physical assets and a description of the value of any other associated security;

(17) Copies of all current or proposed contracts between the applicant and any third parties which are significant to the proposed project;

(18) A description of other Federal financial assistance (e.g., direct loans, guaranteed loans, grants) available or expected to be made available to the applicant in connection with the demonstration facility;

(19) Lists of all applications filed and approvals issued by Federal, state, and local government agencies for permits and authorizations to conduct construction and operations associated with the project. If these approvals have not been obtained, or applications not filed, the estimated date of such filings and approvals shall be provided;

(20) An environmental report prepared in accordance with the guidelines specified in the appendix(ces) or solicitation announcements made under this regulation, or, in the event that any Federal or state agency has prepared an environmental impact statement regarding this project, a copy of this document;

(21) A plan or program to acquire, evaluate and monitor the environmental, economic, social and technological impacts of the proposed demonstration facility, if appropriate;

(22) A copy of the applicant's plans for providing for small and disadvantaged business concerns to participate in the project;

(23) A copy of the applicant's nondiscrimination policies and programs and information on any pending affirmative action complaints;

(24) A copy of the approval by the appropriate Indian tribe and Secretary of the Interior concerning the Indian tribe's involvement, if applicable, with the applicant in the demonstration facility;

(25) A copy of the affirmation by the applicant supporting the necessity for a Federal loan guarantee. Applicant shall provide information necessary for a determination by the Secretary whether reasonable methods of financing other than a Federal guarantee or a cooperative agreement are available to the applicant;

(26) Other information as may be required by the Attorney General or the Chairman of the FTC to assess the impact of a specific loan guarantee or cooperative agreement on competition and concentration in the production of energy;

(27) An analysis of any adverse community impacts which may result from the AFDP;

(28) Any other information requested by the Secretary or specified in an appendix to this regulation or in a solicitation announcement, if applicable;

(b) If a lender has been specified by the applicant and has joined in the preparation of the application, then the following information from the lender shall be provided:

(1) Description of the lender's organization and legal authority under which the lender operates its business, together with a copy of any appropriate authorizing resolutions necessary for the transaction between the lender and applicant;

(2) Copies of investigations obtained from credit bureaus, references, inquiries, and professional associations regarding the credit worthiness of the borrower;

(3) Information covering the management experience of each officer or key person in the lender's organization who is or will be associated with the loan;

(4) A description of the management plan to be employed in servicing and monitoring the loan;

(5) A written affirmation by the lender supporting the necessity for a Federal loan guarantee;

(6) The lender's written assessment of all aspects of the applicant's loan application, in sufficient detail, as would be completed by any prudent lender considering a loan without a guarantee;

(7) A copy of the proposed loan agreement to be executed by the applicant and the lender, together with copies of all other documents proposed by the lender to be used in the financial transactions;

(8) A copy of the lender's conditional loan commitment document issued to the applicant, if applicable;

(9) When appropriate to the project, evidence of the lender's experience in surveying the financial aspects of complex technological projects;

(10) Any proposed marketing plan under which the lender will sell any

portion of the debt to secondary marketholders;

(11) A disclosure by the lender whether any of its officers, directors or major stockholders or other parties having a major financial interest in the lender have a financial interest in the applicant and whether any of the applicant's officers, directors, major stockholders or other parties having a major financial interest in the applicant have a financial interest in the lender; and

(12) Any other information requested by the Secretary or as may be specified in an applicable appendix(ces) to this regulation or in a solicitation announcement, if applicable.

Subpart C—Application Processing

§ 796.40 Application processing for a loan guarantee for a demonstration facility.

(a) Upon receiving an application for a loan guarantee for a demonstration facility and other relevant information, the Secretary shall determine whether:

(1) The application is complete and in compliance with this regulation and the applicable appendices or solicitation announcements made under this regulation;

(2) The type of technology, scope, size financial assistance sought, and geographic location of the project to be demonstrated falls within the AFDP objectives and the applicable appendix and sufficient loan guarantee authority and appropriations are available to conduct the project;

(3) The adverse community impacts resulting from the proposed demonstration facility have been adequately evaluated by the applicant; and

(4) The terms and conditions of the proposed loan as set forth in the application are generally acceptable to the Secretary and whether there is satisfactory evidence that the lender, if applicable, is willing, competent and capable of performing the terms and conditions of the loan guarantee agreement;

(b) The Secretary will, upon completion of the determinations in paragraph (a) of this section, inform the applicant whether its application meets the initial requirements. The Secretary may request that the applicant provide additional information in order for the Secretary to further consider the application if the Secretary so elects. Upon submittal of the requested information, the Secretary will determine whether the application meets the requirements of paragraph (a). If the Secretary thereafter determines that the application does not meet the initial requirements, the Secretary will inform the applicant of the basis of the disapproval of its application.

(c) If the Secretary determines that an application meets the requirements of paragraph (b) of this section, the Secretary shall inform:

(1) The governor of the state, officials of each political subdivision and Indian tribe(s), as appropriate, in which the facility would be located or which would be adversely impacted by such facility.

(2) The general public by notice in the FEDERAL REGISTER and in local newspapers (of general circulation in the geographic area where the demonstration facility would be located), to the extent appropriate. Such notice will provide general information on the demonstration facility and specify how interested parties may comment on the proposed application for financial assistance for such demonstration facility;

(3) The Secretary of Interior, if the proposed demonstration facility is to be located on Indian land or if a substantial portion of the feedstock for such facility is to be obtained pursuant to an agreement with any Indian tribe; and

(4) The Advisory Council on Historic Preservation, which may review and comment upon applications for guarantees for any project which would affect property listed or eligible for listing in the *National Register of Historic Places* or which may meet the criteria for listing in the *National Register*, pursuant to 36 CFR Part 800.

(d) The governor of the state in which the proposed demonstration facility would be located shall be requested to submit to the Secretary written comments making a recommendation for or against the location of such facility within the governor's

state within a reasonable period after
the initial notification by the Secre-
tary to such governor. The Secretary
shall not guarantee or make a commit-
nent to guarantee a loan for such a
demonstration facility if the governor
of the state in which the proposed
demonstration facility would be locat-
ed recommends, within a reasonable
period of time after notification by the
Secretary, that such action not be
aken unless the Secretary finds that
here is an overriding national interest
n taking such action to achieve the
purpose of this regulation. If the Sec-
etary decides to guarantee or make a
ommitment to guarantee despite the
ffected governor's recommendation
hat such action not be taken by the
Secretary, the Secretary shall commu-
icate to the governor, in writing, rea-
ons for such determination. The Sec-
etary's decision shall be final unless
therwise determined upon judicial
eview by the reviewing court pursu-
nt to 5 U.S.C. 706(a) (A) through (D).
Such review shall take place in the
Jnited States Court of Appeals for the
Circuit in which the state involved is
ocated, upon application made within
0 days from the date of the Secre-
ary's decision;

(e) After completing the initial de-
erminations as required in paragraph
b) of this section, or after a competi-
ive evaluation of applications in ac-
ordance with § 796.7 "Award proce-
ural guidelines for loan guarantees,"
he Secretary shall forward the
pplication(s) selected for possible
ward of a guarantee to the United
tates Attorney General and to the
hairman of the FTC. The Secretary
hall request written views, comments
nd recommendations (for each appli-
ation selected and forwarded) from
oth of these officials concerning the
npact of a loan guarantee on compe-
tion and concentration in the pro-
uction of energy. The Secretary shall
ve due consideration to the views,
omments and recommendations re-
ived from the Attorney General and
e Chairman of the FTC. Upon re-
ving a recommendation from either
Attorney General or the Chair-
an of the FTC against the award of
guarantee to an applicant, the Secre-
ry shall consider such recommendations in the selection of an applicant for an award of a loan guarantee as follows:

(1) The Secretary, after considering a negative recommendation from the Attorney General or Chairman of the FTC, may nevertheless consider to proceed with the award of the guarantee to such applicant, if the Secretary determines that the energy demonstration project offered by the applicant meets the overall goals of DOE and outweighs any negative recommendation by the Attorney General or Chairman of the FTC; or the Secretary may notify the applicant of the disapproval of its application with reasons for such disapproval;

(2) If the Secretary determines to award the guarantee to an applicant, in spite of the negative recommendation by the Attorney General or the Chairman of the FTC, the Secretary shall forward the decision papers and the recommendations of the Attorney General or the Chairman of the FTC to the President for a written decision on whether it is in the national interest to have the Secretary award a loan guarantee to the applicant; and

(3) If the President upholds the recommendation of the Attorney General or the Chairman of the FTC against making such guarantee, the Secretary shall notify the applicant that its application has been disapproved and the reasons for such disapproval.

(f) If the President upholds the Secretary's determination for awarding the loan guarantee to an applicant under paragraph (e) of this section or the Secretary has selected an applicant after receiving a favorable recommendation from both the Attorney General and Chairman of the FTC, the Secretary shall forward the relevant documents on the proposed demonstration facility of the applicant seeking the loan guarantee to the Secretary of the Treasury for concurrence, with respect to the timing, interest rate and substantial terms of such loan guarantee prior to awarding the guarantee to the applicant. The Secretary of Treasury shall ensure to the maximum extent feasible that the timing, interest rate and substantial terms and conditions of such guarantee will have the minimum possible impact on the capital markets of the United States, taking into account other Federal direct and indirect securities activities.

(g) The Secretary shall forward to the Chairman of the Committee on Science and Technology of the House of Representatives, and to the Chairman of the Committee on Energy and Natural Resources of the Senate, a full and complete report on the proposed demonstration facility of the applicant seeking the loan guarantee. The Secretary shall not finalize the loan guarantee prior to the expiration of 90 calendar days (not including any day on which either House of Congress is not in session because of an adjournment of more than 3 calendar days to a day certain) from the date on which such report on the proposed demonstration facility is received by such committees.

(h) In the event that a commitment to guarantee is to be issued, the Secretary shall not finalize such commitment to guarantee prior to the expiration of 90 calendar days (not including any day on which either House of Congress is not in session because of an adjournment of more than 3 calendar days to a day certain) from the date on which such report is received by such committee. After such period of time has expired, the Secretary may finalize the commitment to guarantee and the subsequent guarantee without further notification to the committees.

(i) The Secretary shall not finalize any loan guarantee or commitment to guarantee for a demonstration facility costing in excess of $50 million unless such guarantee or commitment to guarantee is authorized by Congress, or both Houses of Congress pass a resolution approving such loan guarantee or commitment to guarantee.

(j) Upon obtaining the concurrence of the Secretary of Treasury with respect to the timing, interest rate and substantial terms of the loan guarantee prior to its award to an applicant, and complying with the other requirements of this section, the Secretary may award the loan guarantee or commitment to guarantee to the successful applicant.

§ 796.41 Application processing for a cooperative agreement for a modular size oil shale facility.

(a) Upon receiving an application for a cooperative agreement for a modular size oil shale facility and other relevant information, the Secretary shall follow the procedures set forth in applicable DOE assistance regulations on cooperative agreements (see proposed regulations: 44 FR 20594, Apr. 5, 1979) and other applicable rules or solicitation announcements made under this regulation, and then determine:

(1) Whether the application is complete and in compliance with Section [illegible] and other provisions of the Act and with other applicable DOE regulations pertaining to cooperative agreements;

(2) If the type of technology, scope and size financial assistance sought and geographic location of the project to be demonstrated falls within the AFDP objectives and sufficient funding authority appropriations are available to conduct the project;

(3) If the adverse community impacts resulting from the proposed demonstration facility have been adequately evaluated by the applicant;

(b) Such processing procedures shall follow the same notification requirements and procedures as described in paragraphs (b), (c), (d), (e), (g), (h) and (i) of § 796.40, "Application processing for a loan guarantee for a demonstration facility."

§ 796.42 Closing requirements for a loan guarantee.

(a) When an application for a loan guarantee has been approved by the Secretary in accordance with the procedures described in § 796.40, "Application processing for a loan guarantee for a demonstration facility," the Secretary will notify the lender, if any, and the borrower and provide them with a copy of the proposed guarantee agreement or at that time with a copy of a commitment to guarantee.

(b) To the extent necessary, conferences will be arranged by the Secretary to discuss the terms and conditions contained in the guarantee agreement and other instruments relevant to the transaction.

(c) Upon agreement as to the terms and conditions of the guarantee agreement and other relevant instruments, a closing date agreeable to the parties shall be set.

Subpart D—Guarantee and Project Administration

§ 796.50 Loan servicing.

(a) The loan guarantee agreement shall provide that the lender service the guarantee in accordance with these regulations, except that another party may be selected by the Secretary to service the loan in the event that the Federal Financing Bank is used or in other situations where such course of action is determined by the Secretary to be appropriate.

(b) The lender or other party servicing the loan shall exercise such care and diligence in the disbursement, servicing, and collection of the loan as would be exercised by a reasonable and prudent lender in dealing with a loan without a guarantee.

(c) The lender or other party servicing the loan shall notify the Secretary in writing without delay:

(1) That the disbursement or loan drawdowns for the first project milestone is ready to be made, together with evidence from the borrower that the project has begun or is about to begin;

(2) Of the date and amount of disbursement for each subsequent milestone under the loan;

(3) Of any nonreceipt of payment within 15 days after the date specified for payment, together with evidence of appropriate notifications to the borrower;

(4) Of any known failure, by an intended source of capital to honor its commitment;

(5) Of any known failure by the borrower, to comply with terms and conditions as set forth in the loan agreement or guarantee agreement;

(6) Of a belief that the borrower may fall within any of the default conditions set forth in the loan agreement or the borrower may not be able to meet any future scheduled payment of principal or interest; or

(7) Of any significant changes from the original cash flow projections as evidenced from information and reports by the borrower.

(d) The guarantee agreement or related documents shall require the lender or other party servicing the loan to submit to the Secretary periodic financial reports on the status and condition of the loan.

§ 796.51 Loan disbursements and drawdowns.

(a) Unless otherwise provided in the guarantee agreement, the borrower shall not be provided with any funds under the guaranteed loan agreement until the lender or other party servicing the loan:

(1) Has complied with the notification requirements set forth in § 796.50(b) (1) and (2) of "Loan servicing" and has received written notice from the Secretary that the disbursement for the applicable milestone is approved; and

(2) Has received from the borrower satisfactory documentary evidence that loan drawdowns requested will be used to pay allowable project costs incurred or to be incurred by the borrower. The party servicing the loan or the Secretary may require the borrower to provide documentation setting forth the purposes for which the drawdown is requested and an attestation that the disbursements will be used only for such purposes. Signature on the requesting document will be made by a person authorized to order the expenditure of the borrower's funds.

(b) The party servicing the loan may not release to the borrower drawdowns from any disbursements until the disbursement is approved by the Secretary.

(c) The party servicing the loan may not withhold from the borrower authorized disbursements, except as included in the provisions of the guarantee agreement, without the written approval of the Secretary.

§ 796.52 Financial assistance fund.

(a) As provided for in section 19(n) of the Act, there is established in the Treasury of the United States a separate fund, hereafter referred to as the Fund, for the purpose of carrying out the provisions of paragraph (b), section 19 of the Act.

(b) Appropriations to the Fund that are made available through legislation, repayments made by borrowers in accordance with the terms and conditions in principal and interest assistance contracts, guarantee fees, repayment of loans under Section 19(k)(1) of the Act, and any other moneys, property, or assets derived from operations of this loan guarantee program including foreclosure, repossession or sale of collateral shall be deposited in the Fund, and shall, except as otherwise provided by law, be available to the Secretary for payment to debt holders of principal and interest on loan guarantee agreements and principal and interest assistance contracts made in accordance with this regulation. In addition, balances in the Fund may be used for necessary administrative expenses incurred by DOE or other Federal agencies acting pursuant to DOE direction in carrying out the provisions of this regulation.

(c) If, at any time, the moneys available in the Fund are insufficient to enable the Secretary to pay principal and accrued interest in the event of default or principal and interest assistance payments, the Secretary shall issue to the Secretary of the Treasury notes or other obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of the Treasury. This borrowing authority shall be effective only to such extent or in such amounts as are specified in appropriation acts. Such authority shall be without fiscal year limitation. Redemption of such notes or obligations shall be made by the Secretary from appropriations or other moneys available under this regulation. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall not be less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the notes or other obligations. The Secretary of the Treasury may at any time sell any of the acquired notes or other obligations. All redemptions, purchases, and sales by the Secretary of the Treasury of such notes or other obligations shall be treated as public debt transactions of the United States.

(d) The amounts in the Fund shall be without fiscal year limitations and remain available until expended, with the exception that, if at any time, the Secretary determines that moneys in the Fund exceed the present and foreseeable requirements of the Fund, such amounts in the Fund that are not required to secure outstanding financial assistance obligations shall be paid into the General Fund of the Treasury.

(e) Amounts as may be necessary for direct loans, cooperative agreements and grants for community impact assistance pursuant to section 19(k)(8) of the Act shall be provided in annual appropriation acts.

§ 796.53 Reduction or withdrawal of a guarantee.

(a) The Secretary may reduce or withdraw the guarantee (as to amounts not yet disbursed or drawn down by the borrower) by written notice to the lender and to the borrower if the Secretary determines that:

(1) Initiation of activity on the project has not occurred within the period of time set forth in the guarantee agreement. Within 60 days after the guarantee is withdrawn under this circumstance, the Secretary shall reimburse to the lender the full amount of the guarantee fee paid by the lender if the fee has not been passed to the borrower;

(2) The borrower has failed to acquire the required capital from intended or alternate sources of such capital or has failed to comply with material terms and conditions as set forth in the loan or guarantee agreement. The Secretary shall notify the borrower and the lender that the guarantee will be reduced to the amount of the loan that has been drawn down to the borrower as of the date of the notice. Drawdowns permitted to be made by the lender after such notification is received shall not be covered by a guarantee; or

(3) The lender has failed to comply with any material term or condition as set forth in the guarantee or loan agreement and the Secretary has determined that such breach will increase the financial exposure of the Government and that the guarantee should be withdrawn.

(b) If the Secretary finds that the lender has not complied with a material term of the guarantee or loan agreement, the Secretary will notify the borrower and the lender that the guarantee or loan agreement has been breached. Thereafter, the guarantee may be reduced in the discretion of the Secretary to the amount that has been provided by the lender to the borrower as of the date that the Secretary's notice has been received by the lender. Following notification of the Secretary's determination to reduce the guarantee, the borrower will be allowed reasonable time, in no event less than 6 months, to acquire a substitute lender that is capable of complying with the provisions in the loan and guarantee agreements. If the borrower obtains a substitute lender satisfactory to the Secretary, a new guarantee agreement will be executed.

(c) In the event the Secretary determines that the project's economic success cannot be achieved in accordance with the requirements specified in the guarantee agreement, the guarantee shall be reduced to amounts which have been received by the borrower as of the date of notice.

(d) In no case may the guarantee be reduced below amounts provided in good faith by the lender or holder.

§ 796.54 Assignment.

(a) Except as may be required by law, a holder may, with the Secretary's approval and in a manner specified in the guarantee agreement, assign to another party certain rights and obligations under the loan or guarantee agreement. Such assignment will be in accordance with the provisions of the guarantee agreement.

(b) The lender, except to the extent that specific limitations provided by law or in the guarantees do not permit, may provide other lenders with participating shares in the loan without the prior consent of the Secretary. The guarantee agreement shall specify to what extent and in what manner the loan may be divided into shares. The lender will give advance written notice to the Secretary when participating shares are so provided. The notice shall provide the participant's business name, address, telephone number, and name of official to contact.

(c) The original lender will continue to be responsible for and perform the servicing provisions of the loan guarantee agreement unless the Secretary approves a substitute party to service the loan.

§ 796.55 Project monitoring.

The guarantee agreement or related documents shall provide that the DOE manager and other applicable DOE representatives shall have access to the project site at all reasonable times in order to monitor the performance of the project. The lender, to the extent lawful and within its control, and the borrower will assure availability of information related to the demonstration facilities as is necessary to permit the Secretary to determine technical progress, soundness of financial condition, management stability, compliance with environmental protection requirements, and other matters pertinent to the guarantee. The guarantee agreement or related documents shall identify those items or types of information which the Secretary may not make available for public dissemination.

§ 796.56 Survival of financial assistance agreement.

Loan guarantee agreements under this regulation shall be binding upon the lender, the borrower, the Secretary, and upon their successors and assignees. No delay or failure of the Secretary in the exercise of any right or remedy or partial exercise of any such right or remedy shall preclude any exercise of further rights or remedies; no action taken or omitted by the Secretary shall be deemed a waiver of any such further right or remedy.

§ 796.57 Other Federal assistance.

Nothing in this regulation shall be interpreted to deny or limit the borrower's right to seek and obtain other Federal financial assistance (e.g., grants, cooperative agreements, direct loans, or guaranteed loans) for a demonstration facility. For purposes of this section, other financial assistance does not include revenue sharing funds or any tax benefits. However, the total amount of Federal financial assistance obtained for such facility shall not, in the case of a loan guarantee agreement, exceed 75 percent of total costs; and, in the case of a cooperative agreement, exceed 75 percent of the construction, startup, and related costs, plus operation and maintenance costs. All receipts from the sale of any products produced during the operation of the modular facility (for which a cooperative agreement has been awarded) shall be used to offset the costs incurred in the operation and maintenance of the facility.

§ 796.58 Appeals.

The guarantee agreement shall include a provision which specifies that any dispute concerning a question of fact arising under the guarantee shall be decided in writing by the Secretary. The borrower or lender may request the Secretary to reconsider any such decision. If not satisfied with the Secretary's final decison, the borrower or lender upon receipt of such written decision, may appeal the decision within 30 days, in writing, to the Chairman, Energy Board of Contract Appeals (EBCA), Department of Energy, Washington, D.C. 20585. EBCA, when functioning to resolve such a dispute under a loan guarantee, shall proceed in the same general manner as when it presides over appeals involving contract disputes. The decision of EBCA with respect to such appeals shall be the final decision of the Secretary.

§ 796.59 Examination of project records.

The guarantee agreement or related documents shall provide that the lender or other party servicing the loan, as applicable, and the borrower, shall keep such records concerning the project as is necessary to facilitate an effective audit and performance evaluation of the project and that the Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the borrower, lender and other party servicing the loan, as applicable. Such inspection may be made during the regular office hours of the borrower, lender, or other party servicing the loan, or at any other time mutually convenient. At six month intervals, the Comptroller General shall make an audit of recipients of financial assistance under this regulation.

Subpart E—Default

§ 796.60 Default, demand, payment, and collateral liquidation.

(a) In the event that the borrower has defaulted in the making of required payments of principal or interest on any portion of a loan guaranteed by the Secretary under the AFDP, and such default has not been cured within the period of grace provided in the guarantee and loan agreements, the lender, or any other holder, or nominee or trustee empowered to act for the lender or holder (referred to in this section collectively as "holder"), may make written demand upon the Secretary for payment pursuant to the provisions of the guarantee agreement.

(b) In the event that the borrower is in default as a result of a breach of one or more of the terms and conditions of the guarantee agreement, note, loan agreement, or other contractual obligation related to the transaction, other than the borrower's obligation to pay principal or interest, as provided in paragraph (a) of this section, the holder will not be entitled to make demand for payment pursuant to the guarantee, unless the Secretary agrees in writing that such default has materially affected the rights of the parties, and finds that the holder should be entitled to receive payment pursuant to the guarantee agreement.

(c) No provision of this regulation shall be construed to preclude forbearance by the holder with the consent of the Secretary for the benefit of the borrower.

(d) Upon the making of demand for payment as provided in paragraph (a) or (b) of this section, the holder shall provide, in conjunction with such demand or immediately thereafter, at the request of the Secretary, such supporting documentation as may be reasonably required to justify such demand.

(e) Payment as required by the guarantee agreement of the guaranteed loan shall be made 60 days after receipt by the Secretary of written demand for payment, provided that the demand complies with terms of the guarantee agreement, applicable law, and the Act. The guarantee agreement shall provide that interest shall accrue to the holder at the rate stated in the guarantee agreement until the defaulted loan has been fully paid by the Secretary.

(f) The guarantee agreement shall provide that, upon payment of the guaranteed loan by the Secretary, the holder shall transfer and assign to the Secretary all rights held by the holder in the guaranteed loan. Such assignment shall include all related liens, security, and collateral rights. Upon such payments and assignment, the Secretary shall be subrogated to the rights of the recipient of the payment and shall have superior rights in and to the property acquired from the recipient of the payment. Where there is a partial guarantee of the loan, the guarantee will specify the terms and conditions for the handling of collateral and the disposition of the proceeds of recovery after liquidation of the security.

(g) Where the guarantee agreement so provides, the lender and the Secretary may jointly agree to a plan of liquidation of the collateral pledged to secure the guaranteed loan.

(h) Where payment of the guaranteed loan has been made and the lender has not undertaken a plan of liquidation, the Secretary, in accordance with the rights received through subrogation and acting through the U.S. Attorney General, shall seek to foreclose on the collateral assets and take such other legal action as necessary for the protection of the Government.

(i) If the Secretary is awarded title to collateral assets pursuant to a foreclosure proceeding, the Secretary may take action to complete, maintain, operate, or lease the project facilities, or take any other necessary action which the Secretary deems appropriate, in order that the original goals and objectives of the project will, to the extent possible, be realized.

(j) In addition to foreclosure and sale of collateral pursuant thereto, the U.S. Attorney General shall take appropriate action in accordance with rights contained in the guarantee agreement to recover costs incurred by the Government as a result of the defaulted loan. Any recovery so received by the U.S. Attorney General on behalf of the Government shall be applied in the following manner. First to the expenses incurred by the U.S. Attorney General and DOE in effecting such recovery; second, to reimbursement of any amounts paid by DOE as a result of the loan guarantee; third, to any amounts owed to DOE under related principal and interest assistance contracts; and fourth, to any other lawful claims held by the Government on such proceeds. Any sums remaining after full payment of the above shall be available for the benefit of other parties lawfully entitled to claim them.

(k) If a partial guarantee is involved, funds received by the lender as a result of liquidation actions will be applied as follows:

(1) First, to the payment of reasonable and customary fees and expenses incurred in the liquidation process, and as set forth in the liquidation plan; and

(2) Second, distributed among the legal owners of interests in the loan, prorated in accordance with their relative percentage ownership of the loan.

(l) No action taken by the lender in the liquidation of any assets pledged by the borrower will affect the rights of any party, including the Secretary, having an interest in the loan to pursue, jointly or severally, to the extent provided in the loan agreement, legal action against the borrower, or other liable parties, for any deficiencies owing on the guaranteed balance after application of the proceeds received upon liquidation.

(m) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with the liquidation of collateral or recovery of deficiencies due under the loan, the Secretary will take such action as may be appropriate under the circumstances.

(n) Nothing in this regulation may preclude the Secretary from purchasing the holder's interest in the project upon liquidation.

§ 796.61 Perfection of liens and preservation of collateral.

(a) The guarantee agreement or other documents related thereto shall provide that:

(1) The lender will take those actions necessary to perfect and maintain liens, as applicable, on assets which are pledged collateral for the guaranteed portion of the loan; and

(2) Upon default by the borrower, the holder of pledged collateral shall take actions such as the Secretary may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery upon default of the loan. The Secretary shall reimburse the holder of collateral for reasonable and appropriate expenses incurred in taking actions required by the Secretary. Except as provided in § 796.60, no party may waive or relinquish, without the consent of the Secretary any collateral for the loan to which the United States would be subrogated upon payments under the guarantee agreement.

(b) In the event of a default, the Secretary may enter into contracts as required to preserve the collateral for the loan and to complete unfulfilled environmental requirements. The cost of such contracts may be charged to the fund.

(c) If any of the assets offered by the borrower as collateral for the debt guaranteed are subject to prior financing liens by other creditors, DOE will require that such prior liens be removed, or an acceptable legal arrangement be made with such prior lien creditors where DOE will be protected in the event of default. An arrangement of this nature must be in the form of a written agreement between DOE and the prior lien creditors and provide the following conditions:

(1) Ample notice of default and collateral sale;

(2) A plan of liquidation offering mutual protection to DOE and other creditors; and

(3) An option on the part of DOE, which would be assignable to a third party, to have the first lien debt payable according to the original installation terms (even after default) if the project operation is undertaken by DOE or an acceptable third party or on behalf of or through DOE.

Subpart F—Community Impact Assistance

§ 796.70 Purpose of community impact assistance.

The purpose of this subpart is to set forth the policies and procedures under which states, political subdivisions, or Indian tribes may assess adverse community impacts that result from the siting, construction and operation of demonstration facilities financed under this regulation. This subpart also sets forth procedures on how states, political subdivisions or Indian tribes adversely impacted (as defined in § 796.3(u) of this regulation) by the siting, construction and operation of a demonstration facility within their jurisdictions or adjacent jurisdictions may obtain community impact assistance.

§ 796.71 Community impact assistance.

(a) The Secretary may provide the following forms of community impact assistance to eligible applicants as further described in this subpart.

(1) A planning assessment grant to a governor of a state and Indian tribe, as appropriate, in which a proposed demonstration facility would be located or which would be adversely impacted by such facility in that state or on Indian land;

(2) A management grant to a political subdivision or Indian tribe, as ap-

propriate, adversely impacted by the construction and operation of a demonstration facility;

(3) A loan guarantee to a political subdivision or Indian tribe, as appropriate, adversely impacted by the construction and operation of a demonstration facility receiving a loan guarantee under this regulation. In the case of loan guarantees for essential community development, two types of loan guarantees may be awarded:

(i) A guarantee of the payment of interest and principal on loans for financing issued by a political subdivision or an Indian tribe, as appropriate, for essential community development necessitated by the construction and operation of such a demonstration facility;

(ii) A guarantee of the payment of taxes imposed on a demonstration facility by a political subdivision or an Indian tribe, as appropriate, and earmarked to support the payment of interest and principal of loans issued by such political subdivision or Indian tribe, as appropriate, for the purpose of financing essential community development;

(4) A requirement that an applicant obtaining financial assistance for a demonstration facility under this regulation advance funds for management and essential community development to a political subdivision or Indian tribe, as appropriate, in which such facility would be located or which would be adversely impacted by such facility; provided that tax abatement credits are provided by the appropriate political subdivision or Indian tribe to the applicant (obtaining financial assistance for its demonstration facility) over the life of the demonstration facility for such advance payments;

(5) Direct loans by the Secretary to a political subdivision or Indian tribe, as appropriate, for financing essential community development where the Secretary finds that the financial assistance available under paragraphs (a) (3) and (4) of this section is inadequate or unavailable to carry out the intent of the community impact assistance program;

(6) A requirement that an applicant seeking financial assistance for a demonstration facility under this regulation construct essential community development as ancillary to that of the demonstration facility where the political subdivision or Indian tribe lacks the capability to finance this essential community development. The costs of this essential community development would be borne by the applicant seeking financial assistance for the demonstration under this regulation and would be included within the cost of the demonstration facility.

(b) The Secretary may guarantee, or commit to guarantee, up to a maximum of 100 percent of a political subdivision's or Indian Tribe's loan for financing such essential community development or of the tax revenue stream which is expected from the demonstration facility.

(c) The Secretary may provide an eligible applicant with up to a maximum of 100 percent of the costs, for planning assessment and management grant tasks.

(d) When one or more states, political subdivisions, or Indian tribes would be eligible for community impact assistance under this regulation, but for the fact that the siting, construction and operation of the demonstration facility occurs outside of its jurisdiction but a state, political subdivision or Indian tribe, as appropriate, would be adversely impacted by such demonstration facility the Secretary is authorized to provide, to the greatest extent possible, arrangements for equitable sharing of the assistance between such parties.

(e) Prior to receipt of an application for community impact assistance, the Secretary may conduct preliminary discussions with prospective applicants wishing to obtain information or advice regarding eligibility for such assistance and regarding compliance with filing instructions, including the submission of supporting information, as described in §§ 796.77, 796.82 and 796.89 of this subpart. Supporting information and cost data submitted by the applicant for community impact assistance under this regulation shall be updated and furnished to the Secretary whenever there are changes occurring during the period that DOE is considering the application.

(f) Applications by eligible applicants for financing essential community development will be considered in the following order of priority:

(1) Loan guarantees as described in paragraph (a)(3) of this section;

(2) Advancements of funds as a project cost by the applicant seeking financial assistance for a demonstration facility as described in paragraph (a)(4) of this section;

(3) Direct loans as described in paragraph (a)(5) of this section; and

(4) A least favored approach, as described in paragraph (a)(6) of this section, may be used only where the lack of community or other public capability to administer the initial provision of such essential community development would necessitate direct construction (by the applicant obtaining either a loan guarantee or a cooperative agreement for its demonstration facility) of such essential community development as ancillary to that of the demonstration facility. The costs of this essential community development would be included within the costs of the demonstration facility and the applicant obtaining such financial assistance for its demonstration facility would arrange for the construction of this essential community development under the Secretary's direction and with the greatest possible local public participation.

(g) All applicants for community impact assistance described in paragraphs (a) (1), (2), (3) and (5) of the section must comply with the requirement for providing small business concerns the opportunity to participate in essential community development to the optimum extent feasible consistent with the size and nature of the essential community development.

§ 796.72 DOE technical assistance.

DOE technical assistance may be requested by an eligible applicant for impact assistance at anytime or in addition to the other forms of impact assistance as described in § 796.71, "Community impact assistance." Such assistance may be provided in the form of information, data, studies, research, or by temporary utilization of Federal employees as approved by the Secretary.

§ 796.73 Coordination with other Federal agencies.

(a) No community impact assistance shall be awarded or disbursed under this regulation if other Federal funds are available for such purposes, unless the Secretary is assured that such assistance:

(1) Is to be used in addition to, and not in lieu of, any Federal funds obtained under any other law; and

(2) Is not duplicative of other funding assistance.

(b) When assistance from other Federal programs is insufficient to cove essential community development o when combinations of assistance from multiple Federal programs are appropriate and beneficial, an applicant fo community impact assistance may request financial assistance under thes regulations and other Federal programs.

§ 796.74 Eligibility for a planning assessment grant.

After the Secretary knows of the geographic location of a proposed demonstration facility and has informe the governor of the state, officials o each political subdivision and India tribes, as appropriate, in which the facility would be located or which woul be adversely impacted by such facility community impact assistance in th form of a planning assessment gran may be considered by the Secretary i a complete application has been submitted by an eligible applicant. Suc applicant may be:

(a) A governor of a state in whic the demonstration facility would be located or a governor of a state whic would be adversely impacted by suc demonstration facility; and/or

(b) An Indian tribe on whose land demonstration facility would be located or where a substantial portion o the feedstock for such facility is to b obtained pursuant to an agreemen with an Indian tribe.

§ 796.75 Eligibility for a managem grant.

Community impact assistance in th form of a management grant may b considered by the Secretary if all o the following conditions prevail:

(a) The Secretary and the applicant for financial assistance for a demonstration facility have entered into a loan guarantee or a cooperative agreement under this regulation for the purpose of constructing a demonstration facility; and

(b) The applicant for a management grant is:

(1) A political subdivision adversely impacted by the construction and operation of a demonstration facility within its jurisdiction or adjacent thereto; and/or

(2) An Indian tribe adversely impacted by the construction and operation of a demonstration facility on its land or where a substantial portion of the feedstock for such demonstration facility is to be obtained pursuant to an agreement with the Indian tribe.

§ 796.76 Applications for a planning assessment grant or a management grant.

(a) An application for a planning assessment grant or a management grant may be filed by an eligible applicant as described in § 796.74 "Eligibility for a planning assessment grant," or in § 796.75, "Eligibility for a management grant," respectively. Such application shall be submitted in accordance with the provisions of the DOE regulations applicable to grants (DOE assistance regulations 44 FR 12920-12934, Mar. 8, 1979) and shall be in such form and detail as the Secretary may further prescribe. The application for the grant shall be signed by an appropriate official authorized to obligate the applicant.

(b) An application for a planning assessment grant should be filed by an eligible applicant, within a reasonable time after the Secretary has notified the eligible applicant of the location of a demonstration facility as required in § 796.40(c)(1) or § 796.41(b) of this regulation.

(c) An application for a management grant should be filed by an eligible applicant anytime after the Secretary has forwarded to the Chairman of the Committee on Energy and Natural Resources of the Senate, a full and complete report on the proposed demonstration facility(ies) for an award of a loan guarantee or a cooperative agreement.

§ 796.77 Supporting information for a planning assessment grant and a management grant.

(a) The applicant for either a planning assessment grant or a management grant shall provide the following information in support of its application:

(1) A plan of action pertaining to the scope and detail of how the proposed planning assessment grant tasks or management grant tasks will be accomplished;

(2) The kinds of data to be collected and maintained;

(3) The criteria to be used to evaluate the results and successes of the plan of action;

(4) A list of the key individuals (and their experience) who will be associated with the planning assessment or management grant tasks;

(5) A description of other Federal or state financial assistance available (e.g., grants or loans) or expected to be made available in connection with the planning assessment or management grant tasks and for any assistance which would alleviate any adverse community impacts; and

(6) Evidence showing that the amount of a planning assessment grant or a management grant together with any other financial assistance or funds otherwise available to the applicant will be sufficient to carry out and complete planning assessment and management grant tasks;

(b) As to management grants, the following additional information is also required:

(1) A description of the applicant's organization charter, bylaws and authorizing resolutions;

(2) Information regarding whether the applicant has insufficient funds to perform the tasks required by the management grant; and

(3) A current 5-year budget plan indicating new and existing programs and the new essential community development required to be constructed as a result of the siting, construction and operation of a demonstration facility.

§ 796.78 Planning assessment grant and management grant conditions and requirements—general.

(a) A planning assessment grant and a management grant shall be made only if the following requirements and conditions are met as determined by the Secretary:

(1) The assistance recipient for either a planning assessment grant or a management grant agrees to comply with the terms and conditions of the grants as set forth in the DOE regulations applicable to grants (DOE assistance regulations 44 FR 12920-12934, Mar. 8, 1979);

(2) The grant covers only the proposed work which was approved by the Secretary;

(3) The grant agreement provides for reports at such time and in such format as the Secretary prescribes and shall specifically require delivery, at a time certain, of a final report which specifies the results of the study undertaken by the grantee.

(b) In the case of a planning assessment grant, the assistance recipient shall undertake a study indicating existing and planned community development programs of the assistance recipient and assessing the impact of a demonstration facility on the assistance recipient. The study shall include, but not be limited to the following information:

(1) Economic impacts: Such as, secondary employment and characteristics, employment earnings, per capita and per household income, retail sales and service receipts;

(2) Demographic and social impacts: Such as, total population, population age distribution, school enrollment, household and family characteristics, housing requirements, and needs for health, protective service and other social service personnel;

(3) Land use impacts: Such as, land requirements for business, industry, residential development, schools, and other community facilities;

(4) Local government impacts: Such as, capital and operating costs of schools, roads, utilities, and other community facilities and services, the property tax and other local revenues likely to be generated by private residential and nonresidential development; and

(5) Mitigating measures: As used in this regulation, the term "mitigating measure" applies to any policy available to public or private agencies which would respond in a significant way to the adverse impacts of such demonstration facility. Identification of such mitigating measures should be linked to the assessment of the above listed impacts in paragraphs (b)(1) to (4) of this section.

(c) The assistance recipient of a planning assessment grant shall submit a report setting forth its findings and conclusions within three months after the award of such grant, unless otherwise specified by the Secretary.

(d) In the case of a management grant, the assistance recipient shall undertake a study which shall develop at least the following information:

(1) A five-year plan and budget which identify land use changes, economic impacts, demographic and source impacts, essential community development needs, mitigating measures and a schedule of implementation. It is the intent of the Secretary to allow flexibility and provide the assistance recipient with an opportunity to emphasize the planning components or those components which present the most serious problems or require the most effort. The plan need not be comprehensive to the extent that it addresses with equal attention all components of the assistance recipient's essential community development plan. However, it should rank the assistance recipient's needs and produce a document which emphasizes a plan, procedure, and program for the assistance recipient's most pressing growth management problem(s).

(2) Identification of funding requirements for financing essential community development, land use changes, personnel staffing costs to monitor essential community development and the construction and operation of the demonstration facility and other measures to prevent or mitigate adverse community impacts which would result from the construction and operation of the demonstration facility.

(e) The recipient of a management
rant shall be required to submit a
eport within six months of the date
the award of this grant, unless oth-
rwise specified by the Secretary, set-
ng forth the findings and conclusions
escribing the community impact
eeds and the steps to be taken to pre-
ent or mitigate adverse community
npacts which would result from the
nstruction and operation of the
emonstration facility.

796.79 Grant application processing.

(a) Planning assessment and man-
gement grant applications will be
aluated by the Secretary to deter-
ine:
(1) Whether they are complete;
(2) Whether they comply with the
ovisions of the DOE regulations ap-
icable to grants;
(3) The merit and relevance of the
ope of the planning assessment and
anagement grant tasks to be objec-
ves of the AFDP;
(4) Whether the proposed costs are
asonable and applicable to the plan-
ng assessment and management
rant tasks to be performed and with
spect to the size of the demonstra-
on facility proposed and the range of
ossible adverse community impacts;
(5) Whether the applicant has dem-
nstrated that it lacks the capability
finance the tasks required under a
anagement grant;
(6) Whether equitable sharing of
ch assistance is warranted when one
more applicants would be eligible
r such grants; and
(7) Whether the application meets
e requirements of the DOE regula-
ons pertaining to grants.
(b) After the Secretary has evaluat-
l the items in paragraphs (a)(1)
rough (7) of this section, the Secre-
ry shall notify the applicant for a
anning assessment grant and/or
anagement grant if the Secretary
pproves the application or a position
ereof and the DOE funding to be
warded to such applicant. In the
vent the Secretary does not approve
application for a planning assess-
ent and/or management grant the
ecretary shall provide the applicant
ith a written statement setting forth
e reasons therefore.

§ 796.80 Eligibility for a loan guarantee for the purpose of financing essential community development.

(a) An eligible applicant for a loan guarantee for financing essential community development may be:

(1) A political subdivision adversely impacted by the construction and operation of a demonstration facility within its jurisdiction or adjacent jurisdiction; and/or

(2) An Indian tribe adversely impacted by the construction and operation of a demonstration facility on its land or where a substantial portion of the feedstock for such demonstration facility is to be obtained pursuant to an agreement with an Indian tribe.

(b) No loan guarantee for essential community development will be awarded until the Secretary has awarded a loan guarantee or a cooperative agreement for a demonstration facility.

§ 796.81 Filing an application for a loan guarantee for the purpose of financing essential community development.

(a) An application for a loan guarantee for the purpose of financing essential community development must be filed by an eligible applicant, as described in § 796.80, "Eligibility for a loan guarantee for the purpose of financing essential community development." Such application shall be submitted in accordance with the following requirements:

(1) The application must be submitted in such form and detail as the Secretary prescribes; and

(2) The application must be signed by an appropriate official authorized to obligate the applicant to the terms and conditions of such guarantee.

(b) While the Secretary is considering an application for a loan guarantee or a request for a cooperative agreement for a demonstration facility, community impact assistance in the form of a loan guarantee for financing essential community development may be considered upon the filing of an application for such impact assistance by an eligible applicant.

§ 796.82 Supporting information for a loan guarantee for the purpose of financing essential community development.

(a) The following information shall be provided by the eligible applicant in support of an application for a loan guarantee for the purpose of financing essential community development:

(1) A full description of the scope, nature, location of existing community development already planned for the next five years and not related to the construction and operation of a demonstration facility under this regulation;

(2) A description of how the community development in paragraph (a)(1) of this section will be financed;

(3) A description of the applicant's organization, charter, bylaws, and appropriate authorizing resolutions, projected revenues and expenditures for the next 5 years;

(4) A full description of the scope, nature and geographic location of the proposed essential community development necessitated by the construction and operation of a demonstration facility under this regulation and the financial assistance needed;

(i) Evidence supporting the applicant's ability to complete the essential community development necessitated by the construction and operation of a demonstration facility under this regulation;

(ii) A description of the management plan of operations (additional personnel staffing needed) to be employed in carrying out this essential community development;

(iii) Information covering the management experience of each key person associated with the essential community development;

(iv) A description of the intended sources and amount of capital, together with evidence of a commitment from these sources, a copy of each such agreement, and evidence of the financial ability of each source to honor its commitment;

(v) A description of any other Federal or state financial assistance that may be available (e.g., direct loans, guaranteed loans, grants), which has been applied for, or expected to be made available in connection with th essential community development;

(vi) Evidence showing that th amount of the financial assistance, t gether with other financing, will sufficient to carry out and comple this essential community developmen

(vii) A detailed breakdown of the e timated construction, and relate costs, plus operating and maintenanc costs, of the essential community d velopment and the amount of the nancial assistance necessary;

(viii) The face amount of the loan be guaranteed, when appropriate;

(ix) A listing of assets associated, to be associated, with the essenti community development loan, inclu ing appropriate data about the valu and useful life of any such asset which assets will be pledged as secur ty for repayment of the guarante loan;

(x) The proposed interest char payments and principal repaymen schedule, if any have been formulate

(xi) Lists of all applications filed an approvals issued by Federal, state, an local government agencies for permi and authorizations to conduct co struction and operations associat with the essential community develo ment. If such approvals have not bee obtained, provide estimated date such filings or approvals;

(xii) A copy of environmental da (relating to the essential communi development) collected by the app cant (see § 796.10, "Demonstration f cility requirements and conditions," Subpart A of this regulation);

(xiii) Applicant's existing progra or plans for providing for small bu ness concerns to participate in th design and construction of such esse tial community development;

(xiv) Copies of present and previo bond ratings of the applicant, if any;

(xv) Any other information reque ed by the Secretary or may be spe fied in an appendix to this regulati as it applies to a loan guarantee for sential community development;

(b) In addition to the informati set forth in paragraph (a) of this s tion, the application for a loan guara tee shall include the following inf mation from the lender, if applicab

(1) Description of the lender's organization and legal authority under which the lender operates together with any appropriate authorizing resolutions necessary for the transaction;

(2) Information covering the management experience of each officer or key person in the lender's organization who is or will be asssociated with the loan; and

(3) A description of the management plan to be employed by the lender in servicing and monitoring the loan;

(4) The lender's written assessment of all aspects of the applicant's loan application, in sufficient detail as would be completed by any prudent lender considering a loan without a guarantee;

(5) A copy of the proposed loan agreement, if any, to be executed by the applicant and the lender together with copies of all other documents proposed by the lender to be used in the financial transaction;

(6) Any proposed marketing plan whereby the lender will sell any portion of the debt to secondary market holders.

(c) Any other information requested by the Secretary in order to evaluate fully the application.

§ 796.83 Allowable project costs for essential community development.

(a) All reasonable and customary costs relating to construction and initial operation that are paid, expected to be paid, and which are directly related to the essential community development necessitated by the construction and operation of a demonstration facility under this regulation, may be permitted in computing the allowable costs for such essential community development. As guidance for which costs will be allowable, reference should be made to § 796.9, "Project Costs," of this regulation.

(b) The Secretary may audit any or all cost elements included by the applicant in the estimated project cost and reserves the right to exclude or reduce the amount of any allowable project cost which the Secretary determines to be unnecessary or excessive. The applicant shall make available records and other data necessary to permit the Secretary to carry out such review. In carrying out this responsibility, the Secretary may utilize employees of Federal agencies or may direct the borrower to submit to a review performed by an independent public accountant or other competent authority.

§ 796.84 Guarantee requirements and conditions for the purpose of financing essential community development.

A loan guarantee may be made to an eligible applicant for financing essential community development as described in § 796.80, "Eligibility for a loan guarantee for the purpose of financing essential community development," if the following requirements and conditions are met as determined by the Secretary:

(a) Full repayment of the guaranteed loan is to be made over the lesser of 20 years or a period equal to 90 percent of the expected average useful economic life of the project's major physical assets. In calculating such period, the Secretary shall utilize generally accepted accounting principles and practices;

(b) There is reasonable assurance of repayment by the borrower of interest and a guaranteed portion of the loan;

(c) There is satisfactory evidence that the borrower is willing, competent and capable of performing the terms and conditions of the loan;

(d) The loan guarantee agreement includes such detailed terms and conditions as the Secretary deems appropriate to protect the interests of the United States in the case of default;

(e) The lender agrees not to accelerate payment of the borrower's indebtedness except for default without the prior written consent of the Secretary;

(f) The term and conditions set forth in the loan guarantee agreement are acceptable to the Secretary;

(g) The amount of the guaranteed obligation, when combined with funds available to the applicant from other sources, will be sufficient to carry out the essential community development for which the guarantee is made;

(h) DOE and the applicant for financial assistance for a demonstration facility have entered into a loan guarantee or a cooperative agreement for construction of a demonstration facility under this regulation;

(i) Wages and rates to be paid to laborers and merchants employed by contractors or subcontractors in the performance or construction work are not less than those prevailing on similar construction work in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-5);

(j) The borrower agrees to carry out an acceptable plan for small business concerns to participate in the essential community development program to the optimum extent feasible;

(k) The major activities leading to the closing of a loan guarantee or commitment to guarantee are complied with as described in § 796.42 "Closing requirements for a loan guarantee," of this regulation;

(l) The requirements of the sections under Subpart D of this regulation have been complied with;

(m) The applicant (borrower) agrees to comply with the Flood Disaster Protection Act of 1973 (Pub. L. 92-234), if applicable;

(n) The guaranteed loan shall be in a first lien position regarding all assets of the project except title to the facility;

(o) When a lender holds a guaranteed and a nonguaranteed portion of a loan, payments of principal or interest made by the borrower shall be applied by the lender to reduce the guaranteed and nonguaranteed positions of the loan on a proportionate basis;

(p) In the event that the indebtedness to be guaranteed pays interest which is excluded from the gross income of the holder, pursuant to the provisions of the Internal Revenue Code of 1954, as amended, the debt will not be guaranteed by the Secretary unless the purchaser/holder of the debt is the Federal Financing Bank.

§ 796.85 Loan agreement requirements and conditions for a loan guarantee.

(a) In addition to meeting the requirements in § 796.84, a guarantee may be provided only if the loan agreement to which the guarantee applies provides for the following requirements and conditions:

(1) The orderly and ratable retirements of the loan, and includes sinking fund provisions, installment payment provisions, or other methods of payments and reserves as may be required by the Secretary; to the maximum extent possible, repayment or provision therefor shall be required to be made in equal payments payable at equal intervals;

(2) A minimum period of grace of 60 days from the date a principal or interest payment is due; any extension of time over this grace period must be agreed to by the Secretary;

(3) Acceptable provisions for prepayment and acceleration of the loan are included;

(4) Security for the repayment of the loan will be specified by the Secretary, except that in the event of default, demonstration facilities constructed with funds guaranteed by DOE shall not be considered project assets.

(b) Such other terms and conditions required by the Secretary for the protection of the interests of the United States.

§ 796.86 Loan guarantee application processing.

(a) In accordance with the procedures of this regulation, the Secretary will consider an application for a loan guarantee and other relevant information and shall:

(1) Determine whether the application is complete and in compliance with all applicable provisions of the regulation;

(2) Determine whether the eligible applicant seeking such guarantee would be adversely impacted by the construction and operation of a demonstration facility within its jurisdiction or adjacent jurisdiction;

(3) Determine whether the community development proposed by the applicant is essential;

(4) Assess and evaluate the financial, environmental, and managerial aspects of the essential community development;

(5) Review the applicant's plans for essential community development to be constructed, and the proposed costs, under a loan guarantee;

(6) Determine if there is sufficient evidence that the applicant will initiate and complete the essential community development in a timely, efficient, and acceptable manner;

(7) Determine if the terms and conditions set forth in the loan agreement are acceptable and whether there is satisfactory evidence that the lender or other party servicing the loan is competent to administer the terms and conditions of the loan guarantee agreement;

(8) Determine if the impacts resulting from the demonstration facility have been fully evaluated not only by the applicant for financial assistance for its demonstration facility, but also by the political subdivision or Indian tribe, as appropriate, in the management and planning assessment grant stages; and that effective steps have been taken or will be taken in a timely manner to finance essential community development costs resulting from such demonstration facility;

(9) Determine if the applicant lacks the capability to finance such essential community development from tax revenues, Federal or state financial assistance programs or other sources;

(10) Determine if there is satisfactory evidence that the lender, if any, is competent to administer the terms and conditions of a loan guarantee;

(11) Obtain the concurrence of the Secretary of Treasury with respect to the timing, interest rate and substantial terms of the loan guarantee for financing essential community development. The Secretary of Treasury shall ensure to the maximum extent feasible that the timing, interest rate and substantial terms and conditions of such guarantee will have the minimum possible impact on the capital markets of the United States, taking into account other Federal direct and indirect securities activities.

(12) Request the Advisory Council on Historic Preservation views and comments upon application for guaratees for any essential community development which would affect property listed or eligible for listing in the *National Register of Historic Places* or which may meet the criteria for listing in the *National Register*, pursuant to 36 CFR Part 800.

(b) Upon completion of the determinations set forth in paragraph (a) of this section, the Secretary may award a loan guarantee to the applicant. In the event an application is rejected, the Secretary will notify such applicant with reasons for the nonapproval of the application.

§ 796.87 Eligibility for a direct loan.

Financial assistance to an applicant in the form of a direct loan for financing essential community development may be considered upon obtaining specific authorization and appropriations from Congress for such purpose by the Secretary if the applicant for the loan:

(a) Is a political subdivision adversely impacted by the construction and operation of a demonstration facility within the political subdivision's jurisdiction or adjacent thereto; and/or

(b) Is an Indian tribe adversely impacted by the construction and operation of a demonstration facility on its land or where a substantial portion of the feedstock for such demonstration facility is to be obtained pursuant to an agreement with an Indian tribe; and

(c) The Secretary has determined that the impact assistance provided under paragraphs (a)(3) and (4) of § 796.71 "Community impact assistance," is inadequate or unavailable to the eligible applicant to carry out the construction of such essential community development.

§ 796.88 Filing an application for a direct loan.

An application for a direct loan for the purpose of financing essential community development must be filed by an eligible applicant as described in § 796.87 "Eligibility for a direct loan," and be in accordance with the following requirements:

(a) The application must be submitted in such form and detail as the Secretary prescribes;

(b) The application must be signed by an appropriate official authorized to obligate an eligible applicant to the terms and conditions of this direct loan;

(c) The application must be filed within a reasonable period after the

Secretary has forwarded to the Chairman of the Committee on Science and Technology of the House of Representatives and to the Chairman of the Committee on Energy and Natural Resources of the Senate, a full and complete report on the proposed demonstration facility of an applicant seeking a loan guarantee or a cooperative agreement.

§ 796.89 Supporting information for a direct loan.

(a) Information shall be provided in support of the application for a direct loan for the purpose of financing essential community development in such form and with such content as provided herein:

(1) A description of the applicant's organization, charter, bylaws, and appropriate authorizing resolutions;

(2) Notification to the Secretary that the impact assistance provided under paragraphs (a)(3) and (4) of § 796.71 "Community impact assistance," is inadequate or unavailable to carry out the essential community development;

(3) Reasons why the impact assistance provided under paragraphs (a)(3) and (4) of § 796.91 "Community impact assistance," is inadequate or unavailable to carry out the essential community development;

(4) A full description of the scope, nature, and location of any essential community development needed for which funds are not available;

(5) A detailed breakdown of the estimated construction and related cost information for any essential community development and any overruns on the initial estimate of essential community development;

(6) A description of the intended sources and amounts of capital, together with evidence of a commitment from these sources, a copy of each such agreement and evidence of the financial ability of each source to honor its commitments;

(7) Evidence showing that the amount of the additional financial assistance (i.e., direct loans), together with other financing, will be sufficient to carry out and complete such essential community development under this section;

(8) A description of any other Federal or state financial assistance available (e.g., loans and loan guarantees) or expected to be made available in connection with the essential community development under this section;

(9) Evidence supporting the applicant's ability to complete the essential community development;

(10) The description of the management plan of operations to be employed in carrying out the essential community development; the personnel staff needed by the applicant to monitor all stages of the essential community development and to monitor the demonstration facility construction and operation stages; a list of all key personnel who will be involved in the essential community development;

(11) A listing of the assets associated or to be associated with the essential community development including appropriate data as to the value and useful life of any physical assets and a description of the value of any other associated security;

(12) Any environmental data (relating to the essential community development) collected by the applicant (See § 796.10 "Demonstration facility requirements and conditions," of Subpart A of this regulation);

(13) Lists of all applications filed and approvals issued by Federal, state and local government agencies for permits and authorizations to conduct the construction and operation phases associated with the essential community development. If such approvals have not been obtained, provide estimated date of such filings or approvals;

(14) Proposed method of repaying the loan;

(15) Copies of present and previous bond ratings of the applicant, if changed from its initial submission.

(b) In addition to the above required information, the applicant shall provide such other information as the Secretary may deem pertinent.

§ 796.90 Direct loan requirements and conditions.

(a) An agreement for a direct loan for the purpose of financing essential community development shall include the following requirements and conditions:

(1) The orderly retirement of the loan, and include installment payment provisions, or other methods of payments and reserves as may be reasonably required by the Secretary.

(2) An extension of time over the specified payment period in the loan agreement for the making of any payment in whole or in part under such agreement if agreed to by the Secretary. Payments required by the loan agreement, if not made when due, shall accrue interest at a rate specified in the loan agreement;

(3) Full repayment of the loan is to be made over the lesser of 20 years, or a period equal to 90 percent of the expected average useful economic life of the project's major physical assets. In calculating such period the Secretary shall utilize generally accepted accounting principles and practices;

(4) Reasonable assurance of repayment of principal and interest of the loan by the applicant;

(5) Repayment of the loan made will be secured by the essential community development assets and such other collateral that the Secretary determines necessary and appropriate to offer a reasonable assurance of repayment of the Government;

(6) The loan will bear interest at a rate not less than a rate determined by the Secretary, in consultation with the Secretary of Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans adjusted to the nearest one-eighth of one percent but not less than the rate to be charged by the Federal Financing Bank;

(7) Wages and rates to be paid to laborers and merchants employed by contractors or subcontractors in the performance of construction work are not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-5);

(8) The borrower agrees to carry out an acceptable plan for small business concerns to participate in the essential community development program to the optimum extent feasible;

(9) Acceptable provisions for prepayment and acceleration of the loan are included; and

(10) Request for disbursement at closing and thereafter shall be supported by such documents as the Secretary may require.

(b) The provisions of paragraphs (a) (1), (2) and (3) of this section shall be altered to the extent affected, by the following circumstance:

(1) The Secretary forgives repayment as set forth in § 796.93 "Cancellation of a direct loan"; and

(c) Such other terms and conditions as the Secretary deems appropriate to protect the interest of the United States in the case of default.

§ 796.91 Direct loan application processing.

(a) The Secretary, upon receiving authorizations and appropriations for loans for financing essential community development, may consider an application for such a direct loan and other relevant information and then shall:

(1) Determine whether the application is complete and in compliance with all applicable provisions of this regulation;

(2) Determine that the impact assistance available to the applicant as provided in paragraphs (a) (3) and (4) of § 796.71 "Community impact assistance," is inadequate or unavailable to the applicant to carry out the essential community development;

(3) Determine whether the community development qualifies as essential;

(4) Determine whether the eligible applicant under this subpart of the regulation would be adversely impacted by the construction and operation of a demonstration facility;

(5) Assess and evaluate the financial, environmental, managerial, and legal aspects of the essential community development;

(6) Review the applicant's plans for essential community development to be constructed under the loan. The review shall include, but not be limited

to, all costs associated with such facilities;

(7) Determine if there is sufficient evidence that the applicant will initiate and complete the project in a timely, efficient, and acceptable manner;

(8) Determine if the impacts resulting from the demonstration facility have been fully evaluated not only by the applicant for financial assistance for its demonstration facility, but also by the political subdivision or Indian tribe as appropriate;

(9) Obtain the Advisory Council on Historic Preservation views and comments upon applications for a direct loan for any essential community development which would affect property listed or eligible for listing in the *National Register of Historic Places* or which may meet the criteria for listing in the *National Register*, pursuant to 36 CFR Part 800.

(b) Upon completion of the determinations set forth in paragraph (a) of this section, the Secretary may provide a direct loan to an applicant. In the event an application is rejected, the Secretary will notify such applicant with reasons for the nonapproval of the application.

§ 796.92 Assignment or transfer of a direct loan.

Assignments of a loan and obligations contained thereunder may be made only with the consent of the Secretary.

§ 796.93 Cancellation of a direct loan.

The Secretary may cancel the unpaid balance and any accrued interest on a direct loan for financing essential community development if the Secretary determines in his sole discretion:

(a) Due to a change of circumstances of the borrower, that the loan repayment will cause an unreasonable hardship to the borrower; or

(b) Failure of the demonstration facility to operate and to provide the expected tax revenues to the borrower.

§ 796.94 Default on a direct loan.

(a) In the event that the borrower fails to perform the terms and conditions of the loan agreement or any related document, the borrower shall be in default and the Secretary shall have the right, at the Secretary's option, to accelerate the indebtedness and demand full payment of all amounts outstanding, both principal and interest, under the loan;

(b) No failure on the part of the Secretary to make demand at any time shall constitute a waiver of the rights held by the Secretary;

(c) Upon demand by the Secretary, the borrower shall have a period of not more than 30 days from the date of receipt of the Secretary's demand to make payment in full;

(d) In the event that the failure on the part of the borrower to perform the terms and conditions of the loan agreement, or related document, does not constitute an intentional act, but is brought about as a result of circumstances largely beyond the control of the borrower, the Secretary may elect, at the Secretary's option, to waive such failure, or restructure the repayment required by the loan agreement in any manner the Secretary determines;

(e) Should the borrower fail to pay after demand as provided in paragraph (c), the Secretary shall undertake collection in accordance with the terms of the loan agreement and the applicable law.

§ 796.95 Cost internalization for essential community development.

(a) A further form of community impact assistance to be used for financing essential community development necessitated by the construction and operation of a demonstration facility is the process of cost internalization. Under cost internalization, the Secretary may:

(1) Require that an applicant obtaining financial assistance for a demonstration facility under this regulation advance funds for management and essential community development to a political subdivision or Indian tribe, as appropriate, in which such facility would be located or which would be impacted by such facility, provided that tax abatement credits are provided by the appropriate political subdivision or Indian tribe over the life of the

demonstration facility for such advance payment; or

(2) Require that an applicant obtaining financial assistance for a demonstration facility under this regulation construct the essential community development necessitated by the construction and operation of the demonstration facility as ancillary facilities of the demonstration facility when the political subdivision or Indian tribe, as appropriate, lacks the capability to finance this essential community development. The costs of this essential community development would be borne by the applicant seeking financial assistance for the demonstration under this regulation and would be included within the cost of the demonstration facility.

(b) Under paragraph (a)(1) of this section, the applicant would be required by the Secretary to include capital costs for essential community development within its demonstration facility costs. The funds provided by this applicant would then be available to the adversely impacted political subdivision or Indian tribe, as appropriate, under terms and conditions prescribed by the Secretary. Payments by the applicant (seeking financial assistance for its demonstration facility) would be treated as advances on local taxes and credits would be provided by the political subdivision or Indian tribe, as appropriate, to the demonstration facility over its useful life in return for such payments. Paragraph (a)(2) of this section is the least favored approach and is to be used only where the lack of community or other public capability to administer the initial provision of essential community development would necessitate direct construction of this essential community development to that of the demonstration facility. Thus, the costs for this essential community development would be included within the costs of the demonstration facility and the applicant seeking financial assistance for its demonstration facility would arrange for construction of the essential community development under the Secretary's direction and with the greatest possible local public participation.

§ 796.96 Principal and interest assistance for a community impact assistance loan guarantee and direct loan.

Principal and interest assistance for community impact assistance loan guarantees and direct loans will be governed by the provisions of § 796.15 "Principal and interest assistance."

§ 796.97 Environmental evaluation of essential community development.

Each application for impact assistance in the form of loan guarantees or loans for financing essential community development is subject to the provisions of NEPA. Normally, the environmental review required pursuant to NEPA for essential community development will be included in the environmental review for the demonstration facility as required in § 796.10(a) of this regulation. Essential community development not included in the environmental review for the demonstration facility will be the subject of further environmental review under the requirements of NEPA, the CEQ NEPA regulations, and the DOE NEPA Guidelines.

§ 796.98 Essential community development monitoring and audit.

Both the guarantee and the direct loan agreement shall provide that the DOE manager and other applicable DOE representatives shall have access to the essential community development sites at all reasonable times in order to monitor the performance of such development. The borrower or the lender, in the case of a loan guarantee arrangement, will assure the availability of information related to the essential community development as is necessary to permit the Secretary to determine financial soundness, management stability, compliance with environmental protection requirements and other matters pertinent to the guarantee.

§ 796.99 Examination of essential community development records.

The guarantee agreement and the direct loan agreements or related documents shall provide that the lender (in the case of loan guarantee transactions) and the borrower (under both a loan guarantee and direct loan agreements) shall keep such records concerning the essential community development as is necessary to facilitate an effective audit and performance evaluation of such essential community development. The guarantee and the direct loan agreements or related documents shall also provide that the Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the borrower and the lender. Such inspection may be made during the regular office hours of the borrower or the lender, or at any time mutually convenient. At 6-month intervals, the Comptroller General shall make an audit of recipients of financial assistance under this regulation.

(Approved by the Office of Management and Budget under control number 1901-0244)

[45 FR 15473, Mar. 10, 1980, as amended at 46 FR 63209, Dec. 31, 1981]

PART 797—LOANS FOR SMALL HYDROELECTRIC POWER PROJECT FEASIBILITY STUDIES AND RELATED LICENSING

Sec.

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797.500 Appeals.

AUTHORITY: Sec. 401, Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (16 U.S.C. 2701) and sec. 644, Dept. of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.).

SOURCE: 45 FR 3543, Jan. 17, 1980, unless otherwise noted.

§ 797.1 General purpose.

The purpose of this regulation is to establish the procedure for two kinds of loans. One is a loan to defray a percentage of the costs of studying the feasibility of developing a small hydroelectric power project in connection with an existing dam that is not being used to generate electric power. The other is a loan to defray a percentage of the costs of applying for a necessary license or other Federal, State, regional, or local approval respecting such a project and of participating in any administrative proceeding regarding such application. This regulation will also specify (a) the requirements of the feasibility study, (b) the borrower's obligations under a loan, (c) when the Secretary may cancel the obligation to repay the loan, and (d) priorities to be accorded kinds of applications.

§ 797.2 Priority considerations.

(a) The Secretary will give applications for licensing loans priority over applications for feasibility study loans because licensing loan applications must be based on completed feasibility studies (see § 797.40(c)(1)) and thus typically will be closer to putting power from qualified projects on line. Initial consideration will be given in the order applications are received, but the time required to process an application may vary from case to case.

(b) In determining the priority to be accorded a particular licensing or feasibility study loan application, the Secretary may take into account factors including, but not limited to, the following:

(1) The potential of the hydroelectric power project to save oil or gas.

(2) The likelihood that the project will be carried through to completion relative quickly.

(3) The need for substantial revision of the application in order to achieve compliance with this regulation.

(4) The disparity, if any, between the size of the loan sought and the size of the comtemplated project.

(5) Any evident, substantial environmental implications.

§ 797.3 Definitions.

For purposes of this part.

(a) "Small hydroelectric power project" means a hydroelectric power project that is proposed to be located at the site of an existing dam or dams in the United States, its territories or possessions, at a dam(s) not being used to generate electric power, that will use the water power potential of such dam(s), and that, when completed, will have an installed capacity of not more than 30,000 kilowatts, nor less than 100 kilowatts.

(b) "Existing dam" means any dam or barrier built across a watercourse that was completed on or before April 20, 1977, which does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) in connection with the installation of the small hydroelectric power project. "Repairs or reconstruction" as used in this subsection includes reconstruction of breached structures and renovation of machinery left in place.

(c) "Electric cooperative" means any cooperative association eligible to receive loans under section 4 of the Rural Electrification Act of 1936 (7 U.S.C. 904).

(d) "Industrial development agency" means any agency which is permitted to issue obligations the interest on which is excludable from gross income under section 103 of the Internal Revenue Code of 1954.

(e) "Nonprofit organization" means any organization described in section 501(c)(3) or 501(c)(4) of the Internal Revenue Code of 1954 and exempt from tax under section 501(a) of such Code (but only with respect to a trade or business carried on by such organization which is not an unrelated trade or business, determined by applying section 513(a) to such organization).

(f) "Municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power.

(g) "Person" includes an individual, corporation, joint stock company, partnership, association, business trust, organized group of persons (whether incorporated or not), or receiver, or trustee of any of the foregoing.

(h) "Secretary" means Secretary of Energy or his designated representative.

(i) "Statutory interest rate" means the discount or interest rate, used at the time the loan is made, for water resources planning projects under section 80 of the Water Resources Development Act of 1974, 42 U.S.C. 1962 d-17(a).

(j) "Feasibility study loan" means a loan to assist in defraying a percentage of the costs of a study to determine the technical and economic feasibility and environmental acceptability of undertaking a small hydroelectric power project at an existing dam or dams.

(k) "Licensing loan" means a loan to assist in defraying a percentage of the costs of applying for a necessary license or license amendment or other Federal, State, regional, and local approval or exemption concerning a small hydroelectric power project and the costs of participating in any administrative proceeding regarding any such application.

(l) "Loan agreement" means a contractual instrument executed between the United States as lender and a borrower, which sets forth the terms and conditions for provision of funds by the United States to the borrower incidental to a feasibility study loan or a licensing loan and for repayment of the loan by the borrower.

(m) "Commission" means the Federal Energy Regulatory Commission ("FERC").

[45 FR 3543, Jan. 17, 1980, as amended at 45 FR 62031, Sept. 18, 1980]

§ 797.20 Eligibility requirements.

(a) Eligible applicants for any loan under this part may be a municipality (*i.e.*, city, county, irrigation district, drainage district or other political subdivision or agency of a State, competent as defined in § 797.3(f)), electric cooperative, industrial development agency, nonprofit organization, individual, corporation, joint stock company, partnership, association, business trust, organized group of persons (whether incorporated or not), the receiver(s) or trustee(s) of any of the foregoing, or any combination of the foregoing. Applicants may not be Federal agencies.

(b) If the proposed project site is subject to FERC licensing jurisdiction, applicants must meet any citizenship requirement of the FERC. Applicants must also meet any citizenship requirement applicable under State or local law.

§ 797.21 Application requirements.

(a) Application requirements common to feasibility study loans and licensing loans shall include financial, scheduling, and other background information in support of the application. This information will be used as a basis for the Secretary's determination whether the applicant is capable of successfully completing the feasibility study or undertaking the applicable licensing and permitting requirements and subsequently constructing and operating the proposed small hydroelectric power project. Information previously provided by a feasibility study loan applicant need not be repeated at the time of applying for a licensing loan if it is unchanged. If an applicant has already submitted an application to FERC that contains information requested in this section, applicant may attach a photocopy of what was submitted to FERC.

The information required includes the following:

(1) The amount of the loan being requested and whether it is for a feasibility study or for licensing.

(2) A description of the major tasks required to perform the study or to obtain the license; a proposed schedule for completing each major task; estimates of the cost of each major task and of total costs; and the share of costs to be borne by applicant(s).

(3) A brief description of the applicant(s) that indicates its history, the kind and size of its business, or, in the case of a municipality (see definition at § 797.3(f)), the experience if any, that the municipality has had with projects of this nature.

(4) A current financial statement that includes source of revenue and (except in the case of individual applicants) a balance sheet. The Secretary may require a licensing loan applicant to provide certification of the financial statement by a certified public accountant or equivalent certification acceptable to the Secretary.

(5) A description of any other Federal financial assistance (*e.g.*, direct loans, guaranteed loans, grants) expected to be applied for or already applied for or obtained by the applicant(s) in connection with the project.

(6) A list of all key persons who will be involved in the feasibility study or licensing effort (including any permitting effort) with their responsibilities and qualifications. This list should include any contractor and consultant whose services are proposed to be used. Information should be provided to show that they are capable of meeting the schedule within cost constraints of the loan.

(7) Affidavit(s) of United States citizenship as applicable (see § 797.20(b)).

(8) Documentation as to each applicant's authority to undertake the activities contemplated by the application. Such documentation should take substantially the following form:

(i) If an applicant is a municipality (see definition § 797.3(f)), a copy of its charter or other organization papers, duly certified by the Secretary of State, or other proper certifying officer, of the State in which it is located, with a copy of the State law(s) authorizing the proposed activities and an attested copy of the authorization to file the application.

(ii) If an applicant is a corporation, a copy of the charter or certificate and articles of incorporation, with any amendments, duly certified by the Secretary of State of the State where organized, and a copy of the by-laws. If the small hydroelectric power project would be located in a State other than that in which the corporation is organized, a certificate shall be included from the Secretary of State of the State in which the project would be located showing compliance with the laws relating to foreign corporations. There shall also be included a copy of all minutes, resolutions of stockholders or directors or other representatives of the applicant, properly attested, authorizing the filing of the application.

(iii) If an applicant is an association, a verified copy of its articles of association, if any, with an attested copy of the resolution of its governing board, if any, authorizing the filing of the application.

(iv) If an applicant is a nonprofit organization, verification of that fact.

(v) If an applicant is a business trust, a verified copy of the trust instrument and an attested copy of the resolution or other authority under which the application is made.

(vi) If an applicant is a joint stock company, a verified copy of the articles of association.

(vii) For purposes of this subsection, verification may be by affidavit of an authorized representative of an applicant; attestation shall be by the authorized officer of an applicant.

(9) The status of any application by the applicant to FERC for a preliminary permit, license or exemption for the project at the proposed site (or a statement that such application has not been made) and the status of any other application by the applicant for Federal, State, regional, or local approval of the project.

NOTE: A FERC preliminary permit establishes priority of application for FERC licensing purposes. Holding such a permit is not a blanket requirement for a feasibility study loan or licensing loan under this regulation.

It is an appropriate requirement for a loan applicant (typically an applicant that is not a municipality as broadly defined, see § 797.3(f) of this part) whose failure to establish priority of application may result, under FERC regulation, in the ultimate award of a permit or license to another developer of the proposed site.

(10) Information provided in a *pending* application for a feasibility study loan or licensing loan under this regulation shall be updated by the applicant to show changes.

(b) Applications for *feasibility study loans* shall also include the following:

(1) A narrative description of the proposed site to be studied that should address, but not necessarily be limited to, the following, to the extent that such information is reasonably available:

(i) The number, physical composition, dimension (including height of head), general configuration, age and condition, of any dams, spillways, penstocks, powerhouses, tailraces, or other structures, to be included as part of the project;

(ii) The number, surface area, storage capacity and normal maximum surface elevation of any reservoirs to be included as part of the project and their present use;

(iii) The number, length, voltage, interconnection, age and condition of any transmission lines to be included as part of the project;

(iv) A preliminary indication of capacity potential, average annual energy generation, and the most likely customers for the power which would be produced;

(v) A preliminary estimate as to sale price or value of power;

(vi) Stream characteristics (yearly flow patterns, downstream dependence on streamflows, etc.); and,

(vii) Any other information that would aid the Secretary in understanding the setting in which the facility will be built, particularly those factors which may make the setting important or unique, including listing on the National Register of Historic Places of any structures or sites in the vicinity of the proposed project.

(2) Maps and pictures describing the site.

(i) U.S. Geological Survey topographical quadrangle sheets, or similar topographic maps of a State agency, if available, are preferred.

(ii) The map, as supplemented by the pictures, should indicate:

(A) The location of the proposed project with reference to the affected stream or other body of water and, if possible, to a nearby town or any other permanent monuments or objects that can be noted on the map and recognized in the field.

(B) The approximate relative locations of the principal project features.

(C) The approximate proposed project boundary. This should also indicate both non-Federal lands necessary for the project and lands of the United States (including reservations).

(3) Any report on the safety of the dam or dams at the project site reasonably available to the applicant.

(4) A description of substantial environmental implications known to the applicant, including information regarding the presence of any Federally or State-listed endangered or threatened species of animal or plant in the area of the project, critical habitat involved, if any, and the possible need to accommodate migratory fish by installation of fish ladders.

(5) Information on how the applicant will have access to the proposed project site to perform the study.

(6) A copy of the project notification sent by applicant for review by areawide and State clearinghouses, as required by Office of Management and Budget Circular No. A-95, Revised (41 FR 2052, Jan. 13, 1976).

(c) Applications for a *licensing loan* shall include in addition to the information specified in paragraph (a) of this section, a copy of a completed feasibility study acceptable to the Secretary and conforming to the requirements indicated in § 797.30.

(d) In addition to the above required information the loan applicant shall supply such other information as the Secretary may deem necessary to consider the request for a loan.

(e) The application shall be signed by the applicant(s) or on behalf of an applicant by an authorized representative. (*Note:* Title 18 United States Code, section 1001 provides criminal penalties for fraud and intentional false statements in information submitted in such an application.)

(f) Every applicant whose application has been rejected will be informed, upon request, of the reason for rejection. The rejection is not a bar to submission of an appropriately revised application.

§ 797.30 Purpose of loans.

(a) *Feasibility study loans.* (1) The purpose of a feasibility study loan is to help to defray expenses to be incurred in preparing a study of the small hydroelectric power project proposed by an applicant. Broadly stated, the goal of that study is to determine, through engineering and economic analysis and consideration of environmental and institutional requirements, whether the project is technically and economically feasible and environmentally sound as a supplier to an existing power grid or as an independent contributor of power for local applications or a combination of both. Accordingly, each study should address, but is not limited to, the following:

(i) Site description not previously supplied under § 797.21(b)(1)(i) through (iii) and (b)(2).

(ii) Estimated performance characteristics of the facility, including potential peak power production, and estimated average annual energy production.

(iii) Engineering acceptability of the site for hydroelectric power development.

NOTE: For an existing dam, this should not ordinarily require extensive detailed field investigation (*e.g.*, subsurface geotechnical investigation) nor preparation of detailed working drawings and specifications of the kind that may be required in connection with a FERC license application.

(iv) Initial assessment of the condition of the dam and of the safety hazards, if any, likely to be introduced by the installation or rehabilitation of the power plant and appurtenances.

(v) Availability of a suitable turbine(s), generator(s) and accessories required for the facility.

(vi) Plan for using or marketing the power including description of present and prospective power user groups and estimated revenues or value to be derived from power produced.

(vii) Plan for transmitting power from the project to intended user.

(viii) Anticipated annual operation and maintenance costs.

(ix) Anticipated project life.

(x) Need, if any, to acquire land or any interest in land or in project structures, or other land rights or water rights, to construct and operate the facility, and their availability and estimated cost.

(xi) Environmental and related considerations as indicated in paragraph (a)(2) of this section.

(xii) Estimates of costs of obtaining Federal, State, regional and local license and/or approval necessary for construction and operation of the facility, including legal and consultant expenses incidental to administrative proceedings. *Note* the importance of early identification of all such agencies and of advance contact with them to determine turn-around time.

(xiii) Financial analysis as indicated in paragraph (a)(3) of this section.

(xiv) Total estimated cost of the project and cost per kilowatt-hour produced.

(xv) Schedule for putting power on line.

(2) The study should identify probable environmental and social impacts of the project. In particular, the study should analyze the likely effect of construction and of proposed mode(s) of operation of the facility on water resources of the project area (including water quality and effects on the current uses of the reservoir, and on major downstream uses); on recreation; and on plant and local or migratory animal wildlife, listing the presence of any Federally- or State-listed endangered or threatened species. The study should also indicate the involvement of any critical habitat and the involvement of any site included on, or eligible for, the National Register of Historic Places. *Note:* Applicants should consult with the Department of Energy early in the feasibility study to obtain further guidance on the scope and level of detail required for a specific project. In general, this aspect of the feasibility study will be based on available information supplemented by reconnaissance level site specific information as necessary to identify probable environmental impacts. Further, this aspect does not involve the preparation of an environmental impact statement or an environmental assessment pursuant to the requirements of the National Environmental Policy Act of 1969 ("NEPA") (42 U.S.C. 4321 *et seq.*) and the regulations (40 CFR Parts 1500-1508) of the Council on Environmental Quality for implementing the procedural provisions of NEPA. Applicants should be aware that the licensing of small hydroelectric power projects will require a site specific NEPA review that will be under the jurisdiction of the Federal Energy Regulatory Commission.

(3) In those cases where construction of the facility will require project financing, the study should include a cash flow statement covering the first ten operating years and a financing plan. The plan should use realistic assumptions regarding interest rates and debt amortization, and should detail contractual commitments proposed to be obtained for purchase of power output of the project. For projects not requiring project financing, an economic benefit/cost analysis should be provided. *Note:* Although a benefit/cost analysis is not required for a project which uses project financing, such an analysis is often of assistance in evaluating such a project, and its inclusion is encouraged.

(b) *Licensing loans.* The purpose of a licensing loan is to assist in defraying a percentage of the costs of applying for a necessary license or license amendment or other Federal, State, regional, and local approval or exemption respecting a small hydroelectric power project and the cost of participating in any administrative proceeding regarding any such application.

§ 797.40 Approval procedure and requirements.

(a) *Consultation with FERC.* Before making a feasibility study loan or a licensing loan, the Secretary will consult with FERC to the extent the Secretary deems necessary to determine whether the loan would be inadvisable unless the applicant holds a preliminary permit from FERC under Subchapter I of the Federal Power Act (16 U.S.C. 791a, and following) for the proposed project. The Secretary will not make the loan if the Secretary believes it to be inadvisable for lack of that permit. See note to § 797.21(a)(9).

(b) *Feasibility study loans.* (1) Before issuing a feasibility study loan, the Secretary must make the following findings, which will be based upon the Secretary's evaluation of the information provided in the loan application or otherwise available:

(i) That there exists a reasonable likelihood that the applicant or other person who will undertake the study is capable of performing it.

(ii) That the applicant will repay the loan.

(iii) That the project may be found to be both technically and economically feasible and environmentally acceptable. The determination of economic feasibility will include consideration of costs associated with environmental and safety factors.

(iv) That all requirements of this regulation, and of Title IV of the Public Utility Regulatory Policies Act of 1978, pertaining to the issuance of the feasibility study loan, have been found to be satisfied.

(2) In cases where there are two or more proposed projects located upon the same waterway, the Secretary may approve one loan for a single feasibility study dealing with all such projects (in which the persons proposing the projects will jointly participate with rights and obligations hereunder exactly the same as if their participation were on a separate basis) even though the projects are proposed by different persons, if the Secretary finds that to do so would avoid unnecessary duplication of effort and costs and would provide adequate information to make a determination concerning the feasibility of all such projects.

(c) *Licensing loans.* Prior to the issuance of a licensing loan, the Secretary must make the following findings, which will be based upon the Secretary's evaluation of the information provided in the loan application and accompanying feasibility study, or otherwise available:

(1) That the applicant has submitted a feasibility study which substantially conforms to the requirements and purpose indicated in § 797.30 and tends to establish that the proposed small hydroelectric power project is technically and economically feasible and environmentally acceptable. The determination of economic feasibility will include consideration of costs associated with environmental and safety factors.

(2) That there exists a reasonable likelihood that the applicant will repay the loan.

(3) That all requirements of this regulation, and of Title IV of the Public Utility Regulatory Policies Act of 1978, pertaining to the issuance of the licensing loan, have been satisfied.

(d) *Additional considerations as to feasibility study loans and licensing loans.* In determining whether or not to make a feasibility study loan or licensing loan, as well as in determining the percentage of costs such loan will defray, the Secretary may take into consideration the cost of the work as it relates to the size and output of the proposed hydroelectric power facility, and such other matters as in the Secretary's judgment bear on the ultimate success or failure of the proposed small hydroelectric power project. See, also, § 797.50(c), regarding loan limits.

(e) *Site visits.* In making the determinations referred to in this section, the Secretary may consider information provided by a visit to the proposed site by the Secretary or his or her representative.

§ 797.41 Delegation of authority.

(a) Pursuant to the authority vested in the Secretary of Energy ("Secretary") and by section 642 of the Department of Energy Organization Act (Pub. L. 95-91), there is hereby delegated to the Assistant Secretary for Resource Applications the authority to:

(1) Make feasibility study loans and licensing loans, and cancel the unpaid balance and any accrued interest on such loans, pursuant to the Small Hydroelectric Power Projects Program authorized in Title IV of the Public Utility Regulatory Policies Act of 1978 (Pub. L. 95-617) ("PURPA") and otherwise administer such Program;

(2) Promulgate such rules and regulations as necessary and appropriate for the Assistant Secretary to perform his or her functions under Title IV of PURPA;

(3) Sign documents, for publication in the FEDERAL REGISTER, that are necessary for the Assistant Secretary to perform his or her functions under Title IV of PURPA;

(4) Take such other action as the Secretary or the Secretary's authorized delegates may, from time to time, direct or authorize.

(b) The authority delegated to the Assistant Secretary for Resource Applications may be further delegated, in whole or in part.

(c) In exercising the authority hereby delegated or as redelegated pursuant to this section, the delegate(s) shall be governed by the rules and regulations of the Department of Energy and the policies and procedures prescribed by the Secretary's delegate.

(d) Nothing in this delegation by the Secretary shall preclude the Secretary from exercising any of the authority so delegated whenever, in the Secretary's judgment, the Secretary's exercise of such authority is necessary or appropriate to administer the functions vested in the Secretary.

§ 797.50 Loan agreement and terms.

(a) A loan agreement, and a promissory note securing performance of that agreement, shall be executed in writing between the borrower and the Secretary. In addition to other provisions the Secretary may deem appropriate, the loan agreement and the promissory note shall provide as follows, either at full length or by incorporation by reference to terms of the other of the two documents.

(1) The borrower agrees to repay the loan of funds provided by the Secretary, unless the Secretary forgives repayment as provided in paragraph (a)(4)(i) of this section.

(2) The interest rate on the loan will be the statutory interest rate.

(3) The loan shall be repaid over a maximum period of 10 years as follows:

(i) No payments of principal or interest are required for the first 4 years from the date of execution of the loan agreement.

(ii) Beginning on the 4th anniversary date, the accrued interest, which will include interest charged on unpaid interest, shall be added to the outstanding principal balance and 1/7 of that total shall be due at such time.

(iii) Each anniversary date thereafter, 1/7 of the total computed in paragraph (a)(3)(ii) shall be due plus all interest accrued in the previous year on the unpaid balance of the loan.

(iv) Prepayments may be made at any time without penalty.

(4) The provisions of this subsection above shall be altered by the following circumstances:

(i) The Secretary forgives repayment of interest and principal as permitted in § 797.80.

(ii) Construction is undertaken on the proposed hydroelectric power project, in which event the outstanding balance of the feasibility study and/or licensing loan should be part of the financing for such project and the loan repaid out of the proceeds of any construction loan. To insure compliance with this provision, the Secretary shall have the option of accelerating the repayment of any loan made under this regulation and demanding payment in full any time after the expiration of 60 days from the date construction has begun on the project.

(5) Payments required by the loan agreement, if not made when due, shall accrue interest at a specified rate, which shall be not less than 10 percent per annum.

(6) The loan may be used by the borrower to defray up to 90 percent of the costs of a feasibility study or of the costs of applying for a necessary license or license amendment, other Federal, State, regional, and local approval or exemption respecting the project, and of participating in any administrative proceeding regarding such application. No part of the loan shall be used to defray any fee charged by any Federal, State, regional or local agency as a condition of receiving a license, amendment, or other approval or exemption, or any cost associated with a finder's fee. The loan may defray reasonable and customary costs directly related to the project and entailed in the engineering, financial, legal, environmental, social and institutional considerations necessary to the study on to the licensing or approval endeavors of the borrower.

(7) The borrower will make periodic reports, as required, regarding the progress of the feasibility study or licensing or approval activities.

(8) Requests for disbursements at closing and thereafter shall be supported by such documents and by such indications of progress as the secretary may require.

(9) Costs allowable under paragraph (a)(6) of this section and incurred by a borrower prior to signing the loan agreement may be credited toward the borrower's share of costs. In no case will such costs be reimbursable from proceeds of the loan.

(b) The documents shall also provide, either at full length or by incorporation by reference, for monitoring and audit (see § 797.60), assignment or transfer (see § 797.70), default (see § 797.90), and appeals (see § 797.500).

(c) The Secretary will not increase the amount of a feasibility study loan or licensing loan, nor make a feasibility study loan or licensing loan in excess of $50,000, unless in the Secretary's judgment good cause is shown. In that event, the Secretary may require of the borrower such additional supporting covenants, collateral security arrangements, and contribution to the project as the Secretary deems necessary to protect the interests of the United States.

§ 797.60 Project monitoring and audit.

The borrower shall keep such records concerning the small hydroelectric power project as are required by generally accepted accounting principles, and such other records as the Secretary may deem necessary. The Secretary may have access, for the purpose of audit and examination, to any pertinent records or other documents of the borrower during the regular business day, and may require that copies of such documents be provided to the Department of Energy by the borrower.

(Approved by the Office of Management and Budget under control number 1901-0225)

[45 FR 3543, Jan. 17, 1980, as amended at 46 FR 63209, Dec. 31, 1981]

§ 797.70 Assignment or transfer of loan.

Assignment or transfer of the loan and obligations contained thereunder may be made only with the written consent of the Secretary.

§ 797.80 Cancellation.

(a) The Secretary may cancel the unpaid balance and any accrued interest on any feasibility study loan or licensing loan if the Secretary determines on the basis of the study, or on the basis of any other information available to the Secretary, that the small hydroelectric power project would not be technically or economically feasible or environmentally acceptable. The Secretary's determination to cancel the loan may be made prior to the completion of the study or afterwards.

(b) In determining economic feasibility, the Secretary shall be guided by the Secretary's determination of the ability of the proposed project to support financing appropriate to carry out the project and available to the applicant for the project under reasonable terms and conditions.

(c) The Secretary may cancel the unpaid balance and any accrued interest on a loan to a borrower who, in the Secretary's judgment, has been or will be unable to obtain a necessary license respecting the project, or any right necessary to construct and operate the project, for a reason beyond the borrower's control and despite borrower's good faith effort to do so.

(d) The Secretary will not cancel the unpaid balance and accrued interest on any feasibility study or licensing loan if the Secretary finds that the borrower, in applying for the loan, (1) failed to provide information reasonably available to such borrower that would have indicated that there was not a reasonable likelihood the project would be found to be technically and economically feasible and environmentally acceptable, or (2) withheld information indicating that the borrower would be unable to obtain a license, approval or right necessary to the project.

(e) It shall be a condition of cancellation of unpaid balance or accrued interest under this section that:

(1) The Secretary's obligation to disburse funds under the loan agreement shall terminate.

(2) A feasibility study produced under a feasibility study loan made to the borrower pursuant to this regulation shall become property of the United States.

(3) The borrower shall withdraw any pending license application for the project.

(4) If during the term of a cancelled loan the borrower, or an entity in which the borrower has a substantial interest, as determined by the Secretary, starts construction of the small hydroelectric power project to which the loan pertained, unpaid principal and interest to date shall become due and payable.

§ 797.90 Default.

(a) If the borrower fails to perform the terms and conditions of the loan agreement or any related document, the borrower shall be in default and the Secretary shall have the right, at the Secretary's option, to accelerate the indebtedness and demand full payment of all amounts outstanding, both principal and interest, under the loan.

(b) No failure on the part of the Secretary to make demand at any time shall constitute a waiver of the rights held by the Secretary.

(c) Upon demand by the Secretary, the borrower shall have a period of not more than 30 days from the date of demand to make payment in full because of default.

(d) If the failure on the part of the borrower to perform the terms and conditions of the loan agreement, or related document, does not constitute an intentional act, but is brought about as a result of circumstances largely beyond the control of the borrower, or is deemed by the Secretary to be insubstantial, the Secretary may elect, at the Secretary's option, to waive the default and restructure the repayment required by the loan agreement in any mutually acceptable manner.

(e) Should the borrower fail to pay after demand as provided in paragraph (c) of this section, the Secretary shall undertake collection in accordance with the terms of the loan agreement and the applicable law.

§ 797.100 Disclosure.

Subject to the requirements of law and in accordance with Department of Energy ("DOE") regulations concerning public disclosure, trade secrets, commercial and financial information, and other information or data concerning the project that the applicant submits to DOE in writing on a privileged or confidential basis before or during the project will not be disclosed by DOE without prior notification to the applicant. Any applicant asserting that the information is privileged or confidential shall appropriately identify and mark such information.

§ 797.200 Noninterference with Federal, State, regional, and local requirements.

Nothing in this regulation shall be construed to modify requrements imposed on the borrower by Federal, State, regional, and local government agencies in connection with permits, licenses, or other authorizations to construct or finance small hydroelectric power projects.

§ 797.300 Overall program considerations.

Nothing in this regulation shall be interpreted to restrict the Secretary, in making the various determinations provided for in this regulation, from taking into account considerations relating to the small hydroelectric power project loan program as a whole.

§ 797.400 Nondiscrimination in federally assisted programs.

(a) Applicants and recipients of Federal assistance from DOE are obligated to comply with civil rights requirements of the following public laws: Title VI of the Civil Rights Act of 1964; Title IX of the higher Education Amendments of 1972; section 16 of the Federal Energy Administration Act of 1974; section 401 of the Energy Reorganization Act of 1974; section 504 of the Rehabilitation Act of 1973; and the Age Discrimination Act of 1975.

(b) To be in compliance with civil rights requirements, an applicant/recipient, among other obligations, must:

(1) Submit a written assurance that the program or activity will be operated in a manner that does not exclude from participation in or deny the benefits or services to individuals on the basis of race, color, national origin, sex, age, or handicap;

(2) Designate the person responsible for coordination of activities to carry out its civil rights compliance responsibilities; and

(3) Take appropriate initial and continuing steps to notify participants, beneficiaries, applicants and employees that it does not discriminate on the basis of race, color, national origin, sex, age, or handicap.

§ 797.500 Appeals.

Any dispute about a question or fact arising under the loan agreement shall be decided in writing by the DOE official who executed the agreement, or his successor. The borrower may, within 14 calendar days after receipt of the decision, make a written request to that official to reconsider the decision. The decision on the request for reconsideration, which also shall be in writing, may be appealed in writing by the borrower, within 30 calendar days after receipt, to the Chairman, Board of Contract Appeals, Department of Energy, Washington, D.C. 20545. That Board, when functioning to resolve the dispute, shall proceed in the same general manner as when it presides over appeals involving contract disputes. The decision of the Board on the dispute shall be the final decision of the Secretary.

PART 798—URBAN WASTES DEMONSTRATION FACILITIES GUARANTEE PROGRAM

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AUTHORITY: Sec. 19 of the Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. 93-577, (42 U.S.C. 5918, 5919); as amended by Pub. L. 95-238, (92 Stat. 61); and sec. 644 of the Dept. of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254).

SOURCE: 45 FR 31607, May 13, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 798.1 Purpose.

The purpose of these regulations is to set forth policies and procedures under which the Department of Energy (DOE) will issue loan guarantees backed by the full faith and credit of the United States, for financing the construction, startup, and related costs for facilities demonstrating the conversion of urban wastes into synthetic fuels, and the generation of desirable forms of energy, including synthetic fuels, from urban wastes in an environmentally acceptable manner.

§ 798.2 Objectives.

The objectives of the Urban Wastes Demonstration Facilities Guarantee Program are:

(a) To assure Federal support to foster a demonstration program to generate desirable forms of energy, including synthetic fuels, from urban wastes;

(b) To guarantee the payment of the outstanding principal balance of, and accrued interest on, financial obligations made for demonstrating the conversion of municipal waste into synthetic fuels, and for the generation of desirable forms of energy from urban wastes, in an environmentally acceptable manner;

(c) To generate data necessary for evaluation of environmental impacts, energy efficiencies, technical advances in the state of the art, social costs and other factors affecting the economic viability of the technology, its economic desirability by displacement of fossil fuels, and its environmental desirability considering both the advantages of generating a clean burning fuel, and the elimination of potential contaminants; and

(d) To demonstrate the commercial viability of the technology, which will insure that financing will be available in the future for urban wastes conversion facilities without the need for Federal guarantees.

§ 798.3 Full faith and credit.

The full faith and credit of the United States is pledged to the payment of all guarantees issued under these regulations with respect to principal and interest. The guarantee agreement will be conclusive evidence that the guarantee, and the underlying loan, comply with the provisions of the Act and these regulations. A guarantee will be valid and incontestable by the government, except for fraud or material misrepresentation by the holder.

§ 798.4 Definitions.

(a) "Act" means the Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. 93-577, as amended by Title II, section 207 of Pub. L. 95-238.

(b) "Applicant" means any individual, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company, municipality, or other non-Federal entity that has the authority to enter into a loan agreement for which a guarantee under these regulations is being sought.

(c) "Borrower" means any applicant who has had an application approved by the Secretary, and who receives the proceeds from a loan that is guaranteed in accordance with these regulations.

(d) "Commitment to guarantee" means a document issued by the Secretary that sets forth, specifically or by reference, the terms and conditions (e.g., securing other funds, completing environmental studies, obtaining permits) under which the Secretary will subsequently issue a loan guarantee.

(e) "Construction and startup costs" means all reasonable project costs, computed in accordance with generally accepted accounting principles and practices, consistently applied, or that system required by law, that would be incurred from the start of final engineering design to the point of initial production.

(f) "Default" means the failure of a borrower to make payments of principal and interest on a loan guaranteed under these regulations by the Federal government within the time period specified in a guarantee agreement, or the failure of the borrower to comply with other material terms or conditions specified as default conditions in a guarantee agreement.

(g) "Demonstration" means the establishment of a facility to exhibit the technical, economic, or environmental feasibility, normally under commercial conditions, of a new technology, device, technique, process or practice, or a significantly new combination or use of technologies, processes or institutional practices to convert urban wastes to synthetic fuels or other desirable forms of energy.

(h) "Desirable forms of energy" means recovered energy forms including, but not limited to:

(1) Synthetic fuels, direct heat, steam, electricity, low-grade heat and ammonia; and

(2) Recycled materials, whether source separated or otherwise recovered, originally produced be methods which consumed significant amounts of energy.

(i) "Fund" means the separate fund established in the Treasury of the United States, as provided for in section 19(n) of the Act.

(j) "Guarantee agreement" means a written agreement by which DOE guarantees payment of the principal balance of and accured interest on specific financial obligations of a borrower.

(k) "Holder" means an individual or any legal entity that has lawfully acquired all or part of the rights, title, and interest in the guaranteed portion of the loan.

(l) "Indian tribe" means any tribe, band, or community having a governing body recognized by the Secretary of Interior.

(m) "Lender" means any individual, partnership, corporation, Federal entity, or other legal entity formed for the purpose of, or engaged in the business of lending money. Examples of lenders may include, but are not limited to, commercial banks, savings and loan institutions, insurance companies, factoring companies, investment banking organizations, institutional investors, venture capital investment companies, trusts, Federal entities, or other entities designated as trustees or agents acting on behalf of bondholders or other lenders.

(n) "Loan" means any financial obligation, including, but not limited to, bonds, debentures, notes, or other financial debt instruments.

(o) "Municipal waste" means wastes, including, but not limited to, trash, garbage, sewage sludge, and industrial nonprocess wastes, that are generated in an urban environment and collected by the municipal system. Municipal waste does not include: industrial process wastes; agricultural wastes produced in an agricultural environment that remain within the confines of that environment; or forestry wastes generated on large wooden tracts not in an urban environment.

(p) "Municipality" means a city, town, township, borough, county, parish, district, or Indian tribe, or other public body created by or pursuant to State law.

(q) "Point of initial production" means that time when placement, startup, and testing of equipment is complete, and productive operation can begin, but where no waste has yet been processed.

(r) "Project"means a group of interrelated tasks undertaken, or intended which, when completed, will result in a facility for the conversion of urban wastes into synthetic fuels, or for the generation of desirable forms of energy from urban wastes, or both.

(s) "Related costs" means those project costs, computed in accordance with generally accepted accounting principles and practices, consistently applied, or that system required by law, that would be incurred from the inception of planning to the start of engineering design, and from the point of initial production through the end of a trial period. The length of the trial period, not to exceed two years, will be proposed by the applicant, approved by the Secretary on a case-by-case basis, and included in the guarantee agreement.

(t) "Secretary" means the Secretary of Energy, or the Secretary's designee.

(u) "Servicer" means any individual, partnership, corporation, Feder entity, or other legal entity, including a lender or the lender's designated trustee or agent, engaged in the business of, or being capable of servicing financial debt instruments in accordance with the provisions of these regulations, and the guarantee agreement.

(v) "State" means any State of the United States and the District of Co lumbia, the Commonwealth of Puert Rico, Guam, the Virgin Islands, Ame ican Samoa, or any territory or posse sion of the United States.

(w) "Synthetic fuels" means an liquid, gaseous, or solid fuel which c be used as a substitute for supplies petroleum, coal, natural gas or other fossil fuel.

(x) "Total costs" means the sum of construction and startup costs, and related costs.

(y) "United States" means the several States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(z) "Urban wastes" is synonymous with municipal waste.

§ 798.5 Program management.

(a) Program management responsibility is vested in the Chief, Community Technology Systems Branch, Community Systems Division, Office of Buildings and Community Systems, DOE. These responsibilities include all normal actions necessary to plan, organize, direct, and control an endeavor that is a group of projects. Specific questions regarding these regulations or urban wastes conversion technology pertinent to guarantees should be directed to this branch.

(b) The administration of any project entered into pursuant to these regulations for any commercial demonstration facility for the conversion of solid waste will be adminstered in accordance with the May 7, 1976, Interagency Agreement, the subsequently executed memorandum of understanding (MOU), and all applicable future agreements between the Environmental Protection Agency (EPA) and DOE on the "Development of Energy From Solid Wastes." The interagency agreement and MOU provide that:

(1) EPA will provide support to municipalities for feasibility studies and procurement planning for energy and resource recovery systems under the President's Urban Policy;

(2) DOE will provide support for engineering, design, construction and operation of facilities within its available authorities; and

(3) DOE will not provide funds for feasibility study and procurement planning for demonstration facilities except in those instances where DOE desires to demonstrate a specific technique and EPA supported studies have not led to the selection of that technique, and other special circumstances mutually agreeable to DOE and EPA.

(c) DOE will consider applications for support under the provisions of these regulations equally, whether or not a feasibility study has been supported by the Federal Government, except that any Federal support of the feasibility study will be considered within the 75% limitation on Federal support of the project.

(d) EPA will retain responsibility for the environmental, economic, and institutional aspects of solid waste projects and for assurance that these projects are consistent with any applicable suggested guidelines pursuant to Section 1008 of the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, as amended, and any applicable State or regional solid waste management plan.

§ 798.6 Citizenship requirements.

An applicant for financial assistance under these regulations must be a citizen or a national of the United States. An individual, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company, or other non-Federal entity may not be deemed to be a citizen or national of the United States unless the Secretary determines that such applicant satisfactorily meets all the requirements of section 2 of the Shipping Act of 1916 (46 U.S.C. 802) for determining such citizenship, except that the provisions in such section 2(a) concerning: (a) The citizenship of officers or directors of a corporation, and (b) the equity required to be owned in the case of a corporation, association, partnership, or firm operating a vessel in the coastwise trade shall not be applicable. The Secretary, in consultation with the Secretary of State, may waive such requirements in the case of a corporation, association, partnership, or firm in which controlling interest is owned by citizens of countries that are signatories to the International Energy Agreement.

§ 798.7 Deviations.

To the extent that such requirements are not specified by the Act or other applicable statutes, the Secretary may authorize deviations on an individual basis from the requirements of these regulations, upon a finding that such deviation is essential to program objectives, and the special circumstances presented make such deviation clearly in the best interest of the Government. Recommendation for any deviation will be submitted in writing by the program office of the Secretary. Such recommendations will include a supporting statement, which indicates briefly the nature of the deviation requested and the reasons therefore. This deviation authority may be delegated. With respect to environmental matters, deviation authority may be the Assistant Secretary for Environment.

§ 798.8 Fiscal year 1980 appropriation modification.

(a) Except to the extent obviated or deemed satisfied by legislation, the procedures established by these regulations will be applicable.

(b) Pub. L. 96-126 provides appropriations for a reserve for defaults, and authority to the Secretary to make loan guarantees for alternative fuel production facilities and further deems that certain requirements for Congressional action pursuant to guarantees made under that appropriation were satisfied. By virtue of this language, the requirements for Congressional action specified in §§ 798.22(c) and 798.46(b) (3) and (4) are deemed satisfied and therefore do not apply to guarantees made under the appropriations of Pub. L. 96-126.

§ 798.9 Nondiscrimination in projects receiving Federal assistance.

All applicants receiving Federal assistance under this regulation will agree:

(a) Not to discriminate against any person on the grounds of race, color, national origin, sex, handicap, or age in the carrying out or completion of any project where Federal assistance is issued under this regulation, and to comply with the DOE "Nondiscrimination in Federally Assisted Programs" regulations implementing the Civil Rights Requirements of Title VI of the Civil Rights Act of 1964; section 16 of the Federal Energy Administration Act of 1974; section 401 of the Energy Reorganization Act of 1974; Title IX of the Higher Education Amendments of 1972; section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; and the Civil Rights Requirements administered pursuant to the DOE Organization Act;

(b) To incorporate or cause to be incorporated into all construction contracts related to the project the provisions prescribed by 41 CFR Part 60 pursuant to the provisions prescribed for Government contracts by section 202 of Executive Order 11246, Sept. 28, 1965, 30 FR 12319 (regarding nondiscrimination in employment by Government contractors and subcontractors); and

(c) To take positive efforts to maximize the utilization of small and disadvantaged business concerns in connection with the assistance received.

Subpart B—Demonstration Project Provisions

§ 798.20 Project costs.

(a) The cost elements set forth in this section are for the purpose of illustrating the manner by which allowable construction, and startup costs, and related costs of the project may be determined. The types of costs listed in this section may be incurred throughout the planning phase, the construction and startup phase, or trial period phase of the project. The Category (i.e., construction and startup cost, or related cost) to which any allowable costs incurred will be included will depend both upon the point in time at which it is incurred, and the purpose for which it is incurred. These two cost categories must be separately treated in order to determine the allowable guarantee amount. Cost elements for any group of interrelated tasks must be separately identified for each of those tasks to the extent feasible.

(b) Those reasonable and customary costs that are paid, expected to be paid, and directly related to the construction and startup phase of the project will be used to estimate the construction and startup costs for a demonstration facility, except as set forth in paragraph (d) of this section

These costs may include, but are not limited to the following types:

(1) Materials, labor, utility services, travel, and transportation;

(2) Employees' salaries, wages, consultant's fees, and materials, and other operating expenses;

(3) Professional services and fees necessary to obtain licenses, permits, and to prepare environmental reports and data. These will generally relate to changes required after engineering design begins;

(4) Financial and legal services costs;

(5) Engineering, architectural, and legal fees paid in connection with the demonstration facility;

(6) Costs of acquisition or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition or rental, site improvements, site restoration, and abandonment costs, access roads, fencing, bridges, and other general site conditions;

(7) Equipment purchase, placement and testing costs;

(8) Costs to provide safety and environmental protection equipment, facilities, and services;

(9) Where applicable, fees for royalties and licenses that relate to the project;

(10) Interest costs and other normal costs charged by lenders;

(11) Bond financing costs and trustee's fees and commissions;

(12) Necessary and appropriate insurance and bonds of all types (e.g., bid and construction bonds, etc.);

(13) Purchase of flood insurance, if required;

(14) Taxes to be paid to Federal, State, and local government agencies, and other taxing authorities;

(15) Cost of any current assets directly related to the project, including cash reserves, and other forms of working capital;

(16) A reasonable contingency reserve to cover the possibility of cost increases;

(17) Guarantee fees payable by the borrower, if that is included in the terms and conditions of the debt instrument and the guarantee agreement; and

(18) Other necessary and reasonable costs, as approved by the Secretary.

(c) Reasonable and customary costs that are paid, or expected to be paid, and directly related to preliminary planning or trial period phases of the project will be used to estimate the related costs, except as set forth in paragraph (d) of this section. These costs may include, but are not limited to the following types:

(1) All costs of the type included in paragraph (b) of this section that are not incurred, or directly related to the construction and startup phase of the project;

(2) Costs incurred by the applicant before the approval of the guarantee agreement (e.g., preliminary planning, design, development, etc.);

(3) Costs of data gathering (technical, environmental, economic, and socio-economic impacts) and preservation required by the guarantee agreement; and

(4) Working capital, reserves, and other costs associated with the operations of the facility during the trial period.

(d) Costs that are not considered as allowable project costs include, but are not limited to, the following:

(1) Fees and commissions charged to the borrower, including finder fees, for obtaining Federal funds;

(2) Parent corporation general and administrative expenses, and other parent corporation assessments, including company organizational expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Expenses not paid or incurred by the applicant;

(6) Costs that are excessive or are not directly required to carry out the project, as determined by the Secretary; and

(7) Operating expenses incurred after the end of the trial period.

(e) The Secretary may audit any or all cost elements included in the estimated project cost, and reserves the right to exclude or reduce the amount of any cost which the Secretary determines to be unnecessary or excessive. The borrower will make available

records and other data necessary to permit the Secretary to carry out such an audit. In carrying out this responsibility, the Secretary may utilize employees of other Federal agencies or may direct the borrower to submit to a review performed by an independent public accountant or other competent authority.

§ 798.21 Demonstration facility requirements and conditions.

A guarantee or a commitment to guarantee a loan may be made only if the following demonstration facility requirements and conditions are met as determined by the Secretary:

(a) The project will, at minimum, comply with applicable Federal, State, and local environmental laws and regulations and the terms and conditions of the guarantee regarding environmental protection. The issuance of a Federal guarantee under these regulations is subject to, among others, the provisions of the National Environmental Policy Act of 1969 (NEPA), as amended, (42 U.S.C. 4321 et seq.; Pub. L. 91-190), applicable DOE regulations, and guidelines implementing NEPA, Executive Order (E.O.) 11988—Floodplain Management, and E.O. 11990—Protection of Wetlands. DOE is responsible for conducting a preliminary environmental analysis, and, if necessary, preparing an Environmental Assessment (EA) of Environmental Impact Statement (EIS). In addition to generally applicable criteria used to determine the proper scope of environmental review to be accorded individual applications, DOE may review and consider the environmental impacts associated with the commercial operation of the project throughout its useful life, even where the guarantee may be limited to only a small or preliminary segment of the entire commercial project. In considering environmental impacts, particularly environmental impacts associated with commercial operation, due consideration will be given to the fact that one of the purposes of the demonstration facility is to generate data necessary for a complete evaluation. The DOE will utilize such analyses in the decisionmaking process regarding the design and minimization of the enironmental impacts for a proposed project;

(b) The project is considered to be technically and economically feasible and environmentally acceptable, and major milestone events are readily identifiable;

(c) There is sufficient evidence that the applicant will initiate and complete the project in a timely, efficient, and acceptable manner;

(d) The project will be performed in the United States;

(e) The project is not for the manufacture of component parts for demonstration facilities eligible for assistance under these regulations; and

(f) The project is consistent with the objectives set forth in § 798.2.

§ 798.22 Guarantee requirements and conditions.

A guarantee of a loan for a demonstration facility may be issued only if the following requirements and conditions are met as determined by the Secretary:

(a) The financial assistance applied for is necessary to encourage financial participation;

(b) The loan to be guaranteed may not exceed 75% of the estimated total costs, or 90% of the estimated construction and startup costs of the project, whichever is less:

(1) The guarantee may be for the full amount of the loan, or may provide for only a partial guarantee where other lenders are participating in the loan;

(2) Where only a partial guarantee is made by the Secretary, the guarantee agreement and underlying loan agreement will include adequate provisions regarding the rights, interests, and responsibilities of the parties in the event of a default, and disposition of any receipts obtained after liquidation;

(c) Where the estimated cost of a demonstration facility to be assisted with a loan guarantee exceeds $50 million, the following provisions will be complied with, unless otherwise authorized by an Appropriations Act:

(1) The making of the guarantee, or commitment to guarantee, is specifi-

cally authorized by legislation enacted by Congress; or

(2) Both Houses of Congress pass a resolution stating, in substance, that they favor issuing the guarantee;

(d) Full repayment of a guaranteed loan is to be made over a period not to exceed 30 years, or a period equal to 90 percent of the expected average useful economic life of the project's major physical assets, whichever is less. In calculating such period, generally accepted accounting principles and practices will be utilized by the Secretary;

(e) The amount of the loan to be guaranteed, when combined with other funds available to the applicant, will be sufficient to carry out the project;

(f) There is a reasonable assurance of repayment of principal and interest of the loan by the borrower;

(g) The project assets, and other collateral security or surety, to the extent determined by the Secretary to be necessary, are pledged for the repayment of the loan;

(h) The applicant agrees to the following provisions with respect to patents, technology, and other proprietary rights:

(1) Detailed terms and conditions that the Secretary considers appropriate to protect the interests of the United States in the case of default will be included in the guarantee agreement;

(2) Guarantees or commitments to guarantee entered into under these regulations will incorporate, to the extent appropriate, the patent provisions contained in DOE's regulations on "Patents, Data and Copyrights" (41 CFR Part 9-9) and appropriate data and copyright provisions;

(3) Title to inventions conceived or first actually reduced to practice in the course of or under any guarantee or commitment to guarantee authorized by these regulations will vest in the Government, except to the extent that the Secretary waives these rights in accordance with section 9 of the Act.

(4) Patents, including any inventions for which a waiver was made by the Secretary under section 9 of the Act, and technology resulting from the demonstration facility, will be treated as project assets of the facility in the event of default. However, inventions, title to which is vested in the United States, may not be treated as project assets for disposal purposes unless the Secretary determines in writing that it is in the best interests of the United States to treat then as project assets; and

(5) All patents, technology, and other proprietary rights which are necessary, will be available, on equitable terms, including due consideration of the amount of default payments made by the United States, to any person selected including, but not limited to the Secretary, to complete and operate a defaulted project;

(i) The guaranteed loan bears a reasonable interest rate as determined by the Secretary, in consultation with the Secretary of Treasury, after taking into account the range of interest rates prevailing in the private sector for similar government guaranteed obligations of comparable risk;

(j) Adequate provisions for servicing the loan and monitoring the project are provided for;

(k) The lender agrees not to accelerate payment of the borrower's indebtedness, except as may be permitted in the guarantee agreement:

(l) The applicant is willing, competent, and capable of performing the terms and conditions of the guarantee agreement, including the conditions that:

(1) No change of project ownership or financing arrangement will occur without prior written consent of the Secretary;

(2) The Flood Disaster Protection Act of 1973 (Pub. L. 92-234) must be complied with;

(3) The wages and rates paid to laborers and merchants employed by contractors or subcontractors in the performance of construction work must not be less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-5); and

(4) A plan acceptable to DOE for small and disadvantaged business concerns to participate in the project to

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the optimum extent feasible, consistent with the size and nature of each project, will be carried out;

(m) Any loan for the project which is not part of the guaranteed loan is subordinate to the guaranteed loan, and the guaranteed loan is in a first lien position regarding all assets of the project and all collateral security and surety pledged. However, if any of the assets offered by the borrower as collateral security and surety pledged. However, if any of the assets offered by the borrower as collateral security or surety for the guarantee are subject to prior financing liens by other creditors, DOE will require that such prior liens be removed, or an acceptable legal arrangement be made with such prior lien creditors where DOE will be protected in the event of default. An arrangement of this nature must be in the form of written agreement between DOE and the prior lien creditors and provide the following conditions:

(1) Ample notice of default, and collateral security or surety sale;

(2) A plan of liquidation offering mutual protection to DOE and other creditors; and

(3) An option on the part of DOE, which would be assignable to a third party, to have the first lien debt payable according to the original installment terms (even after default) if the project operation is undertaken by or on behalf of DOE or an acceptable third party;

(n) After a period of not lesss than 10 years from the closing date of the agreement, the Secretary may determine the feasibility and advisability of teminating the Federal participation in the demonstration facility. The Secretary will take into consideration whether the Government's need for information to be derived from the project have been substantially met, and whether the project is capable of commercial operation. In the event that a decision for temination is made, the borrower, upon notification by the Secretary, has not less than two nor more than three years to arrange for alternative financing. At the expiration of the designated period of time, if the borrower has been unable to secure alternative financing, the Secretary may charge the borrower an additional fee not to exceed one percent per year on the remaining principal to which the Federal guarantee applies, and the guarantee will remain in full force and effect;

(o) The Secretary may approve modifications to terms and conditions in existing guarantee agreements and collateral documents pertaining to the project only upon determining that such modifications will not: (1) Substantially change the project's scope, cost, and purpose; (2) Deviate from provisions in these regulations; or (3) Compromise the schedule for loan repayment. When the program office finds that a substantive modification to existing terms and conditions is desirable or necessary, or a substantive modification is requested in writing by the borrower, or servicer, a written recommendation will be forwarded for approval to the Secretary.

§ 798.23 Tax status of guaranteed obligations.

In accordance with the Act, a loan may be guaranteed only if the interest paid on the obligation and received by the holder is to be included in gross income for the purpose of Chapter 1 of the Internal Revenue Code of 1954, as amended. Where the borrower would normally issue a nontaxable obligation, the issuance of a loan guarantee will make such debt taxable, and the Secretary will pay the borrower that differential portion of the interest on the obligation, that is determined by the Secretary of the Treasury to be appropriate after taking into account current market yields on other obligations of the borrower, if any, or on other obligations with similar terms and conditions paying interest which is not ordinarily included in gross income for Federal income tax purposes.

§ 798.24 Guarantee fees.

A guarantee fee will be paid by the lender or service on the guaranteed portion of the loan, and will be computed at a rate specified in the guarantee ageeement of up to one percent per year on the estimated principal balance for the coming year. Payment of the first annual guaranteed fee will be made at the time of closing of the guarantee, and annually thereafter, or at other intervals as set forth in the guarantee agreement. This fee may be passed to the borrower, and in such case, may be included as a cost of the project. If principal and interest assistance is in effect and the fee is being passed to the borrower, payments of this fee may be deferred by the Secretary for the term of the principal and interest assistance contract. When the Federal Financing Bank is the lender, the borrower will pay the guarantee fee directly to the Secretary.

§ 798.25 Cost overruns.

(a) At the discretion of the Secretary, a guarantee agreement may be amended to increase the amount of the loan guaranteed in the event that the actual total costs to be incurred exceed the original estimates. In no event may the guarantee be increased to cover more than 60 percent of the expected overrun costs. All the following conditions must be met by the borrower before the Secretary may determine whether to amend the guarantee agreement to cover such cost overruns:

(1) The Secretary must be notified as soon as an overrun is anticipated, along with the reasons for the expected cost overrun; and

(2) The borrower will provide, when requesting a guarantee increase to cover overrun costs:

(i) The revised expected completion date and costs for the project;

(ii) An acceptable plan indicating how the cost overruns will be funded;

(iii) A list of the additional collateral security or surety, if any, to be pledged for the guarantee increase; and

(iv) Updated information on the project's economics to indicate that a reasonable assurance of repayment of the guaranteed loan (including the cost overrun) by the borrower still exists.

(b) Based on the information submitted by the borrower and other information known to the Secretary may, at the Secretary's discretion, provide for the guarantee of additional funds for the expected cost overruns upon making the following findings:

(1) The continuation of the project is worthwhile to meet program objectives, and is in the public interest; and

(2) The probable net cost to the Government in increasing the guarantee to reflect the increase will be less than that which would result in the event of default.

§ 798.26 Information for Governors and others.

(a) As soon as the Secretary receives an application for a project which might receive a guarantee, the Secretary will inform the Governor of the State, in which the facility will be located, or directly having an interest in the geographic area, or in the facility. If, within 60 days of notification, the Governor of the State in which the facility is to be located recommends that the guarantee not be issued, the application will be rejected, unless the Secretary decides that the application should be further considered. In such a case, the Secretary will notify the Governor of the reasons, in writing, and provide 30 days for response.

(b) Office of Management and Budget (OMB) Circular No. A-95 Revised, "Evaluation, Review, and Coordination of Federal and Federally Assisted Programs and Projects," requires that any agency of a State or local government or any organization or individual applying for a guarantee under this program notify the State and areawide planning and development clearinghouses in the jurisdiction of which the project is to be located. Applicants are encouraged to contact State and areawide clearinghouses at an early stage for possible assistance in developing applications.

(c) The applicant is required to provide DOE with information in the application about the financial status of its organization, about specific individuals who will be involved in the management of the project, and/or other proprietary information. Proprietary information received by DOE may be released only in accordance with § 798.40 (d) and (e).

(d) The Advisory Council on Historic Preservation may review and comment upon applications for guarantees for any project which would affect property listed or eligible for listing in the National Register of Historic Places or which may meet the criteria for listing in the National Register, pursuant to 36 CFR Part 800. All comments received from the Council will be considered by the Secretary when evaluating applications.

§ 798.27 Principal and interest assistance.

(a) With respect to any loan guaranteed under these regulations, the Secretary may enter into a principal and interest assistance contract with the borrower to pay the lender, on behalf of the borrower, the principal and interest charges that become due and payable on the unpaid balance of the loan, if the Secretary finds that:

(1) The borrower is unable to meet principal or interest payments;

(2) It is in the public interest to permit the borrower to continue to pursue the project;

(3) Such principal or interest assistance increases the probability that the loan will be repaid;

(4) The probable net cost to the Federal Government in paying such principal or interest will be less than that which would result in the event of a default for the nonpayment of principal or interest;

(5) The amount of principal or interest payment which may be made under this Section will be no greater than the amount of principal or interest that the borrower is obligated to pay under the guaranteed portion of the loan agreement; and

(6) The borrower agrees to reimburse the Secretary for such payment (including interest) on such terms and conditions which are satisfactory to the Secretary, and executes all necessary documents as the Secretary may require.

(b) If the Secretary determines that principal and interest assistance is not warranted, the Secretary will notify the borrower, and other parties, as appropriate.

§ 798.28 Federal Financing Bank.

(a) The Federal Financing Bank (FFB) is an agency operating under the United States Treasury Department which has authority to purchase Federally guaranteed debt. Loans guaranteed under these regulations may be funded through private lenders or the FFB. Funding by private lenders will have preference except in the following cases:

(1) Whenever the Secretary may be required to make an interest differential payment as provided for in § 798.23; or

(2) Whenever the Secretary determines, after consultation with the Secretary of the Treasury, and negotiation with the private lender, if any, or other private lenders, that the interest rate, maturity, lending fees, or other terms and conditions applicable to the borrower do not reflect the value of a guarantee backed by the full faith and credit of the United States.

(b) Whenever a loan is funded through the FFB, the loan will be serviced, in accordance with the loan servicing requirements, as described in § 798.50, "Loan servicing," by parties acceptable to the Secretary. In addition to the guarantee fee, the cost of servicing, which is normally borne by the lender and borrower, will be paid by the borrower to the Secretary, and may be included as project cost.

§ 798.29 Applicability of other laws.

Nothing in these regulations may be construed as affecting the obligations of any party to comply with Federal, State, and local environmental, land use, and health and safety laws and regulations, or to obtain applicable Federal, State, and local permits licenses and certificates.

Subpart C—Solicitation, Evaluation, and Selection of Applications

§ 798.40 General information.

(a) The application process for loan guarantees will consist of these phases:

(1) Solicitation of applications;

(2) Initial application screening and evaluation;

(3) Review by other Federal agencies;

(4) Selection of applications for further consideration;

(5) Issuance of conditional commitment and report to Congress; and

(6) Issuance of loan guarantee upon satisfaction of conditions in commitment.

(b) A Solicitation Announcement may be issued periodically by DOE. The announcement will be synopsized in the *Commerce Business Daily* and FEDERAL REGISTER. In addition, the announcement will be circulated directly to interested individuals, private and public entities (excluding Federal agencies), and associations thereof, to the maximum extent feasible. The Solicitation Announcement may include the following items:

(1) A brief description of the type of projects for which applications are solicited;

(2) The time period during which responses to the solicitation may be filed;

(3) The name and address of the DOE representative to whom any questions may be directed; and

(4) Other information and requirements as determined by DOE to be relevant to the Solicitation Announcement.

(c) Presubmission conferences open to all parties may be conducted by DOE personnel. All parties requesting copies of the solicitation will be notified of all conferences scheduled.

(d) Subject to the requirements of applicable law and regulations, information such as trade secrets, commercial and financial information, and other information or data concerning the demonstration project which the applicant or lender submit to DOE in an application, or at other times throughout the duration of the project, on a privileged or confidential basis, may not, in accordance with the DOE regulations concerning public disclosure of information, section 19(t) of the Act, and paragraph (e) of this section, be disclosed by DOE without prior notification to the submitter. Any submitter asserting that the information is privileged or confidential will appropriately identify and mark such information.

(e) Technical, financial, environmental, marketing, and management information maintained by the Secretary under this program will be made available to the public, subject to the provisions of 5 U.S.C. 552, and 18 U.S.C. 1905, and to other Government agencies in manner that will facilitate its dissemination, provided that:

(1) Upon a determination by the Secretary that any information, or portion thereof, obtained under this program directly or indirectly from any person would, if made public, divulge trade secrets or other proprietary information which is protected by 18 U.S.C. 1905, the Secretary may not publicly disclose such information; and

(2) The Secretary may, upon request, provide information to any delegate of the Secretary for the purpose of carrying out this Act, and the Attorney General, the Secretary of Agriculture, the Secretary of the Interior, the Federal Trade Commission, the Environmental Protection Agency, the General Accounting Office, other Federal agencies, or heads of other Federal agencies, when necessary to carry out their duties and responsibilities under these regulations and other laws, but such agencies and agency heads may not publicly disclose such information. This section is not authority to withhold information from Congress, or from any committee of Congress upon request of the Chairman.

(f) No guarantee or commitment to guarantee will be entered into unless authority is provided for the such guarantees by appropriations law.

§ 798.41 Evaluation criteria.

Unless solicitations issued under § 798.40(b) specify otherwise, the following criteria will be used as the basis for competitive evaluation of applications (The order of listing is no indication or reflection of priorities):

(a) The arrangements for and extent to which risk will be shared by the parties to the project other than the United States. This includes the percentage of the total cost of the project to be guaranteed, stages of inclusion of funds not guaranteed, equity invested, extent to which the equity reflects sunk costs, and types of collateral security and surety that would be pledged.

(b) The net energy that can be recovered or conserved by the project.

this includes relative energy efficiencies, including savings resulting from recycling of source separated and otherwise recovered materials, the utility of the energy form to the area, and the net amount and type of fossil fuels displaced.

(c) Potential applicability of the project to other parties or other geographic areas. This includes the extent to which the technology is adaptable to or repeatable in, other locations, or the extent to which the project demonstrates how institutional barriers can be overcome.

(d) Adequacy of the management plan for the project, and qualifications and experience of key personnel with all aspects of similar operations.

(e) Technical probability of success and advances in the state-of-the-art.

(f) Potential environmental, and health and safety impacts, as well as socioeconomic and competitive impacts. This includes the regional labor market impact, the marketability of all the desirable forms of energy produced or conserved, the degree of need that a proposed project would have in relation to the present system in use, the level of support of the community, and the degree to which the project assists in attaining the goals of other Federal programs in the area.

(g) Commercial viability of the project.

§ 798.42 Evaluation and selection panel.

Applications submitted in response to a Solicitation Announcement will be evaluated by a panel which will be appointed by the Secretary, the Deputy Secretary, or the Under Secretary, as may be appropriate. When any individual proposal, together with later phases of the same project, is estimated to meet the Source Evaluation Board (SEB) Handbook (Procurement Regulation Handbook No. 1, 44 FR 6038, Jan. 30, 1979) dollar threshold, comprehensive evaluation will be conducted by a specially constituted board which will follow the procedures and documentation requirements of SEB Handbook modified as appropriate to conform to the solicitation process set forth in these regulations or in the solicitation. When no individual proposal is expected to meet the SEB dollar theshold, proposal submitted in response to a solicitation will be evaluated by a panel which will be appointed by the cognizant program office. The panel will utilize any of the procedures and documentation requirements of the SEB Handbook modified as appropriate to conform to the solicitation process whenever necessary to insure the impartial, equitable and thorough evaluation of each proposal.

§ 798.43 Applications.

(a) The applicant will be asked to provide information in support of the application in the form and with the content prescribed in the Solicitation Announcement. The type of information requested will generally be similar to that required by an investment banking, or other financial, institution which might consider the project for debt financing. The application must contain the most current data available, and be adequate for DOE to properly evaluate the project. The following items are an example of the type of information that may be requested by the Solicitation Announcement. This information, as available, should be submitted in a brief but precise manner:

(1) A description of the scope, nature, extent, and location of the proposed project, including specification of the technology;

(2) A preliminary or conceptual design of the demonstration facility;

(3) A description of prior operating experience with the technology;

(4) Mass and energy balances for the proposed plant, to include energy data on the projected inputs and outputs from the plant;

(5) Estimates of project costs, and operating and maintenance costs;

(6) An analysis of the market for the product(s) to be produced, and the relevant economics justifying the analysis;

(7) Construction and operation schedules, including major milestones;

(8) An analysis of the project's technical and economic feasibility, including the feasibility and effect of source separation techniques, if applicable;

(9) A description of the applicant's management concept and plan of oper-

ation to be employed in carrying out the project;

(10) Amount of loan and guarantee requested, including preliminary cash flow projections;

(11) Proposed risk allocation among project participates;

(12) A written affirmation from the applicant supporting the need for a Federal loan guarantee;

(13) Other data, such as social, employment, and economic factors;

(14) A description of the potential environmental impacts of the demonstration including mitigation measures; and

(15) Any other information requested by the Secretary.

(b) The following items illustrate the range, but not necessarily the full breadth, of additional information that may also be required for proper evaluation of a project, dependent upon the type, complexity and cost of the project, the stage of project development, and the type of applicant (e.g., municipality, private firm, etc.):

(1) A description of the applicant's organization and, when applicable, a copy of the business certificate, partnership agreement or corporate charter, bylaws, and appropriate authorizing resolutions;

(2) A description of the management experience of each officer or key person in the applicant's organization who is to be associated with the project;

(3) The past financial history of the firm, including financial statements and projections as to the firm's future financial status;

(4) Business and financial interests of principal organizations (e.g., parent and/or subsidiary of the applicant);

(5) Such additional environmental information on potential environmental impacts, including mitigation measures;

(6) Evidence of a credit rating, if any (e.g., Dun and Bradstreet, Standard & Poor's, Moody's, etc.);

(7) A copy of the lender's conditional loan commitment document issued to the applicant, if applicable; and

(8) When appropriate to the project, evidence of the lender's exerience in surveying the financial aspects of complex technological projects.

§ 798.44 Initial evaluation of applications.

(a) Upon receipt of applications and all required supporting material, the Secretary will screen each application to determine if the proposed project described in the application is within the authorization and appropriations currently available to DOE, and to determine of the application is in compliance with applicable statutory and regulatory provisions and the requirements of the Solicitation Announcement, if any. Applications which exceed the Department's authorization or appropriation, or are not in compliance with applicable statutory or regulatory provisions, or the requirements of the Solicitation Announcement, if any, will be rejected, and the applicant will be notified by the Secretary together with the basis for this determination.

(b) Governors and others will be notified in accordance with the provisions of § 798.26, of applications for projects which are accepted for further processing in accordance with the requirements of paragraph (a) of this section.

(c) The Secretary will, with due regard for the need for competitive evaluation:

(1) Evaluate all remaining applications under the evaluation criteria set forth in § 798.41 or the Solicitation Announcement, as applicable;

(2) Determine whether or not to proceed with the application for consideration for a conditional commitment; and

(3) Notify the applicants not selected for further evaluation.

(d) While the applications selected for further consideration are being evaluated by other Federal agencies, as outlined below, any additional information needed by DOE for further evaluation of the applications will be requested; however, the decision to continue with further evaluation of an application and request for further data does not insure that a guarantee will be issued.

(e) Pursuant to the requirements of the Act, the Secretary will forward applications under evaluation to the following other Federal authorities for appropriate action:

(1) To the U.S. Attorney General and the Chairman of the Federal Trade Commission requesting their written views, comments and recommendations concerning the impact of a specific loan guarantee on competition and concentration in the production of energy;

(2) To the Administrator of the Environmental Protection Agency for certification that the proposed project is consistent with guidelines published pursuant to section 1008(a) of the Resource Conservation and Recovery Act; and

(3) To the Secretary of the Treasury for concurrence as to the terms, rates, and fees of the proposed financing, and to insure that the timing, interest rate, and substantial terms and conditions of such guarantee will have the minimum possible impact on the capital markets of the United States.

(f) The Secretary will give due consideration to the views and comments received from the agencies described in paragraph (e) of this section. In the event that the Attorney General and/or the Chairman of the Federal Trade Commission make a negative recommendation concerning any proposed transaction, the Secretary may not proceed to issue a guarantee unless the President of the United States determines in writing that such guarantee is in the national interest. Upon receipt of appropriate recommendations for approval from the above agencies, or from the President in the event of a negative recommendation from the Attorney General or Chairman of the Federal Trade Commission, the Secretary may proceed to take such action as is determined to be warranted in accordance with the provisions of these regulations for further consideration, and/or approval or disapproval of the proposed loan guarantee.

§ 798.45 Additional information requirements.

The Secretary may determine that additional project specific information may be required with regard to the review, evaluation, and selection of applications received in response to Solicitation Announcements. Such additional information requirements will be communicated in writing by the Secretary directly to applicants, or, in some cases, their respective lenders or servicers.

§ 798.46 Issuance of commitments to guarantee.

(a) Upon receipt of any required additional information and all necessary supporting material, the Secretary will complete evaluation of the financial, economic, environmental, engineering, managerial, other regulatory, and social aspects of the project.

(b) After completion of this final evaluation, the Secretary will, for each project still being considered for a guarantee:

(1) Obtain the final certification of the Administrator of EPA and any appropriate State and areawide solid waste management agency, that the application is consistent with any applicable suggested guidelines published pursuant to section 1008(a) of the Resource Conservation and Recovery Act and any applicable State or regional solid waste management plan;

(2) Obtain the final concurrence of the Secretary of the Treasury with respect to the timing, interest rate, and substantial terms of the loan guarantee. The Secretary of Treasury will ensure to the maximim extent feasible that the timing, interest rate, and substantial terms and conditions of such guarantee will have the minimum possible impact on the capital markets of the United States, taking into account other Federal direct and indirect securities activities;

(3) Forward to the Chairman of the Committee on Science and Technology of the House of Representatives and to the Chairman of the Committee on Energy and Natural Resources of the Senate a full and complete report on the proposed demonstration facility of the applicant seeking the guarantee, as required; and

(4) Not finalize the loan guarantee or commitment to guarantee prior to expiration of 90 calendar days (not including any day on which either House of Congress is not in session because of an adjournment if the adjournment is for more than three calendar days to a day certain) from the date on which such report on the pro-

posed demonstration facility is received by such committees.

(c) Upon, or, in some cases, subject to, the satisfactory completion of the requirements contained in paragraph (b) of this section, the Secretary may issue a conditional commitment to provide a guarantee to the tranaction proposed by the application. The conditional commitment will identify the terms and conditions under which the guarantee would be issued, and any additional requirements to be placed upon the applicant as a condition for the guarantee.

(d) Prior to issuing a loan guarantee all appropriate site specific environmental analyses required by relevant laws or regulations will be completed in accordance in accordance with § 798.21(a). However, if an Environmental Impact Statement (EIS) is required, a guarantee may be entered into on the condition that disbursements under such guarantee will be made, prior to the completion of the EIS, only for the purpose of assisting the borrower in providing information to DOE to aid in completion or review of the EIS, or for other purposes, only with the express written approval of the Offices of the Assistant Secretary for Environment and the General Counsel.

§ 798.47 Closing.

When an application for a guarantee agreement has been approved by the Secretary, the Secretary will notify the applicant, and other parties, if appropriate, and issue a commitment to guarantee. To the extent necessary, meetings will be arranged to discuss the terms and conditions contained in the commitment, the guarantee agreement, and other instruments relevant to the transaction. Upon agreement as to the terms and conditions of the guarantee agreement and other relevant instruments, a closing date agreeable to the parties will be set.

Subpart D—Guarantee and Project Administration

§ 798.50 Loan servicing.

(a) The guarantee agreement will provide that a party, hereafter called the servicer, that is acceptable to the Secretary, service the guarantee in accordance with the applicable provisions of these regulations, and the guarentee agreement. In addition, where the Federal Financing Bank is used, the servicing arrangements will be jointly developed by DOE and the borrower. Where such course of action is considered by the Secretary to be appropriate, a separate servicer may be appointed for the construction, startup and trial period of the project.

(b) The servicer will exercise such care and diligence in the disbursement, servicing, and collection of the loan as would be exercised by a reasonable and prudent party in dealing with a loan without a guarantee.

(c) The servicer will notify the Secretary in writing without delay:

(1) That the first disbursement is ready to be made, together with evidence from the borrower that the project has begun or is about to begin;

(2) Of the date and amount of disbursement for each subsequent disbursement under the guaranteed loan;

(3) Of any known failure by an intended source of capital to honor its commitment;

(4) Of any nonreceipt of payment within fifteen (15) days after the date specified for payment, together with evidence of appropriate notifications made by the servicer to the borrower;

(5) Of any known failure by the borrower to comply with terms and conditions as set forth in the loan agreement or guarantee agreement;

(6) If the servicer has information that the borrower may not be able to meet any future scheduled payment of principal or interest;

(7) If the servicer has information that the borrower may not meet any of the material terms and conditions of the guarantee agreement; or

(8) Of any significant changes from the original cash flow projections as evidenced from information and reports received from the borrower.

(d) The servicer will be required to submit to the Secretary periodic reports on the status and condition of each project guaranteed under this regulation. The Secretary will prescribe the frequency, format, and content of these reports. However, a report on the status of the guarantee will, at a minimum, be submitted by the servicer to the Secretary annually on the anniversary date of closing. Reporting will be in accordance with requirements established by DOE and specified in the guarantee agreement, and servicing agreement, if applicable. Reports will be furnished to the Secretary until that time when the guaranteed portion of the instrument is repaid.

(e) The servicer will take those actions necessary to perfect and maintain liens on assets which are set forth in the loan or guarantee agreement as collateral security or surety for the guaranteed portion of the loan.

§ 798.51 Loan disbursements.

(a) Unless otherwise provided in the guarantee agreement, the borrower may not be provided with any funds under the guarantee until the servicer has:

(1) Received written notice from the Secretary that the disbursement is approved; and

(2) Received from the borrower satisfactory documentary evidence that loan disbursements requested will be used to pay allowable project costs incurred or to be incurred by the borrower. The servicer or Secretary may require the borrower to provide documentation setting forth the purposes for which the drawdown is requested and an attestation that the disbursements will be used only for such purposes. Signature on the requesting document will be made by a person authorized to order the expenditure of the borrower's funds.

(b) The servicer may not release to the borrower drawdowns from any disbursement until the disbursement is approved by the Secretary; and

(c) The servicer may not, without the written approval of the Secretary, withhold from the borrower authorized disbursements, except as included in the provisions of the guarantee agreement.

§ 798.52 Financial assistance fund.

(a) As provided for in section 19(n) of the Act, there is established in the Treasury of the United States a separate fund, hereafter referred to as the Fund, to carry out the provisions o these regulations.

(b) The following will be deposite in the Fund:

(1) Appropriations to the Fund tha are made available by legislation;

(2) Repayments made by borrower in accordance with the terms and conditions in principal and interest assistance contracts;

(3) Guarantee fees; and

(4) Any other moneys, property, o assets derived from operations of thi guarantee program, including foreclosure, repossession, or sale of collatera securities.

(c) Balances in the Fund will be use for:

(1) Payment to debtholders, in the event of default, of the principal balance and accrued interest on loan guarantee agreements;

(2) Payments under terms of a principal and interest contract;

(3) Payment to compensate for increased interest expenses associate with securities as provided for in § 798.23; and

(4) Any necessary administrative expenses incurred by the DOE, or other Federal agencies acting pursuant to the direction of the DOE in carrying out the provisions of this regulation.

(d) If, at any time, the moneys available in the Fund are insufficient to pay principal and accrued interest in the event of default, or principal and interest assistance payments, the Secretary may issue to the Secretary of the Treasury notes or other obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of the Treasury in order to borrow sufficient funds for such purposes. This borrowing authority will be effective only to such extent or in such amounts as are specified in appropriation acts. Such authority will be without fiscal year limitation. Redemption of such notes or obligations will be made by the Secretary from appropriations or other moneys available under this regulation. Such notes o other obligations will bear interest a a rate determined by the Secretary o the Treasury, which may not be les than a rate determined by taking int consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the notes or other obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations acquired. All redemptions, purchases, and sales by the Secretary of the Treasury of such notes or other obligations will be treated as public debt transactions of the United States.

(e) The amounts in the Fund will be without fiscal year limitations and remain available until expended, with the exception that, if at any time, the Secretary determines that moneys in the Fund exceed the present and foreseeable requirements of the Fund, such amounts in the Fund that are not required to secure outstanding financial assistance obligations will be paid into the General Fund of the Treasury.

§ 798.53 Reduction or withdrawal of guarantee.

(a) The Secretary may reduce or withdraw the guarantee, as to amounts not yet disbursed or drawndown by the borrower, by written notice to the lender and to the borrower if the Secretary determines that:

(1) Initiation of activity on the project has not occurred within the period of time set forth in the guarantee agreement. Within 60 days after the guarantee is withdrawn under this circumstance, the Secretary will reimburse to the lender the full amount of the guarantee fee paid by the lender if the fee has not been passed to the borrower;

(2) The borrower has failed to acquire the required capital from intended or alternate sources of such capital, or has failed to comply with material terms and conditions set forth in the guarantee agreement. The Secretary will notify the borrower, the holder, and the servicer, as appropriate, if the guarantee is to be reduced. Drawdowns permitted to be made by the servicer after such notification is received may not be covered by a guarantee;

(3) The lender or servicer has failed to comply with any material term or condition as set forth in the guarantee agreement, and the Secretary has determined that such breach will increase the financial exposure of the Government. The Secretary will give notice of his finding that the lender or servicer has not complied with a material term to the borrower, the servicer, the lender, and the holder, as appropriate. Following notification of the Secretary's determination, the lender, or servicer, as appropriate, will be allowed reasonable time to correct the failure to comply. Actions to be taken, if the failure is not removed in a reasonable time, will be detailed in the guarantee agreement; or

(4) In the event that the Secretary determines that the project's economic success cannot be achieved in accordance with the requirements specified in the guarantee agreement, the guarantee may be reduced to amounts which have been provided by the lender as of the date of notice.

(b) A guarantee will be incontestable in the hands of the holder of the guaranteed obligation, except for fraud or material misrepresentation on the holder's part.

§ 798.54 Assignment.

(a) Except as may be otherwise by law, a holder may assign, to another, the guaranteed loan or portion thereof. Such assignment will be in accordance with the provisions of the guarantee agreement which may include a requirement for DOE approval of any assignment.

(b) The lender, except to the extent that specific limitations provided by law or in the guarantee agreement do not permit, may provide other lenders with participating shares in the loan without the prior consent of the Secretary. The guarantee agreement will specify to what extent and in what manner the loan may be divided into shares. The lender will give advance written notice to the Secretary when participating shares are so provided. The notice will be in accordance with the manner and format prescribed in the guarantee agreement and provide the participant's business name, address, telephone number, and name of official to contact.

(c) The original servicer will continue to be responsible for and perform the servicing provisions of the guarantee agreement unless the Secretary approves or assigns a substitute servicer in accordance with provisions of the guarantee agreement.

§ 798.55 Treatment of loan repayments.

When a lender holds a guaranteed and a nonguaranteed portion of a loan, payments of principal or interest made by the borrower, in accordance with the loan agreement, will be applied by the servicer to reduce the guaranteed and nonguaranteed portions of the loan on a basis that reflects the porportions that the guaranteed and nonguaranteed portions bear to the total loan.

§ 798.56 Project monitoring.

(a) The guarantee agreement or related documents will provide that appropriate DOE and other Federal representatives have access to the project site at all reasonable times in order to monitor the performance of the project. The servicer, to the extent lawful and within its control, and the borrower will assure availability of information related to the demonstration facility as is necessary to permit the Secretary to determine technical progress, soundness of financial condition, management stability, compliance with environmental protection requirements, and other matters pertinent to the guarantee. The guarantee agreement or related documents will identify those items, or types, of information which the Secretary may not make available for public dissemination.

(b) The guarantee agreement, or related documents, will provide that the servicer and the borrower keep such records concerning the project as is necessary to facilitate an effective audit and performance evaluation of the project, and that the Secretary and the Comptroller General, or their duly authorized representatives, will have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the borrower and the lender. Such inspection may be made during the regular office hours of the borrower or the servicer, or at any other time mutually convenient. The Comptroller General, at six month intervals, make an audit of recipients of financial assistance under this program pursuant to applicable General Accounting Office regulations.

§ 798.57 Survival of loan guarantee agreement.

Except in accordance with § 798.53, "Reduction or withdrawal of guarantee," guarantee agreements issued under these regulations will be binding upon the lender, the borrower, the Secretary, and other parties to the agreement, and upon their successors and assignees. No delay or failure of the Secretary in the exercise of any right or remedy, or partial exercise of any such right or remedy, will preclude any exercise of futher rights or remedies, and no action taken or omitted by the Secretary will be considered a waiver of any such further right or remedy.

§ 798.58 Other Federal assistance.

Nothing in these regulations may be interpreted to deny or limit the borrower's right to seek and obtain other Federal financial assistance (e.g., grants, price supports, or cooperative agreements) for a demonstration facility provided the prior written approval of the Secretary in obtained. The total amount of Federal financial assistance obtained for any facility under these regulations or any other Federal program may not exceed 75 percent of the total costs. For purposes of these regulations, other Federal financial assistance does not include revenue sharing funds or any tax benefits.

§ 798.59 Appeals.

The guarantee agreement will include a provision which specifies that any dispute concerning a question of fact arising after the guarantee agreement is executed will be decided in writing by the Secretary. The borrower or lender may request the Secretary to reconsider any such decision. If not satisfied with the Secretary's final decision, the borrower or lender, upon receipt of such written decision, may appeal the decision within 30 days, in writing, to the Chairman, Energy

Board of Contract Appeals (EBCA), Department of Energy, Washington, D.C. 20585. EBCA, when functioning to resolve such a dispute under a loan guarantee, will proceed in the same general manner as when it presides over appeals involving contract disputes. The decision of EBCA with respect to such appeals shall be the final decision of the Secretary.

Subpart E—Default

§ 798.70 Default, demand, payment, and collateral security and surety liquidation.

(a) In the event that the borrower has defaulted in the making of required payments of principal or interest on any portion of a loan guaranteed in accordance with these regulations, and such default has not been cured within the period of grace provided in the guarantee agreement, or other collateral security or surety agreement, the holder of the debt, or other nominee or trustee empowered to act for the holder, including the servicer, may make written demand upon the Secretary for payment pursuant to the provisions of the guarantee agreement.

(b) In the event that the borrower is in default as a result of a breach of one or more of the terms and conditions of the guarantee agreement, note, loan agreement, or other contractural obligation related to the guaranteed debt transaction, other than the borrower's obligation to pay principal or interest, as provided in paragraph (a) of this section, the holder will not be entitled to make demand for payment pursuant to the guarantee, unless the guarantee agreement provides that such default is a material breach entitling the holder to make demand, or unless the Secretary agrees in writing that such default has materially affected the rights of the parties, and finds that the holder should be entitled to receive payment pursuant to the guarantee agreement.

(c) No provision of these regulations may be construed to preclude forbearance by the holder with the consent of the Secretary for the benefit of the borrower.

(d) Upon the making of demand for payment as provided in paragraph (a) or (b) of this section, the holder will provide, in conjunction with such demand or immediately thereafter, at the request of the Secretary, supporting documentation as may be reasonably required to justify the demand.

(e) Payment as required by the guarantee will be made within sixty (60) days after receipt by the Secretary of written demand for payment: *Provided*, the demand is in compliance with the terms and conditions of the guarantee agreement, applicable law, and these regulations. Interest will accrue to the holder, in accordance with provisions stated in the guarantee agreement, until the guaranteed portion of the loan has been fully paid by the Secretary.

(f) In the event of default and payment by the Secretary to the holder, the holder will transfer and assign to the Secretary all rights held by the holder in the guaranteed loan. Such assignment will include all related liens on collateral security and surety rights. Upon such payments, the Secretary will be subrogated to the rights of the recipient of the payment and will have superior rights in and to the property acquired from the recipient of the payment. Where there is a partial guarantee of the loan, the guarantee agreement will specify the terms and conditions for the handling of the collateral and the disposition of the proceeds of recovery after default has occurred.

(g) Where the guarantee agreement so provides, the holder and the Secretary may jointly agree to a plan of liquidation of the collateral security pledged to the guaranteed loan.

(h) Where the guarantee agreement does not provide for a liquidation plan involving the holder, and payment of the guaranteed loan has been made, the Secretary, in accordance with the rights received through subrogation and acting through the U.S. Attorney General, will foreclose on the collateral security and take such other legal action as necessary for the protection of the Government.

(i) If the Secretary is awarded title and rights to collateral security pursuant to foreclosure proceedings, the

Secretary may take action to complete, maintain, operate, or lease the project facilities, or take any other necessary action which the Secretary deems appropriate in order that the original goals and objectives of the project will, to the extent possible, be realized.

(j) In addition to foreclosure and sale of collateral security the U.S. Attorney General will take appropriate action in accordance with rights contained in the guarantee agreement to recover losses and expenses incurred by the Government as a result of the default. Any recovery so received by the U.S. Attorney General on behalf of the Government will be applied in the following manner: First, to the expenses incurred by the U.S. Attorney General and DOE in effecting such recovery; second, to reimbursement of any amounts paid by DOE as a result of the loan guarantee; third, to any amounts owed to DOE under related principal and interest assistance contracts; and fourth, to any other lawful claims held by the Government on such proceeds. Any sums remaining after full payment of the above will be available for the benefit of other parties lawfully entitled to claim them.

(k) If a partial guarantee is involved, funds received by the lender as a result of liquidation actions will be applied as follows:

(1) First, to the payment of reasonable and customary fees and expenses incurred in the liquidation process, and as set forth in the liquidation plan; and

(2) Second, distributed among the legal owners of interests in the loan; pro-rated in accordance with their relative percentage ownership of the loan.

(l) No action taken in the liquidation of any collateral security pledged by the borrower will affect the rights of any party, including the Secretary, having an interest in the loan to pursue, jointly or severally, to the extent provided in the loan agreement or the guarantee agreement, legal action against the borrower, or other liable parties, for any deficiencies owing on the debt after application of the proceeds received upon liquidation.

(m) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with the liquidation of collateral security or recovery of deficiencies due under the loan, the Secretary will take such action as may be appropriate under the circumstances.

(n) Nothing in this section may preclude the Secretary from purchasing the holder's interest in the project upon liquidation or any portion of any nonguaranteed loan which might be partially secured by the assets of the project.

§ 798.71 Preservation of collateral security.

(a) Upon default by the borrower, the holder of pledged collateral security will take those actions that the Secretary may reasonably require to provide for the care, preservation, protection, and maintenance of the collateral security so as to enable the United States to achieve maximum recovery upon default of the loan. The Secretary may reimburse the holder of collateral security for reasonable and appropriate expenses incurred in taking actions required by the Secretary.

(b) Except as provided in § 798.70, no party may waive or relinquish, without the consent of the Secretary, right to any collateral security for the loan to which the United States would be subrogated upon payments under the guarantee agreement.

(c) In the event of a default, the Secretary may enter into contracts as required to preserve the collateral security for the loan.

PART 799—LOAN GUARANTEES FOR ALCOHOL FUELS, BIOMASS ENERGY AND MUNICIPAL WASTE PROJECTS

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AUTHORITY: Title II of the Energy Security Act (Pub. L. 96-294), 94 Stat. 683, 42 U.S.C. 8801 et seq. and the Dept. of Energy Organization Act (Pub. L. 95-91), sec. 644 et seq., 91 Stat. 599 (42 U.S.C. 7254).

SOURCE: 45 FR 67025, Oct. 8, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 799.1 Purpose.

The purpose of this regulation is to set forth policies and procedures utilized by the Secretary to receive, evaluate, and approve applications seeking federal loan guarantees for the financing of biomass energy projects (which include alcohol fuels, biomass, and municipal waste energy projects). This regulation also identifies those requirements and conditions which will be imposed by the Secretary under loan guarantees issued for the purpose of providing financial assistance for the construction of biomass energy projects. The authority of the Secretary to issue loan guarantees under this regulation shall be limited to the extent provided in advance in appropriation acts.

§ 799.2 Definitions.

For the purposes of this regulation:

"Act" means the Biomass Energy and Alcohol Fuels Act of 1980, Pub. L. 96-294 (Title II).

"Alcohol" means alcohol (including methanol and ethanol) which is produced from biomass and which is suitable for use by itself or in combination with other substances as a fuel or as a substitute for petroleum or petrochemical feedstocks.

"Applicant" means any individual, company, cooperative, partnership, corporation, association, consortium, estate, or any entity organized for a common business purpose, any State or local government (including any special purpose district or similar governmental unit) or any agency or instrumentality thereof, or any Indian tribe or tribal organization which has the authority to enter into and is seeking a loan guarantee under this regulation.

"Application Approving Official" means the Secretary or person designated by the Secretary who is authorized to approve an application for a loan guarantee under this regulation and to authorize the negotiation and award of commitments to guarantee, guarantee agreements and other contractual documents. In the case of loan guarantees issued under Subpart

B of this part, the Secretary has designated the Director of the Office of Alcohol Fuels as the Application Approving Official.

"Application Evaluation Panel" (also referred to as "the Panel") means a team of Federal employees appointed by an Application Approving Official to evaluate loan guarantee applications and make approval or disapproval recommendations regarding such applications.

"Biomass" means any organic matter which is available on a renewable basis, including agricultural crops and agricultural waste and residues, wood and wood waste residues, animal waste, municipal waste, and aquatic plants.

"Biomass energy" means biomass fuel or energy or steam derived from the direct combustion of biomass for the generation of electricity, mechanical power, or industrial process heat.

"Biomass energy project" means any facility (or portion of a facility) located in the United States which is primarily for the production of biomass fuel (and byproducts); or the combustion of biomass for the purpose of generating industrial process heat, mechanical power, or electricity (including cogeneration).

"Biomass fuel" means any gaseous, liquid, or solid fuel produced by conversion of biomass.

"Borrower" means any person who enters into a loan all or any portion of which is guaranteed under this regulation.

"Btu" means British thermal unit.

"Cogeneration" means the combined generation by any facility of electrical or mechanical power, and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes.

"Competition cycle" means the period of time in which applications will be received for evaluation. With respect to alcohol fuels and biomass energy projects the initial competition cycle will expire at 4:30 pm on October 20, 1980 and on November 14, 1980 for municipal waste energy projects. Additional competition cycles will be announced in the FEDERAL REGISTER within fifteen days after closing of each previous cycle.

"Construction" means the construction or acquisition of any biomass energy project or the conversion of any facility to a biomass energy project or the expansion or improvement of any biomass energy project which increases the capacity or efficiency of that facility to produce biomass energy. Such term includes the acquisition of equipment and machinery for use in or at the site of a biomass energy project and the acquisition of land and improvements thereon for the construction, expansion, or improvement of such a project, or the conversion of a facility to such a project including the capital costs necessary to meet environmental standards. Such term does not include the acquisition of any facility which was operated as a biomass energy project before the acquisition.

"Cooperative" means any agricultural association as that term is defined in section 15(a) of the Act of June 15, 1929, as amended (46 Stat. 18; 12 U.S.C. 1141j), commonly known as the Agricultural Marketing Act.

"Contracting Officer" means the Department of Energy official warranted and authorized to contractually obligate the Department of Energy and execute written agreements that are binding on the Department.

"Cost overrun" means any cost that exceeds the estimated total cost of the project as established by the Application Approving Official prior to or at the time of the execution of a loan guarantee agreement.

"Default" means the actual failure by the borrower to make payment of principal or interest in accordance with the terms and conditions of a loan guaranteed under this regulation, or the failure of the borrower to meet other requirements specified as a default condition in the guarantee agreement.

"Disadvantaged business concern" means a concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals (as defined in Pub. L. 95-507).

"Federal Agency" means any Executive agency, as defined in section 105 of Title 5, United States Code.

"Guarantee Agreement" means the same as that definition contained herein for "Loan Guarantee".

"Holder" means a person or entity holding in due course all or part of the rights, title and interest in the guaranteed portion of the loan.

"Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaskan native village or regional village corporation as defined in or established pursuant to the Alaskan Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

"Lender" means any entity which make a loan that is guaranteed under this regulation. Examples of lenders include, but are not limited to, commercial banks, savings and loan institutions, insurance companies, factoring companies, investment banking organizations, institutional investors, venture capital investment companies, trust companies, trusts, or other entities designated as trustees or agents acting on behalf of bond holders or other lenders; *Provided*, That the term "lender" does not include the Federal Financing Bank, or any other Federal agency.

"Loan" means a transaction in which a written financial obligation is undertaken, under which obligation the payment of money is guaranteed in accordance with the provisions of this regulation, and where the overall financial obligation may be evidenced by one or more bonds, debentures, notes, or other instruments or classes of debt.

"Loan guarantee" or "Guarantee agreement" means a written agreement issued by the Department of Energy that guarantees, in accordance with the terms and conditions contained therein, the payment of sums of money owing by a borrower to a lender.

"Motor fuel" means gasoline, kerosene, and middle distillates (including diesel fuel).

"Municipal waste" means any organic matter, including sewage, sewage sludge, refuse-derived fuel, and industrial or commercial waste, and mixtures of such matter and inorganic refuse from any publicly or privately operated municipal waste collection or similar disposal system, or from similar waste flows (other than such flows which constitute agricultural waste or residues, or wood waste or residues from wood harvesting activities or production of forest products). Such term includes substances normally found in a municipal waste stream, including incidental amounts of hazardous wastes, but does not include significant amounts of those substances defined as hazardous wastes pursuant to Subpart D of 40 CFR Part 261 or which when utilized in any biomass energy project would, in the opinion of the Secretary, endanger the public health or negatively impact the environment in a significant way.

"Municipal waste energy project" means any facility (or portion of a facility) located in the United States primarily for:

(a) The production of biomass fuel (and byproducts) from municipal waste; or

(b) The combustion of biomass from municipal waste for the purpose of generating steam or forms of useful energy, including industrial process heat, mechanical power, or electricity (including cogeneration).

Such term includes any necessary transportation, preparation, and disposal equipment and machinery for use in or at the site of the facility involved.

"Primary fuel" means the predominate fuel used by the biomass energy project and does not include incidental use of petroleum and natural gas.

"Project cost" means any cost that is described in § 799.11.

"Secretary" means the Secretary of Energy or his designee, by delegation or otherwise.

"Small business" means a concern which, including its affiliates, is independently owned and operated and not dominant in its field of operation, has a net worth less than $6 million or has an average net income (after Federal income taxes) for the preceding two years of less than $2 million or has 1,000 employees or less.

"Start up costs" means those costs that are reasonably and necessarily incurred during the construction of the project which are directly attributable to the testing of equipment or the implementation of the initial production process and which can be capitalized under generally accepted accounting practices.

"State" means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust territory of the Pacific Islands.

§ 799.3 Solicitation, evaluation, and approval of applications.

(a) *Competition.* It is Department of Energy policy to solicit and evaluate applications on a competitive basis as provided herein. Each application received in accordance with the provisions of this regulation will be considered within the competition cycle in which it is received.

(b) *Application process.* The Application process will consist of the following:

(1) The continuing solicitation of applications during the competition cycle or otherwise as provided in paragraph (c) of this section;

(2) Submission of an application which complies with § 799.4;

(3) Preliminary review and screening of applications;

(4) Comparative evaluation and identification of competitive field;

(5) Selection of applications, to the extent that appropriations are available, by the Application Approving Official for competitive negotiations or commitments to guarantee, as appropriate, subject to terms and conditions as determined by the Application Approving Official in his or her sole discretion;

(6) Issuance of such conditional commitment;

(7) Negotiation; and

(8) Execution of a loan guarantee upon satisfaction of conditions in such conditional commitment.

(c) *Solicitation announcement.* The Secretary will, within fifteen days after the closing of each competition cycle and prior to the beginning of the next competition cycle, issue a Solicitation Announcement, which shall as a minimum be published in the FEDERAL REGISTER and the Commerce Business Daily. A Solicitation Announcement will indicate some or all of the following:

(1) The place and time for application submission;

(2) The programmatic or technological areas that will be emphasized in the next competition cycle;

(3) Identification of the issuing office;

(4) Identification of statutory authority and relevant regulation;

(5) Any special requirements not contained in the regulations;

(6) Identification of the time period during which written questions regarding the preparation of applications may be submitted;

(7) Application receipt deadline and location to which application must be delivered if different from that specified in the regulation;

(8) The extent to which appropriations are currently available for loan guarantees;

(9) Date of presubmission conference, if any, open to all interested parties; and

(10) Any additional information determined by the Secretary to be relevant to the solicitation of applications at that time.

(d) *Receipt and handling of applications.* (1) Applications for loan guarantees may be filed at the addresses specified in the applicable subparts of this regulation in accordance with the type of project to be undertaken.

(2) An application received at the location of filing after 4:30 p.m. on the last day of the competition cycle will not be considered in that competition cycle unless:

(i) It is received before the selection of applications by the Application Approving Official under that competition cycle and;

(ii) It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for receipt of the application; or

(iii) It was sent by mail and is determined by the Contracting Officer that the late receipt was due solely to mishandling by the Department of Energy; or

(iv) The Application Evaluation Panel determines that the proposed project would make a significant contribution to the achievement of program objectives if the application is considered immediately.

(3) Late applications, unless accepted pursuant to the provision of paragraph (d)(2) of this section, will be considered in the next competition cycle to the extent appropriations are available and meet the eligibility requirements for such cycle.

(e) *Evaluation and ranking of applications.* (1) Evaluation and ranking of applications shall be accomplished by an appointed Application Evaluation Panel or other appropriate officials designated by the Application Approving Official for the purpose of determining eligibility of applications and identifying those best suited for selection to accomplish the purpose of the Act. The application evaluation process is intended to provide the Application Approving Official sufficient information to permit an optimal selection from among competing applications. The Panel is responsible for preliminary review and screening, comparative evaluations, and presentation of its findings and recommendations to the Application Approving Official. Applicants shall not be permitted to modify applications after the close of the competition cycle, except as provided by paragraph (e)(6) of this section.

(2) Preliminary review and screening of all applications shall be conducted by the Panel to determine which applications should be considered in comparative evaluations. The Panel shall initially review the applications to determine whether each application:

(i) Complies with statutory requirements for project eligibility;

(ii) Complies with programmatic eligibility requirements stated in this regulation and the Solicitation Announcement, if any;

(iii) Contains sufficient information to enable the Panel to perform a comparative evaluation; and

(iv) Is signed by an authorized official of the applicant organization and the lending institution making the loan.

(3) Those applications meeting the requirements of paragraph (e)(2) of this section shall then be comparatively evaluated and ranked by the Panel. The Panel shall consider the following in comparatively ranking applications:

(i) Technical project feasibility and likelihood of success;

(ii) Market potential and economic feasibility;

(iii) *Financial.* (A) Credibility of cost estimates,

(B) Adequacy of capitalization, cash flow, working capital, and other financial capability,

(C) Financial condition of applicant and other principals to the project,

(iv) *Financing structure.* (A) Financial commitment of applicant and other principals to the project,

(B) Lender commitment and debt financing plan,

(C) Other factors which are relevant to a full description of the particular financing structure of the proposed project;

(v) *Management plan.* (A) Corporate and personnel experience,

(B) Management organization and interrelationships,

(C) Key personnel and associated responsibilities;

(vi) Environmental, health, safety and socio-economic impacts of the proposed project; and

(vii) Ability of applicant to comply with requirements of this regulation.

(4) The Panel may, in coordination with the Contracting Officer and in the course of evaluating an application, request additional information of the applicant that may be necessary to complete its evaluation.

(5) The Panel shall present to the Application Approving Official its ranking of the applications together with its findings and recommendations in a comprehensive report, which represents internal evaluations and judgments prior to final decision making.

(f) Selection of Applications. The Application Approving Official may, in his sole discretion, select any number of the competing applications, subject only to the requirement that appropriations be available for the total guaranteed loan amount of the applications selected.

(1) Prior to making a decision, the Application Approving Official may determine that additional project specific information is required. Such additional information requirements will be communicated in writing directly to the applicant or, in some cases, its respective lenders or servicers.

(2) The Application Approving Official will consider the report of the Panel, such other information as the Application Approving Official determines to be relevant, and the policy considerations specified in § 799.5 and applicable subparts of this rule in selecting applications for conditional commitments or competitive negotiations, as appropriate.

(3) When the Application Approving Official determines that competitive negotiations are appropriate, the Panel will negotiate with all or a subset of competing applicants for the purpose of clearly defining the degree and extent of the competitive issues related to the applications prior to the selection of applications for conditional commitments. The Panel will revise its report to the Application Approving Official to reflect the results of negotiations.

(4) Upon, or, in some cases, subject to, the satisfactory completion of the requirements contained in this section, the Application Approving Official may authorize the Contracting Officer to issue a conditional commitment to provide a guarantee for the transaction proposed by the application. The conditional commitment shall identify the terms and conditions under which the guarantee would be issued, and any additional requirements to be placed upon the applicant as a condition of the guarantee.

(5) Decisions by the Application Approving Official shall be made within 120 days of the deadline for receipt of applications (as specified in the Solicitation Announcement). For the purpose of beginning this 120 day period, all applications received during a competition cycle shall be considered as received on the last day of the competition cycle. Those applications not approved for issuance of a conditional commitment shall receive an immediate notification of such disapproval and reasons therefor from the Contracting Officer.

(g) *Post selection negotiation and closing.* (1) Subsequent to execution of a conditional commitment, the Application Approving Official shall designate a Contracting Officer to ensure that the conditions of the conditional commitment are met and negotiate such terms and conditions of the guarantee agreement and related documents as may be required to comply with the Act and this regulation, including §§ 799.7 and 799.8.

(2) In performing the functions under paragraph (g)(1) of this section, the Contracting Officer may request necessary additional information from any relevant party.

(3) If, within a reasonable period of time, the Contracting Officer is unable to negotiate satisfactory terms and conditions, or conditions of the conditional commitment cannot be met on a timely basis, the Application Approving Official shall determine whether to continue negotiations, authorize modification of the commitment, or take other appropriate action. A condition of the conditional commitment shall be unsatisfied unless the Contracting Officer certifies in writing that the condition has been met or, in the alternative, the guarantee agreement is executed.

(4) If the Contracting Officer can negotiate satisfactory terms and conditions in the instruments to be used in the closing of the guaranteed loan, and the conditions of the conditional commitment are met, the Application Approving Officer shall authorize a closing for the purpose of executing the loan guarantee agreement and other related transaction documents. The date, time and place for closing shall be fixed by agreement with the applicant and the lender. Nothing contained in the conditional commitment shall in any way constrain or restrict the ability of the Contracting Officer to require additional documentation, or the insertion of additional terms and conditions which, in his or her sole discretion, are reasonable and necessary for the protection of the interests of the United States. Issuance of the guarantee shall be conclusive evi-

dence that the loan and guarantee comply with the Act and these regulations; that the loan has been approved by the Secretary; and that the guarantee is an obligation supported by the full faith and credit of the United States of America.

(h) *Unsolicited applications.* Because applications will be evaluated on a competitive basis, unsolicited applications for a loan guarantee will not be considered under this regulation. Applications not submitted pursuant to a specific Solicitation Announcement will be returned to the applicant with a recommendation to refile in accordance with the current Solicitation Announcement.

(i) *Discussion with unsuccessful applicants.* Upon the written request by an applicant whose application did not result in a loan guarantee, representatives of the Application Approving Official will explain in detail why the application was disapproved.

(j) *Non-written representations.* No representation shall be binding on the Department of Energy unless in writing and duly signed by a Contracting Officer and all instruments and modifications thereof shall not be considered as approved by the Department unless signed by a Contracting Officer.

§ 799.4 Applications.

(a) The Secretary's consideration of a loan guarantee request for a biomass energy project shall begin with the filing of an application which complies with the application requirement of this regulation. The Secretary may publish additional application requirements in Solicitation Announcements issued pursuant to § 799.3 of this regulation. In general, an applicant is expected to provide information in the application which is similar to that required by an investment banking or other financial institution which might consider the biomass energy project for debt financing. The application must contain the most current data available, and be adequate for the Secretary to properly evaluate the project.

(b) Prospective applicants may request through written questions submitted to the Contracting Officer that the Application Evaluation Panel clarify any provision of this rule at any time prior to the close of the competition cycle. The Contracting Officer shall exercise discretion in the acceptance of questions to insure that no question submitted would result in providing an unfair advantage to any person.

(c) Applications shall be filed with one original and ten legible copies. Each application should contain the following information submitted in a brief but precise manner:

(1) A description of the scope, nature, extent, and location of the proposed project, including identification and feasibility of the technology to be utilized in the project and the extent to which such applicant is applying for, or receiving any other Federal or other governmental financial assistance for the project;

(2) A preliminary or conceptual design of the proposed facility;

(3) A description of prior construction and operating experience of the applicant with the technology to be utilized in the project;

(4) A detailed estimate for the total construction and financing cost of the project (including escalation and contingencies) together with a description of the methodology and assumptions used;

(5) A general description of the overall financial plan for the proposed project including all sources of equity, debt, and the liability of parties associated therewith, necessary for the construction and operation of the project;

(6) Construction and operation schedules for the project including major activity and cost milestones;

(7) Copies of proposed or actual construction contracts together with a description of the construction contractor's experience and financial strength;

(8) An analysis of the market for the product to be produced including relevant economics justifying the analysis and proposed and actual marketing contracts or letters of intent, if any;

(9) A description of the applicant's management concept and plan of operation to be employed in carrying out the project;

(10) A description of the general management experience of the appli-

cant in organizing and undertaking projects of this nature;

(11) Pro forma cash flow statements for at least the first five (5) years of project operation including income statements and balance sheets. All such statements shall include assumptions made in their preparation;

(12) Proposed risk allocation among project participants and financial statements supporting the project participant's ability to contribute equity to the project;

(13) Financial statements for the past three (3) years of the applicant and parties relevant to the applicant's financial backing, together with business and financial interests of principal organizations such as parent and/or subsidiary corporations or partners of the applicant;

(14) An environmental report containing a detailed analysis of the potential environmental, health, safety and socio-economic (EHSS) impacts of the project and any necessary or proposed mitigation measures and other relevant data that may be available to the applicant to enable the Department to assess the probable EHSS impacts and provide the Department with information for any documents required by the National Environmental Policy Act.

(15) A list of all permit applications filed or to be filed, and permit approvals issued or to be issued by Federal, state, and local government agencies for all required permits and authorizations to undertake construction and begin operations associated with the project. If these approvals have not been obtained, or applications not filed, the estimated date of such filings and approvals should be provided. Explain any past, present or anticipated problems in obtaining any approvals.

(16) A description of the applicant's organization and, where applicable, a copy of partnership agreement or corporate charter, articles of incorporation, bylaws, and appropriate authorizing resolutions or their equivalent;

(17) A written affirmation from both the applicant and any proposed lender justifying the need for a Federal loan guarantee in order to finance the project;

(18) The amount of the loan and percentage of guarantee requested, proposed repayment schedule, and other relevant terms and conditions of the anticipated debt financing;

(19) A copy of any lending commitment issued to the applicant by the proposed lender in the transaction;

(20) A statement from the lender reciting the lender's general experience in financing and servicing debt related to projects of the size and general type of the proposed project, together with the lender's proposed loan servicing and monitoring plan for the proposed project;

(21) A listing of assets associated, or to be associated, with the project and any other asset which will serve as collateral for the guaranteed loan, including appropriate data as to the value and useful life of any physical assets and a description of any other associated security and its value;

(22) Copies of all current or proposed contracts between the applicant and any third parties which are significant to the proposed project including any feedstock supply agreements and contracts for the sale of biomass energy and related byproducts.

(23) Information relevant to findings or determinations which the Secretary must make under the Act or this rule in accordance with § 799.6, and §§ 799.24, 799.34 or § 799.46, as appropriate.

(24) Information relevant to the policy considerations under § 799.5 and the priorities and policy considerations under Subpart B, C, or D of this rule, as appropriate.

(d) In addition to the above requirements, the application shall contain such additional information as may be required by the appropriate subpart of this regulation which will apply to the specific type of biomass energy projects for which a loan guarantee is requested.

(e) Information received by the Secretary under this rule may be available to the public subject to the provision of 5 U.S.C. 552 and 18 U.S.C. 1905; *Provided*, That,

(1) Subject to the requirements of law, information such as trade secrets, commercial and financial information, and other information concerning the

project that the applicant or lender submits to the Secretary in an application or at other times throughout the duration of the project, on a privileged or confidential basis, will not be disclosed by the Department of Energy without prior notice to the submitter in accordance with Department of Energy regulations concerning public disclosure of information. Any submitter asserting that the information is privileged or confidential should appropriately identify and mark such information.

(2) Upon a showing satisfactory to the Secretary by a person that any information or portion thereof obtained under this regulation would, if made public, divulge trade secrets or other proprietary information of such person, the Secretary may not disclose such information.

(3) This section shall not be construed as authority to withhold information from Congress, or from any committee of Congress upon request of the Chairman.

(f) When information submitted by the applicant under this rule or in response to a request for additional information made by the Secretary is significantly changed as a result of new circumstances which make the originally submitted information inaccurate or incomplete, the applicant shall promptly notify the Secretary in writing.

§ 799.5 Policy considerations.

The following policy considerations described under this subpart, and other subparts to this regulation which are relevant to the specific type of biomass energy project for which a guarantee has been requested, will be utilized by the Application Approving Official in the selection of applications from among those recommended applications which are similarly ranked by the Application Evaluation Panel:

(a) The Application Approving Official shall consider the extent to which a loan guarantee is necessary for the lender to extend credit to the applicant at reasonable rates and terms, taking into consideration prevailing rates and terms for loans for similar purposes and periods of time. The Application Approving Official shall also consider whether the financial assistance applied for encourages and supplements, but does not compete with nor supplant, any private capital investment which otherwise would be available to the proposed project on reasonable terms and conditions.

(b) In evaluating applications for loan guarantees to be issued under this regulation, the Application Approving Official shall consider the percentage of the guarantee in relation to the total cost of the project and any nonguaranteed loan being provided to the project.

(c) In evaluating applications for loan guarantees to be made under this regulation, the Application Approving Official shall consider the degree to which the borrower is investing equity funds into the project, which were not provided through the issuance of debt, and the extent to which responsible financial parties affiliated with or constituting the legal entity of the borrower are liable for repayment of the debt to be guaranteed.

(d) The Application Approving Official shall consider the degree to which the lender has accepted a reasonable and appropriate degree of risk in the financing of the project. The Application Approving Official shall also consider the extent to which liability will accrue to the Government for repayment of loan proceeds during both the interim and permanent financing stage of the project.

(e) The Application Approving Official shall consider the extent to which necessary feedstocks and a market for the biomass energy produced and related project byproducts are available throughout the life of a biomass energy project.

(f) In evaluating applications for loan guarantees to be made under this regulation, the Application Approving Official shall consider the length of time over which the proposed borrower will repay the guaranteed debt, with regard to the anticipated cash flow of the project and the length of time that the Government should reasonably be exposed to liability for debt associated with the project.

(g) The Application Approving Official shall consider competition factors associated with the concentration and control of biomass energy production that may result from the issuance of a loan guarantee in connection with a particular biomass energy project.

(h) The Application Approving Official shall consider the degree to which the project is receiving other Federal financial assistance.

(i) The Application Approving Official shall consider the relative ability of a project or technology to maintain or improve the quality of the environment.

§ 799.6 Required findings and determinations.

In addition to meeting the requirements set forth in other applicable subparts of this rule, a loan guarantee for a biomass energy project shall be issued only after the Secretary is satisfied, in the sole discretion of the Secretary, that the following requirements have been met:

(a) The amount of the loan to be guaranteed, when combined with other funds available to the applicant, will be sufficient to carry out the project, including adequate contingency funds and working capital;

(b) There is a reasonable assurance of repayment of principal and interest of the loan by the borrower;

(c) The project assets (or other acceptable forms of collateral) and other collateral or surety, as determined by the Secretary to be necessary, are pledged by the borrower as security for the repayment of the loan and a valid first and superior lien or other acceptable lien position will exist on such assets, collateral, or surety for the mutual benefit of the lender and the Department of Energy in accordance with their pro-rata interest;

(d) The terms, conditions, maturity, security, and repayment provisions with respect to the guaranteed loan are reasonable and sufficient to protect the interest of the United States pursuant to the guarantee;

(e) The interest rate on the loan to be guaranteed and other fees charged by the lender in connection with the making of the loan are determined to be reasonable by the Secretary after consideration of the range of interest rates and fees prevailing in the private sector for similar obligations and the degree to which the lender is protected from risk by the guarantee;

(f) Advancement of the loan proceeds by the lender to the borrower will be made under a milestone and disbursement schedule which is satisfactory to the Secretary;

(g) The Secretary has determined that there is satisfactory evidence that the applicant is capable of constructing and operating in a competent manner, the project for which the loan is made;

(h) The Secretary is satisfied that the lender is capable of servicing the debt that is guaranteed in accordance with the requirements of § 799.14 of this regulation;

(i) The Secretary has determined that the loan to be guaranteed is for the construction of a project which is within the applicable purposes and objectives of this rule;

(j) The Secretary is satisfied that the lender is not willing, without the guarantee, to extend credit at reasonable rates and terms;

(k) The Secretary is satsified with the borrower's schedule for inserting equity into the project and determines that the schedule is appropriate for the transaction;

(l) The amount of the loan to which the guarantee applies does not exceed 90 percent of the cost of the construction of the project;

(m) The percentage of the guarantee does not exceed 90 percent of the amount of the loan to which the guarantee applies;

(n) The Secretary has determined that the project will be in conformance with established environmental statutes, regulations, and Executive Orders, which shall include, but are not limited to, the following:

(1) Completing any environmental analysis required pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq., Pub. L. 91-190);

(2) Conformance with Executive Order 11988—Floodplain Management, and Executive Order 11990—Protection of Wetlands, and DOE regulations thereunder (10 CFR Part 1022); and

(3) Receiving, or anticipated receipt of, all necessary environmental permits and approvals;

(o) The Secretary has determined that the project is technically and economically feasible and environmentally acceptable;

(p) There is sufficient evidence that the applicant will initiate and complete the project in a timely, efficient and acceptable manner;

(q) The Secretary has determined that necessary feedstocks are available and will reasonably continue to be available for the life of the project and that the process to be used by the project (except in the case of municipal waste energy projects) will extract the protein content of the feedstock as food or feed unless such extraction would be technically or economically impractical;

(r) The Secretary has determined that no portion of the interest paid on the guaranteed portion of the loan will be excluded from the gross income of the holder of the debt pursuant to the provision of the Internal Revenue Code of 1954, as amended;

(s) The project meets such additional requirements as determined reasonable and necessary by the Secretary for the protection of the interest of the United States; and

(t) The Secretary has made the findings and determinations required under Subpart B, C, or D of this rule, as appropriate.

§ 799.7 Guarantee agreement terms and conditions.

(a) A loan guarantee agreement issued by the Secretary under this regulation shall contain the following requirements and conditions:

(1) A requirement that the lender may not accelerate repayment of the borrower's indebtedness or exercise other remedies available to the lender in the event of the borrower's default, except in the case of the borrower's failure to pay a required payment of principal or interest, without the prior consent of the Secretary or as otherwise permitted in the guarantee agreement;

(2) The following requirements concerning patents, technology, inventions, and other proprietary rights:

(i) A requirement that all patents, technology, and other proprietary rights necessary for the construction and operation of the project shall be obtained by the borrower;

(ii) A requirement that all patents, technology, and other proprietary rights owned or controlled by the borrower and used in the construction and operation of the project, and all patents, technology and other proprietary rights licensed from third parties pursuant to the requirements of paragraph (i) above, shall, upon default of the guaranteed loan, be available to any party acquiring the project assets for the purpose of completing the construction of the project and operating the project throughout the anticipated life of the project. In such circumstances, the license for such patents, technology, and other proprietary rights owned by third parties shall be on terms and conditions no less favorable than the borrower received, and the patents, technology and other proprietary rights owned by the borrower shall be on a royalty free basis;

(iii) A requirement that any inventions conceived or first actually reduced to practice in the course of or under the project, and any patents or patent applications thereon, and all technology and other proprietary rights developed under the project, shall be pledged as collateral securing the guaranteed loan;

(iv) Unless such rights are determined to be inappropriate by the Application Approving Official, a requirement that the borrower grant, on reasonable terms and conditions, to any responsible party designated by the Secretary, nonexclusive licenses to patents, technology, and other proprietary rights owned or controlled by the borrower for the construction or operation of similar projects.

(3) A requirement that no change of project ownership or financial arrangement will occur without the prior written consent of the Application Approving Official;

(4) A requirement that the project be built and operated in the United States;

(5) A requirement that, in the event that the Secretary makes a payment of principal or interest on the guaran-

teed loan in accordance with liability accruing to the Secretary under the guarantee, the Secretary shall be subrogated to the rights of the recipient of such payment and have superior right in and to the property acquired by virtue of such payment;

(6) A requirement that the borrower not obtain credit from any creditor without the written consent of the Contracting Officer, unless such creditor agrees to subordinate, in a manner acceptable to the Contracting Officer, its rights to receive payment, in the event that such creditor would, without such subordination, receive by contract or otherwise a lien on the assets securing the guaranteed loan;

(7) A provision that specifies that when a lender holds a guaranteed and a non-guaranteed portion of a loan for a biomass energy project, payments of principal or interest made by the borrower under such loan shall be applied by the lender to reduce the guaranteed and non-guaranteed portion of the loan on a proportionate basis and that the non-guaranteed portion of the loan shall not, in any event, receive preferential treatment over the guaranteed portion of the loan;

(8) A requirement that the lender provide an adequate period of grace of not less than 60 days prior to the making of demand for payment pursuant to the guarantee agreement in order that the Secretary have adequate time to make a decision regarding principal and interest assistance in accordance with the provision of § 799.13 of this regulation;

(9) A requirement that the borrower keep and maintain adequate records and documents concerning the construction and operation of the project in order that representatives of the Secretary may determine the technical and financial conditions of the project and its compliance with environmental requirements;

(10) A requirement for the borrower to prepare and deliver to the Application Approving Official annual audited financial statements prepared according to generally accepted accounting principles;

(11) A requirement that duly authorized representatives of the Secretary shall have access to the project site at reasonable times during construction and operation of the project;

(12) A requirement that the borrower agree to protect and preserve at all times the project assets and other collateral serving as security for the guaranteed loan and to assist in the liquidation of the collateral for the purpose of minimizing loss in the event of loan default;

(13) A requirement providing for the orderly liquidation of the assets of the project in the event of loan default with an option on the part of the Secretary to acquire from the lender the lender's interest in the project assets pursuant to any non-guaranteed portion of the loan;

(14) A requirement that the borrower not discriminate against any person on the grounds of race, color, national origin, sex, handicap, or age in the carrying out or completion of the project;

(15) A requirement that the borrower agree to take positive efforts to maximize the utilization of small and disadvantaged business concerns in connection with the project;

(16) A requirement that the Secretary be paid at the closing of the guaranteed loan, a fee for the issuance of the loan guarantee, which fee shall not exceed 1 percent of the total amount of the guaranteed portion of the loan;

(17) A requirement that the lender perfect and maintain the liens on the collateral pledged as security for the guaranteed loan and undertake such other loan servicing functions normally performed by a reasonable and prudent lender or as required of the lender in accordance with the provisions of § 799.14 of this regulation;

(18) A requirement that performance of contractors engaged in the construction of the project for which the guaranteed loan is made be fully bonded or that other acceptable arrangements are made that assure adequate performance by contractors;

(19) A requirement that the project operate in full compliance with all laws and regulations;

(20) A provision permitting free transferability and assignability of shares of all or partial interests in the guaranteed loan; Provided, That such transfers take place under agreements

acceptable to the Secretary and that the lender does not transfer or assign the servicing requirements levied upon the lender by the guarantee without the prior written approval of the Secretary;

(21) A requirement that the lender shall not take any adverse action against the borrower without providing 15 days prior notice to the Secretary; and

(22) Such other terms and conditions as determined by the Application Approving Official to be reasonable and necessary for the protection of the United States.

(b) Upon the issuance of a duly executed guarantee agreement in accordance with the requirements of this regulation, the full faith and credit of the United States shall be pledged to the payment of sums of money due and lawfully owing under such guarantee. The guarantee agreement shall be conclusive evidence that the guarantee and the underlying loan for which the guarantee is issued comply with the provisions of the Act and this regulation and such a guarantee subject to terms and conditions of the guarantee shall be valid and incontestable by the Government except for fraud or misrepresentation by the holder of the loan to which the guarantee applies. The guarantee agreement shall provide that the guarantee become effective when signed by the parties and shall apply to each disbursement made by the lender to the borrower.

(The information collection requirements contained in paragraph (a)(9) were approved by the Office of Management and Budget under control number 1904-0028)

[45 FR 67025, Oct. 8, 1980, as amended at 46 FR 63209, Dec. 31, 1981]

§ 799.8 Loan agreement requirements and conditions.

In addition to meeting the requirements set forth in § 799.6 of this regulation, a guaranteed loan may be made only if the underlying loan agreement and other documents necessary for the financing transaction are determined by the Secretary to be satisfactory and meet the following requirements:

(a) The notes, bonds, debentures, or other instruments of debt, credit agreements, security agreements, guarantees, collateral pledge agreements, mortgages, and all other instruments, legal opinions, certificates, licenses, contracts and other documents determined necessary by the Secretary to properly document and close the lending transaction, and the terms and conditions related thereto, are satisfactory to the Secretary in both form and content;

(b) The plan, if any, for marketing the debt to secondary lenders or other holders is acceptable to the Secretary and provides a reasonable assurance that the debt will be funded in a timely manner in accordance with the requirements of the project. The Secretary must also be satisfied that the types of debt instruments and the mix, if any, between long term and short term securities are appropriate for the size and scope of the project and reasonably minimize the cost of borrowing;

(c) The orderly and ratable retirement of the loan which may include sinking fund provisions, installment payment provisions, or other methods of payment and debt payment reserves which are appropriate and necessary in accordance with the size and type of the project and the type of debt instruments to be used;

(d) The lending agreements contain provisions for a minimum period of grace of 60 days from the date the principal or interest payment is due;

(e) The loan proceeds will be advanced by the lender to the borrower on an identified disbursement schedule which is appropriate for the size and type of project to be financed and has adequate control mechanisms to ensure that the funds are utilized in the construction of the project and for the purpose intended;

(f) Trustees, escrow agents, fiscal agents and other fiduciaries acting for the benefit of the lender, the borrower, holders, or any other party, agree, in accordance with the powers, rights and duties expressed in the written contract by virtue of which they so act, to recognize and protect in an appropriate manner the interests of the United States under to the guarantee;

(g) An option on the part of the borrower to prepay the loan at acceptable time intervals, with prepayment penalties, if any, determined acceptable by the Secretary after consideration of the likely holder of such debt at the time of prepayment and of the type of debt instrument utilized;

(h) Appropriate opportunities on the part of the borrower to cure any default, failure, or breach of any of the covenants, conditions and obligations undertaken by the borrower pursuant to the provisions of the loan agreement and other documents relevant to the financing transaction;

(i) The exclusion of any provision which prohibits forbearance or waiver of any breach or failure on the part of the borrower;

(j) Appropriate provisions for the acceleration and demand for full payment of the entire indebtedness in the event of the occurrence of identifiable occasions of borrower default;

(k) A requirement that the borrower keep the assets of the project insured in an acceptable amount from risk of loss, and acceptable provisions for control over any insurance proceeds paid in the event of such a loss to assure that such proceeds are appropriately utilized for the benefit of the project;

(l) A requirement that the borrower maintain its legal entity in good standing with applicable Federal, State, and local laws and requirements regulating the conduct of its business, including the payment of all taxes, fees and other charges, and the maintenance of all requisite licenses and any other governmental authorization necessary for the continued operation of the project;

(m) A requirement that the borrower not suffer or permit any judgment, lien, or other encumberance to be placed against any asset of the project (excluding those liens obtained by the lender pursuant to the loan guarantee under this regulation);

(n) When appropriate for the type of transaction under consideration, an acceptable provision for the control over project revenue which ensures that profits above a predetermined level are made available to the project for the future requirements of the project or for prepayment of the guaranteed loan;

(o) A provision specifying the extent to which project profits can be utilized for dividends and other distributions to the equity participants in the project; and

(p) Such other terms and conditions determined necessary by the Secretary for the protection of the interest of the United States.

§ 799.9 Special considerations for partial financing.

(a) Nothing in this rule shall prohibit applicants from seeking loan guarantees for the financing of a part of, modification of, additions to, or individual assets associated with, biomass and municipal waste energy projects; provided that such financing is consistent with the eligibility requirements of this rule. In such cases, the loan guarantee shall be limited to loans for the financing of those items which the Application Approving Official can reasonably attribute to the production of energy.

(b) Guarantee agreements made for loans described in paragraph (a) of this section, and the loan agreements associated herewith, may have terms and conditions which are modified from those specified in §§ 799.7 and 799.8. Such modifications will be those as determined by the Application Approving Official to be appropriate for the type of financing, extent and rights of other creditors, existing liens, collateral, liability for debt repayment, and the protection of the interests of the United States.

§ 799.10 Withdrawal or limitation of guarantee.

(a) The Secretary may withdraw the guarantee by written notice to the lender and the borrower if after discussions with the borrower and lender, it is determined that initiation of the project has not occurred within the period of time set forth in the guarantee agreement or collateral documents, and such failure has materially affected the purposes of the United States in issuing the guarantee.

(b) The Secretary may limit the guarantee by written notice to the lender and the borrower to those amounts already disbursed under the guaranteed loan if, after discussions with the borrower and lender, it is determined that:

(1) The borrower has failed to acquire capital from intended or alternate sources, or has failed to comply with material terms and conditions as set forth in the loan or guarantee agreement. The Secretary will notify the borrower and the lender that the guarantee shall be limited only to the amount that has been received by the borrower as of the date of receipt of the written notice by the lender; or

(2) The lender has failed to comply with any material term or condition set forth in the guarantee or loan agreement. The guarantee may be limited to the amount that has been received by the borrower as of the date of receipt of the Secretary's notice by the lender of reduction of the guarantee. Notice of the Secretary's finding that a material term has not been complied with by the lender shall be sent by the Secretary to the borrower and the lender. Following notification, the borrower will be allowed reasonable time to acquire a substitute lender that is capable of complying with provisions in the loan and guarantee agreements; or

(3) The project's economic success or environmental acceptability is no longer achievable as determined by the Secretary. The guarantee shall be limited to amounts which have been received by the borrower as of the date that the notice is received by the lender. Any guaranteed funds held by a servicing agent shall be returned to the lender.

(c) The guarantee agreement or collateral documents shall provide that the lender will obtain a substitute servicing agent whenever the Secretary, by written notice to the lender, determines that the current servicing agent has failed to comply with a material term or condition in the guarantee agreement or collateral document.

§ 799.11 Project costs.

(a) Project costs will be recorded in accordance with generally accepted accounting principles which are customarily applied.

(b) Except as set forth in paragraph (c) of this section, those reasonable and customary costs that have been incurred, are expected to be incurred, and which are directly related to the project shall be used to estimate total project costs. Examples of these costs include, but are not limited to, the following:

(1) Start up costs;

(2) Costs of acquisition or rental of real property, including engineering fees, surveys, title insurance, recording fees, real estate commissions, and legal fees incurred in connection with land acquisition or rental, site improvements, site restoration, access roads and fencing;

(3) Professional services and fees necessary to obtain licenses, permits, and to prepare environmental reports and data;

(4) Financial, accounting, and legal services costs;

(5) Engineering and architectural fees;

(6) Equipment purchase, placement and testing costs;

(7) Materials, labor, utility services, travel, and transportation;

(8) Costs to provide safety and environmental protection equipment, facilities, and services;

(9) Interest costs and other normal costs charged by lenders during the construction period;

(10) Bond financing costs and trustee's fees and commissions during the construction period;

(11) Necessary and appropriate insurance and bonds of all types related to the construction of the project;

(12) Purchase of flood and other natural disaster insurance, if required;

(13) Taxes to be paid to Federal, State, and local government agencies, and other taxing authorities during construction;

(14) A reasonable contingency reserve to cover the possibility of construction cost overruns; and

(15) Other necessary and reasonable costs, as approved by the Secretary.

(c) Costs that are not allowable project costs include the following:

(1) Fees and commissions charged to the borrower, including finder fees, for obtaining the Federal guarantee;

(2) Parent corporation general and administrative expenses, including company organizational expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Expenses not paid or incurred by the applicant;

(6) Costs that are excessive or are not directly required to construct the project, as determined by the Secretary;

(7) Costs not attributable to the production of energy; and

(8) Costs incurred as normal operating expenses.

(d) The Secretary may audit any or all cost elements included in the estimated project costs, and reserves the right to exclude or reduce the amount of any cost which the Secretary determines to be unnecessary or excessive. The borrower will make available records and other data necessary to permit the Secretary to carry out such an audit. In carrying out this responsibility, the Secretary may utilize employees of other Federal agencies or may direct the borrower to submit to a review performed by an independent public accountant or other competent authority.

§ 799.12 Cost overruns.

(a) At the discretion of the Secretary, a guarantee agreement may be amended to increase the amount of the loan guaranteed in the event that the actual construction cost incurred exceeds the estimated construction cost specified in the guarantee agreement. In no event may the guarantee be increased to cover overruns that amount to more than that allowed in paragraph (c) of this section. All of the following conditions must be met by the borrower before the Secretary may determine whether to amend the guarantee agreement to cover such cost overruns:

(1) The Secretary must be notified as soon as an overrun is anticipated, along with the reasons for such cost overrun;

(2) The borrower, when requesting overrun assistance, has provided a revised expected completion date and revised construction costs for the project;

(3) The borrower submits an acceptable plan indicating how the borrower's share of the cost overruns will be funded;

(4) The borrower provides a list of the additional collateral, if any, to be pledged for the increased guarantee(s) to cover the cost overruns; and

(5) The borrower provides updated information on the project economics to indicate that a reasonable assurance of repayment of the guaranteed loan (including the cost overruns) still exists.

(b) Based on the information submitted by the borrower and other information known to the Secretary, the Secretary may determine, at his discretion, to provide for the guarantee of additional loan funds for the expected cost overruns if the Secretary finds that:

(1) The continuation of the project is worthwhile to meet the program's objectives and is in the public interest; or

(2) The probable net cost to the Government in increasing the loan guarantee, in the event of cost overruns, will be less than that which would result in the event of default.

(c) In no event may the original loan guarantee be increased to cover overruns that amount to more than:

(1) 60 percent of the estimated overrun costs for biomass energy projects; and

(2) 90 percent of a loan to cover estimated overrun costs for construction of municipal waste energy projects, providing that such overrun costs do not exceed 10 percent of the total initially estimated project costs.

§ 799.13 Principal and interest assistance.

With respect to any loan guaranteed pursuant to this regulation, the Secretary may enter into a principal and interest assistance contract with the borrower to pay the lender, on behalf of the borrower, the principal and interest charges that become due and payable on such loan, if the Secretary finds that:

(a) The borrower is unable to meet principal or interest payments or both and is not in default;

(b) It is in the public interest to permit the borrower to continue to pursue the purposes of the project;

(c) The probable net benefit to the Federal Government in paying such principal or interest will be greater than that which would result in the event of a default for the nonpayment of principal or interest;

(d) The amount of principal or interest payment which may be made under this section will not be greater than the amount of principal or interest that the borrower is obligated to pay under the loan agreement; and

(e) The borrower agrees to reimburse the Secretary for such payment (including interest) on terms and conditions which are satisfactory to the Secretary and executes all written contracts required by the Secretary for such purpose.

§ 799.14 Lender servicing requirements.

(a) The loan guarantee agreement shall provide that the lender service the loan in accordance with these regulations and the terms and conditions of the guarantee. In this regard the lender is generally expected to undertake those servicing responsibilities that a reasonable and prudent lender would undertake in a similar transaction which was not guaranteed by the Government. The lender may select a third party to service the loan in the event that the lender is a private entity that normally does not service loans or in other situations where such course of action is determined by the Secretary to be appropriate and such services are acceptable to the Secretary.

(b) The lender or other party servicing the loan shall exercise such care and diligence in the disbursement, servicing, and collection of the loan as would be exercised by a reasonable and prudent lender in dealing with a loan without a guarantee.

(c) The lender or other party servicing the loan shall notify the Secretary in writing without delay:

(1) That the disbursement or loan drawdown for the first project milestone is ready to be made, together with evidence from the borrower that the project has begun or is about to begin;

(2) Of the date and amount of disbursement for each subsequent milestone under the loan;

(3) Of any nonreceipt of payment within 10 days after the date specified for payment, together with evidence of appropriate notifications to the borrower;

(4) Of any known failure by an intended source of capital to honor its commitment;

(5) Of any known failure by the borrower to comply with terms and conditions as set forth in the loan guarantee agreement;

(6) Of evidence that the borrower may fall within any of the default conditions set forth in the loan agreement or the borrower may not be able to meet any future scheduled payment of principal or interest; and

(7) Of any significant changes from the original cash flow projections as evidenced from information and reports by the borrower.

(d) The guarantee agreement or related documents shall require the lender or other party servicing the loan to submit to the Application Approving Official periodic financial reports on the status and condition of the loan.

§ 799.15 Project monitoring.

The guarantee agreement or collateral documents shall provide that employees and representatives of DOE shall have access at reasonable times and under reasonable circumstances to the project site. Further, the agreement shall provide that auditors selected by the Secretary or the U.S. Comptroller General shall have access to, and the right to examine, any directly pertinent documents and records of the borrower. The lender or servicing agent, to the extent lawful and within its control, and the borrower will assure availability of information related to the project as is necessary to permit the Secretary to determine technical progress, soundness of financial condition, management stability, compliance with environmental protection requirements, and other matters pertinent to the guarantee.

(Approved by the Office of Management and Budget under control number 1904-0028)

[45 FR 67025, Oct. 8, 1980, as amended at 46 FR 63209, Dec. 31, 1981]

§ 799.16 Default, demand, payment and collateral liquidation.

(a) In the event that the borrower has defaulted in the making of required payments of principal or interest on the loan guaranteed by the Secretary, and such default has not been cured within the period of grace provided in the guarantee and loan agreements, the lender, or any nominee or trustee empowered to act for the lender, or any other holder or trustee empowered to act for the lender or holder (referred to collectively in this section as "lender"), may make written demand on the Secretary for payment pursuant to the provisions of the guarantee agreement.

(b) In the event that the borrower has failed to comply with one or more of the terms of the guarantee agreement, note, loan agreement, or other contractural obligation relating to the transaction, other than the borrower's obligation to pay principal or interest, as provided in paragraph (a) of this section, the lender will not be entitled to make demand for payment pursuant to the guarantee, unless the Secretary agrees in writing that such default has materially affected the rights or security of the parties, and finds that the lender should be entitled to receive payment pursuant to the guarantee agreement.

(c) No provision of this regulation shall be construed to preclude forbearance by the Secretary or the lender, with the consent of the Secretary, for the benefit of the borrower in accordance with the terms and conditions of the guarantee.

(d) Upon the making of demand for payment as provided in paragraph (a) or (b) of this section, the lender shall provide, in conjunction with such demand, or immediately thereafter at the request of the Secretary, such supporting documentation as may be reasonably required to justify such demand.

(e) Payment as required by the guarantee agreement shall be made within 60 days after receipt by the Secretary of written demand for payment: Provided, That the demand complies with terms and conditions of the guarantee agreement.

(f) The guarantee agreement shall provide that upon payment of the guaranteed portion of the loan by the Secretary, the lender shall transfer and assign to the Secretary all rights held by the lender in the guaranteed portion of the loan. Such assignment shall include all related liens, security, and collateral rights. Upon such payments and assignment, the Secretary shall be subrogated to the rights of the recipient of the payment and shall have superior rights in the property acquired from the recipient of the payment.

(g) The guarantee agreement will specify the terms and conditions for the handling of collateral by the lender and the Secretary in loan default situations. Such provisions may provide for liquidation of the collateral either prior to or after the Secretary has made payment pursuant to the guarantee.

(h) The guarantee agreement shall specify the respective rights of the parties who are the legal owners of the guaranteed loan with respect to the liquidation of assets securing the loan. Such agreement shall include a specification that proceeds received as a result of collateral liquidation shall be applied in the following manner:

(1) First to the payment of legally recoverable expenses actually incurred as a result of such recovery;

(2) Second to the payment of accrued interest on the loan;

(3) Third to the payment of the outstanding principal balance of the loan; and

(4) Fourth to the payment of other recognizable claims held by the legal owners of the loan and for which such proceeds may be lawfully utilized. The proceeds so recovered shall be paid to each of the legal owners of the loan in accordance with their respective percentage of ownership.

(i) In the event that proceeds received as a result of liquidation of the assets securing the loan are insufficient to fully pay all expenses of recovery and the principal and accrued interest of the loan, the legal owners of the loan shall be entitled to attempt further recovery from any parties liable for such deficiency in accordance with the provisions of the loan agreement and other documents related thereto. No action taken in the liquidation of any assets pledged by the borrower to secure the loan will, unless agreed otherwise, affect the rights of any party, including the Secretary, to attempt further recover of any deficiency.

§ 799.17 Appeals.

The guarantee agreement shall include a provision which specifies that any dispute concerning a question of fact arising under the guarantee shall be decided in writing by the Contracting Officer. The borrower or lender may request the Contracting Officer to reconsider any such decision. If not satisfied with the Contracting Officer's final decision, the borrower or lender, upon receipt of such written decision, may appeal the decision within 30 days, in writing, to the Chairman, Financial Assistance Appeal Board (FAAB), Department of Energy, Washington, D.C. 20585. The Board shall proceed in accordance with the Department of Energy's rules and regulations for such purpose. The decision of the Board with respect to such appeals shall be the final decision of the Secretary.

§ 799.18 Deviations.

To the extent that such requirements are not specified by the Act, relevant Appropriations Acts, or in other applicable statutes, the Secretary may deviate on an individual application basis from the requirements of this regulation upon a finding that a deviation is necessary and warranted in the individual case for the accomplishment of program objectives and that unique circumstances exist which make a deviation clearly in the best interests of the Government.

Subpart B—Alcohol Fuel Projects

§ 799.20 Purpose.

The purpose of this subpart is to set forth the policies and procedures, in addition to those of Subpart A of this rule under which the Secretary will approve an application and issue, or commit to issue, a Federal guarantee on a loan or loans to construct facilities for the production of alcohol fuel from biomass (other than municipal waste) in an environmentally acceptable manner.

§ 799.21 Program management and administration.

Program management of the alcohol fuels loan guarantee program is assigned to the Director of the Office of Alcohol Fuels ("Director"). For purposes of this subpart the Director is the Applications Approving Official as defined in § 799.2 and exercises the functions of the Application Approving Official described in this subpart. That authority includes, but is limited to, determining terms and conditions for inclusion in conditional commitments and guarantee agreements, selecting members of the application evaluation panel, selecting recipients of loan guarantees, and representing the Secretary in consultations with other Federal agencies on alcohol fuel program matters.

§ 799.22 Receipt of applications.

(a) Applicants are requested to file applications under this subpart directly with: Manager, Idaho Operations Office, 550 Second Street, Idaho Falls, Idaho 83401.

(b) Applications may also be filed at one of the following regional offices:

Region I: Department of Energy, Regional Representative, 150 Causeway Street, Analex Building, Room 700, Boston, MA 02114.

Region II: Department of Energy, Regional Representative, 26 Federal Plaza, Room 3206, New York, NY 10007.

Region III: Department of Energy, Regional Representative, 1421 Cherry Street, Room 1001, Philadelphia, PA 19102.

Region IV: Department of Energy, Regional Representative, 1651 Peachtree Street, 8th Floor, Atlanta, GA 30309.

Region V: Department of Energy, Regional Representative, 175 West Jackson Boulevard, Room A-333, Chicago, IL 60604.

Region VI: Department of Energy, Regional Representative, P.O. Box 35228, 2626 West Mockingbird Lane, Dallas, TX 75235.

Region VII: Department of Energy, Regional Representative, Twelve Grand Building, P.O. Box 2208, 112 East 12th Street, Kansas City, MO 64142.

Region VIII: Department of Energy, Regional Representative, P.O. Box 26247, Belmar Branch, Lakewood, CO 80226.

Region IX: Department of Energy, Regional Representative, 333 Market Street, San Francisco, CA 94105.

Region X: Department of Energy, Regional Representative, 1992 Federal Building, 915 Second Avenue, Seattle, WA 98174.

(c) All applications should be marked by the application on the outside of the package "Application for Loan Guarantee—Alcohol Fuel."

§ 799.23 Eligible projects.

In addition to meeting the requirements of Subpart A, to be eligible under this subpart to receive a Federal guarantee on a loan or loans to construct facilities for the production of alcohol fuel from biomass (other than municipal waste), a project must either:

(a) Utilize aquatic plants as feedstocks; or

(b) Have an anticipated annual energy production capacity equal to at least the energy equivalent of 15 million gallons of ethanol.

§ 799.24 Additional required findings and determinations.

(a) In addition to meeting the requirements of Subpart A of this rule, prior to committing to issue or issuing a loan guarantee, the Application Approving Official must find with respect to an eligible project:

(1) The Btu content of the motor fuels to be used in the facility involved to produce the alcohol fuel will not exceed the Btu content of the alcohol fuel produced in the facility. In making this determination, the Application Approving Official shall take into account any displacement of motor fuel or other petroleum products which result from the alcohol fuel produced in the facility involved;

(2) The process to be used by the project will extract the protein content of the feedstock for use as food or feed for readily available markets where such extraction is technically and economically practicable; and

(3) Necessary feedstocks are available and will continue to be available in the future to sustain long term commercial operations, and for alcohol fuel projects using wood, wood wastes or residues from the National Forest System, the current levels of use by existing facilities have been considered in coordination with the Department of Agriculture.

(b) Prior to committing to issue or issuing a loan guarantee, the Application Approving Official shall, to the extent and in the manner required by the Act, consult with and, where applicable, obtain the concurrence of the Secretary of Agriculture.

§ 799.25 Priorities.

(a) In evaluating applications under Subpart A of this rule, priority will be given to eligible projects which use a primary fuel other than petroleum or natural gas in the production of alcohol fuel; apply new technologies that expand possible feedstocks; produce alcohol using improved or new technologies; or any combination of the foregoing.

(b) Within the group of priority projects preferential consideration will be given to:

(1) Projects which have the smallest ratio of petroleum and natural gas consumed to biomass energy produced;

(2) Applicants proposing projects that evidence a strong likelihood of business success and economic viability;

(3) Applicants that qualify as small or disadvantaged business concerns;

(4) Applicants which maximize private investment and have a strong equity position; and

(5) Projects which promote competition.

Subpart C—Biomass Energy Projects

§ 799.30 Purpose.

The purpose of this subpart is to set forth the policies and procedures in addition to those of Subpart A of this rule, under which the Secretary will approve an application and issue, or commit to issue, a Federal guarantee on a loan or loans to construct facilities for the production of biomass energy (other than alcohol) from biomass (other than municipal waste but including wastes or residues of agricultural activities, wood harvesting activities or production of forest products) in an environmentally acceptable manner.

§ 799.31 Program management and administration. [Reserved]

§ 799.32 Receipt of applications.

(a) Applicants are requested to file applications under this subpart directly with: Department of Energy, Manager, Idaho Operations Office, 550 Second Street, Idaho Falls, Idaho 83401.

(b) Applications may also be filed at one of the following regional offices:

Region I: Department of Energy, Regional Representative, 150 Causeway Street, Analex Building, Room 700, Boston, MA 02114.

Region II: Department of Energy, Regional Representative, 26 Federal Plaza, Room 3206, New York, NY 10007.

Region III: Department of Energy, Regional Representative, 1421 Cherry Street, Room 1001, Philadelphia, PA 19102.

Region IV: Department of Energy, Regional Representative, 1651 Peachtree Street, NE., 8th Floor, Atlanta, GA 30309.

Region V: Department of Energy, Regional Representative, 175 West Jackson Boulevard, Room A-333, Chicago, IL 60604.

Region VI: Department of Energy, Regional Representative, P.O. Box 35228, 2626 West Mockingbird Lane, Dallas, TX 75235.

Region VII: Department of Energy, Regional Representative, Twelve Grand Building, P.O. Box 2208, 112 East 12th Street, Kansas City, MO 64142.

Region VIII: Department of Energy, Regional Representative, P.O. Box 26247, Belmar Branch, Lakewood, CO 80226.

Region IX: Department of Energy, Regional Representative, 333 Market Street, San Francisco, CA 94105.

Region X: Department of Energy, Regional Representative, 1992 Federal Building, 915 Second Avenue, Seattle, WA 98174.

(c) All applications should be marked by the applicant on the outside of the package "Application for Loan Guarantee—Biomass."

§ 799.33 Eligible projects.

In addition to meeting the requirements of Subpart A of this part, to be eligible under this subpart to receive a Federal guarantee on a loan or loans to construct facilities for the production of biomass energy (other than alcohol) from biomass (other than municipal waste), a project must either:

(a) Utilize aquatic plants as feedstock; or

(b) Have an anticipated annual energy production capacity equal to at least the energy equivalent of 15 million gallons of ethanol as determined pursuant to a notice issued by DOE and USDA, 45 FR 52911, August 8, 1980, or any revisions thereof.

§ 799.34 Additional required findings and determinations.

(a) In addition to meeting the requirements of Subpart A of this rule, and prior to committing to issue or issuing a loan guarantee, the Application Approving Official must find with respect to an eligible project that:

(1) The Btu content of the motor fuels to be used in the facility involved to produce the biomass fuel will not exceed the Btu content of the biomass fuel produced in the facility, taking into account any displacement of motor fuel or other petroleum products which results from the biomass fuel produced in the facility involved;

(2) The process to be used by the project will extract the protein content of the feedstock for use as food or feed for readily available markets where such extraction is technically and economically practicable;

(3) Necessary feedstocks are available and will continue to be available in the future to sustain long term commercial operations, and for biomass energy projects using wood, wood wastes or residues from the National Forest System, the current levels of use by existing facilities have been considered.

(b) Prior to committing to issue or issuing a loan guarantee, the Application Approving Official shall, to the extent and in the manner required by the Act, consult with and, where applicable, obtain the concurrence of the Secretary of Agriculture.

(c) In cases where a variety of technologies is available, the Application Approving Official shall assure that the awards of financial assistance are designed to minimize duplication of technologies.

§ 799.35 Priorities.

(a) In evaluating applications under Subpart A of this rule, priority will be given to eligible projects which use a primary fuel other than petroleum or natural gas in the production of biomass fuel; apply new technologies that expand possible feedstocks or produce new forms of energy, produce energy (other than alcohol) using improved or new technologies; or any combination of the foregoing.

(b) Within the group of priority projects preferential consideration will be given to:

(1) Projects which have the smallest ratio of petroleum and natural gas consumed to biomass energy produced;

(2) Applicants proposing projects that evidence a strong likelihood of business success and economic viability;

(3) Applicants that qualify as small or disadvantaged business concerns;

(4) Applicants, which maximize private investment and have a strong equity position;

(5) Projects which promote competition.

Subpart D—Municipal Waste Energy Projects

§ 799.40 Purpose.

The purpose of this subpart is to set forth the policies and procedures in addition to those of Subpart A of this rule, under which the Secretary will approve an application and issue, or commit to issue, a Federal guarantee on a loan or loans to construct facilities for the production of biomass energy from municipal waste in an environmentally acceptable manner.

§ 799.41 Program management and administration. [Reserved]

§ 799.42 Receipt of applications.

(a) Applications under this subpart shall be filed with Department of Energy, Procurement and Contracts Management Directorate, Mail Stop 1J009, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585.

(b) All applications should be marked by the applicant on the outside of the package "Application for Loan Guarantee-Municipal Waste."

§ 799.43 Eligible and ineligible projects.

(a) In addition to meeting the requirements of Subpart A of this rule, to be eligible under this part to receive a Federal guarantee on a loan or loans to construct facilities for the production of biomass energy, a project must utilize municipal waste as a feedstock.

(b) Loan guarantees for municipal waste energy projects involving industrial waste shall be available only for wood processing waste, paper processing waste, and waste from food processing (including waste from fruit and vegetable processing, nut packing, grain milling, sugar refining, and similar materials, but excluding waste from meat processing and dairy products industries) which do not constitute the wastes or residues of agricultural activities, wood harvesting activities or production of forest products.

§ 799.44 Additional application requirements.

An application for a loan guarantee for a municipal waste energy project shall include the following additional information:

(a) An analysis of the feasibility and effect of source separation technigues, including identification of existing source separation efforts, if applicable;

(b) Assurances that the project will not use, in any substantial quantities, waste paper or other recyclable material which would otherwise be recycled for use other than as a fuel and will not substantially compete with facilities in existence on the date of issuance of the loan guarantee which are engaged in the separation or recovery of reuseable materials from municipal waste.

(c) A description of the materials in the waste stream and an analysis to the extent practicable, of the economic and energy conservation potential for alternative uses of materials derived from the municipal waste stream.

(d) If the applicant requests an interest subsidy, a complete analysis and statement of the reasons such subsidy is essential to the undertaking of the projects.

(e) Other information relevant to the policy considerations, required findings and determinations, and priorities under this subpart.

§ 799.45 Policy considerations.

The following additional considerations apply to evaluation of applications:

(a) The extent of energy that can be recovered or conserved economically by the project including, but not limited to, energy savings resulting from recycling of source separated and otherwise recovered material and from displacement of petroleum or natural gas;

(b) The extent of the economic and energy conservation potential of alternative uses of source separated components of the municipal waste feedstock;

(c) The extent to which there are performance guarantees on the technology;

(d) The extent of coordination with local or regional planning activities;

(e) The extent to which the project minimizes unnecessary disruption of existing municipal waste collection and disposal services;

(f) The extent to which the Federal Government will incur additional costs as a result of financial assistance in the form of interest subsidies; and

(g) The extent to which selections provide an appropriate level of assistance to both private and publicly owned projects.

§ 799.46 Additional required findings and determinations.

In addition to the requirements stated in Subpart A, the Application Approving Official must, prior to committing to issue or issuing a loan guarantee for an eligible project determine:

(a) With respect to projects producing biomass energy other than biomass fuel, that the project does not use petroleum or natural gas except for flame stabilization or startup;

(b) With respect to projects producing biomass fuel, that the Btu content of the biomass fuel exceeds the Btu content of any petroleum or natural gas used in the project to produce the biomass fuel; and

(c) Assurances have been provided as required under § 799.44(b).

§ 799.47 Priorities.

In evaluating applications under Subpart A of this rule, priority will be given to eligible projects which will:

(a) Produce a liquid fuel from municipal waste; or

(b) Displace petroleum or natural gas as a fuel; or

(c) Require the least amount of Federal assistance, including interest subsidies under the provisions of § 799.48 of this subpart, in comparison to total project cost.

§ 799.48 Tax treatment.

(a) With respect to any loan or debt obligation which is:

(1) Issued after June 30, 1980, by or on behalf of, any state or any political subdivision or governmental entity thereof, and is

(2) Guaranteed by the Secretary, and

(3) Not supported by the full faith and credit of the issuer as a general obligation of the issuer, the interest paid on such obligation and received by the purchaser thereof (or the purchaser's successors in interest) shall be included in gross income for the purposes of chapter 1 of the Internal Revenue Code of 1954.

(b) With respect to the amount of obligations described in paragraph (a)(1) of this section that the issuer would have been able to issue as tax exempt obligations (other than obligations secured by the full faith and credit of the issuer as a general obligation of the issuer), the Secretary is authorized to pay only to the issuer any portion of the interest on such obligations, as determined by the Secretary of the Treasury to be appropriate after taking into account the interest rate which would have been paid on the obligations had they been issued as tax exempt obligations without being so guaranteed by the Secretary, and the interest rate actually paid on the obligations when issued as taxable obligations. Such payments shall be made in amounts determined by the Secretary and in accordance with such terms and conditions as the Secretary of the Treasury shall require.

§ 799.49 EPA role in program administration.

The Administration of any project entered into pursuant to these regulations for any commercial facility for the conversion or bioconversion of solid waste will be administered in accordance with the May 7, 1976, Interagency Agreement between the Environmental Protection Agency (EPA) and DOE on the "Development of Energy From Solid Wastes," and related documents. The intragency agreement provided that:

(a) For those energy-related projects of mutual interest, planning will be conducted jointly by EPA and DOE, following which project responsibility will be assigned to one agency;

(b) Energy-related projects for recovery of synthetic fuels or other forms of energy from solid waste will be the responsibility of DOE; and

(c) EPA will retain responsibility for the environmental and institutional aspects of solid waste projects and for assurance that these projects are consistent with any applicable suggested guidelines pursuant to section 1008 of the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, as amended, and any applicable State or regional solid waste management plan.

PART 800—LOANS FOR BID OR PROPOSAL PREPARATION BY MINORITY BUSINESS ENTERPRISES SEEKING DOE CONTRACTS AND ASSISTANCE

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AUTHORITY: Sec. 211(e) of the Department of Energy (DOE) Organization Act, Pub. L. 95-91, Title II, as amended by Pub. L. 95-619, Title VI, sec. 641, Nov. 9, 1978, 92 Stat. 3284 (42 U.S.C. 7141).

SOURCE: 46 FR 44689, Sept. 4, 1981, unless otherwise noted.

Subpart A—General

§ 800.001 Purpose.

The purpose of this regulation is to set forth policies and procedures for the award and administration of loans to minority business enterprises. The loans are to assist such enterprises in participating fully in research, development, demonstration and contract activities of the Department of Energy. The loans are to defray a percentage of the cost of obtaining DOE contracts and other agreements, including procurements, cooperative agreements, grants, loans and loan guarantees; of obtaining subcontracts with DOE operating contractors; and of obtaining contracts with first-tier subcontractors of DOE operating contractors in furtherance of the research, development, demonstration or other contract activities of DOE. Issuance of loans under this regulation is limited to the extent funds are provided in advance in appropriation acts. This regulation implements the authority for such loans in section 211(e) of the Department of Energy (DOE) Organization Act, Pub. L. 95-619, Title VI, section 641, November 9, 1978, 92 Stat. 3284 (42 U.S.C.A. 7141).

[48 FR 17574, Apr. 25, 1983]

§ 800.002 Program management.

Program management responsibility for financial assistance awarded under this regulation has been assigned to the Office of Minority Economic Impact.

§ 800.003 Definitions.

For the purpose of this regulation:

"Act" means the DOE Organization Act, Pub. L. 95-91, Title II, as amended by the National Energy Conservation Policy Act, Public Law 95-619, Title VI, section 641.

"Applicant" means a minority business enterprise which is seeking a loan under this regulation.

"Application Approving Official" means the Director of the Office of Minority Economic Impact.

"Application Evaluation Panel" (also referred to as the "Panel") means a team of Federal employees appointed by the Application Approving Official to evaluate loan applications and make approval or disapproval recommendations regarding such applications.

"Borrower" means an applicant who enters into a loan agreement with DOE.

"Contracting Officer" means the DOE official warranted and authorized to contractually bind the Department of Energy and execute written agreements that are binding on the Department.

"Costs" of a bid or proposal means the cost of preparing, submitting and supporting a bid or proposal, whether solicited or not, for a DOE contract or other agreement such as a procurement contract, grant, cooperative agreement, loan or loan guarantee; or a subcontract with a DOE operating contractor; or a contract with a first-tier subcontractor of a DOE operating contractor in furtherance of the research, development, demonstration or other contract activities of DOE.

"Default" means the actual failure by the borrower to make payment of principal or interest in accordance with the terms and conditions of a loan issued under this regulation, or the failure of the borrower to meet any other requirement specified as a default condition in the loan agreement.

"Director" means the Director of the Office of Minority Economic Impact (OMEI).

"Loan", in reference to a loan made pursuant to the regulation, means a transaction in which a contractual instrument ("loan agreement") is executed between the United States, as lender, acting through the Secretary of Energy, and a borrower. The instrument must obligate the United States to provide the borrower with a specified amount(s) of United States funds for a specified period of time and must obligate the borrower to use the moneys to bid for and attempt to obtain contracts and other agreements relating to DOE research, development, demonstration and contract activities, and to repay the moneys at a specified time at an agreed rate of interest. The words 'loan', 'loan agreement' and 'transaction' include (where the context does not require otherwise) the terms and conditions of related documents, such as the borrower's note or bond or other evidence of, or security for, the borrower's indebtedness.

"Minority Business Enterprise" means a firm including a sole proprietorship, corporation, association, or partnership which is at least 50 percent owned or controlled by a member of a minority or group of members of a minority. For the purpose of this definition, 'control' means direct or indirect possession of the power to direct, or cause the direction of, management and policies, whether through the ownership of voting securities, by contract or otherwise. An individual who is a citizen of the United States and who is a Negro, Puerto Rican, American Indian, Eskimo, Oriental, or Aleut, or is a Spanish speaking individual of Spanish descent, is a member of a "minority" as used in this regulation.

"Operating Contractors" means contractors under contracts having one of the following purposes, in accordance with the provisions of § 9.50.001(a)(1) of the DOE procurement regulations (Title 41 CFR Part 9-50):

(a) DOE prime contracts for the management of Federal Government-owned laboratories, production plants, and research facilities located on Federal Government-owned or Federal Government-leased sites, where the programs being conducted are considered of a long-term, continuing nature; or

(b) DOE prime contracts for the operation of Federal Government-owned facilities located on contractor-owned or leased sites where the programs being conducted are of a long-term, continuing nature. An example of this category would be those contracts with universities for the operation of Federal Government-owned facilities, for the purpose of conducting long-term basic research programs.

(c) Other contracts performed on sites owned by the Federal Government when so designated by the appropriate procurement official.

"Secretary" means the Secretary of the Department of Energy or his delegate.

[46 FR 44689, Sept. 4, 1981, as amended at 48 FR 17574, Apr. 25, 1983]

§ 800.004 Eligibility.

In order to be eligible for a loan, an applicant must be a minority business enterprise as defined in § 800.003.

Subpart B—Loan Solicitation, Application and Review

§ 800.100 Solicitation of applications.

The Secretary will periodically issue an announcement soliciting applications under this regulation. The announcement will be published in the FEDERAL REGISTER, synopsized in the *Commerce Business Daily*, and circulated to minority trade associations and organizations and to the Minority Business Development Agency and Small Business Administration. The announcement will indicate funds availability, eligibility requirements, application instructions, interest rates, maturities and other key loan terms and any applicable restrictions. In such solicitations, DOE shall further indicate that, in the case of applications for loans relating to bids or proposals for contracts with first-tier subcontractors of DOE operating contractors, information necessary to substantiate such applications may be unavailable to DOE from such subcontractors. If the substantiating information is not made available to DOE in a timely manner, the application may be rejected.

[46 FR 44689, Sept. 4, 1981, as amended at 48 FR 17574, Apr. 25, 1983]

§ 800.101 Application requirements.

(a) Applications for loans shall be filed, one original and three copies with: Department of Energy, Washington, D.C. 20585, Attention: Announcement No. DE-PS60-MI.

(b) An application for a loan under this regulation must include the following information. Items described in paragraphs (b)(1) through (7) of this section may be submitted for preliminary review in advance of a specific loan request but must be updated at time of loan request to reflect substantial changes.

(1) Applicant's name and address, with a description of the kind and size of its business, its business experience and its history as a minority business enterprise.

(2) Financial statements of applicant and its principals, including source of revenue and balance sheets for the current year and, as to applicant, for the two preceding years of applicant's existence as a business entity. The Secretary may require applicant to provide certification by a public accountant, or other certification acceptable to the Secretary.

(3) A description of any other Federal financial backing (direct loans, guaranteed loans, grants, etc.) applied for or obtained by the applicant within the previous five years, or expected to be applied for.

(4) A description of applicant's management structure, with list of applicant's key persons with their responsibilities and qualifications.

(i) In the case of a specific loan request this list should include any contractor or consultant whose services are proposed in connection with the bid or proposal for which the loan is sought.

(5) Affidavit(s) of eligibility (see § 800.004).

(6) Documentation as to applicant's authority to undertake the activities contemplated by the application. Such

documentation shall take substantially the following form:

(i) If the applicant is a corporation, a copy of the charter or certificate and articles of incorporation, with any amendments, duly certified by the Secretary of State of the State where organized, and a copy of the by-laws. There shall also be included a copy of all minutes, resolutions of stockholders or directors or other representatives of the applicant, properly attested, authorizing the filing of the application.

(ii) If the applicant is an association, a verified copy of its articles of association, if any, with an attested copy of the resolution of its governing board, if any, authorizing the filing of the application.

(iii) If the applicant is a business trust, a verified copy of the trust instrument and an attested copy of the resolution or other authority under which the application is made.

(iv) If the applicant is a joint stock company, a verified copy of the articles of association and of the authorizing resolution.

(v) If the application is made on behalf of a partnership, a copy of the partnership agreement, if any; if on behalf of a limited partnership, a duly certified copy, also, of the certificate of limited partnership, if such certificate is required to be obtained under state law governing such limited partnership.

(7) Credit references.

(8) Information on the award to be sought through the bid or proposal, as follows:

(i) Title, and whether in response to a solicitation or unsolicited.

(ii) Brief description of work to be performed.

(iii) Sponsoring DOE office, including solicitation number, if any.

(iv) If an unsolicited proposal is planned, the loan application shall indicate the appropriate DOE program personnel to be consulted as to whether there is potential for the proposal to be supported.

(v) Schedule for preparation and submission of the bid or proposal.

(9) Itemized cost estimates (and whether yet incurred).

(10) The required loan amount, not to exceed 75 percent of total bid or proposal costs, in accordance with § 800.200 on allowable costs.

(11) Requested loan maturity, in accordance with § 800.202(a)(3).

(12) How applicant will finance performance of work under a successful bid or proposal.

(13) Such other information as the Application Approving Official may deem necessary for evaluation in accordance with § 800.103 and for compliance with the provisions of this regulation.

(14) The application shall be signed by the applicant or on behalf of the applicant by an authorized representative. Verification may be by affidavit of an authorized representative of an applicant; attestation shall be by the authorized officer of an applicant.

NOTE: Title 18 United States Code, section 1001 provides criminal penalties for fraud and intentional false statements in information submitted in such an application.

§ 800.102 Review by Application Evaluation Panel.

(a) Applications for loans under this regulation shall be reviewed by an Application Evaluation Panel, which shall be appointed by the Application Approving Official. The Panel shall include, at a minimum, a representative of the Office of Minority Economic Impact, the contracting officer and a representative of the Office of the Controller.

(b) Panel review shall be conducted pursuant to paragraph (c) or (d) of this section, as applicable, to evaluate, to clarify and to develop information contained in the application and such other information as the Application Approving Official or the Panel may request.

(1) The Panel shall give priority to applications relating to a competitive solicitation, because of time limits on such solicitations. The Panel may defer action a maximum of five days after a solicitation has been announced in the *Commerce Business Daily* to provide all interested applicants an opportunity to apply.

(2) Initial screening will be in the order applications are received, but

time required to process an application may vary from case to case.

(c) Panel review of specific loan requests.

(1) If an application contains a specific loan request, and complies with § 800.101, the Panel shall arrange for risk analysis, independent of any such analysis submitted by or on behalf of the applicant. Risk analysis shall be directed both to the loan request and to applicant's prospective performance of work pursuant to the bid or proposal.

(2) The Panel shall evaluate the loan request in light of the risk analysis, and shall give its conclusions in writing to the Application Approving Official, with respect to the following and to such other considerations as that official may direct:

(i) Applicant's eligibility as a minority business enterprise.

(ii) Compliance with the application requirements of § 800.101.

(iii) Compliance with § 800.200 on allowable costs.

(iv) Applicant's financial ability to make the bid or proposal without the loan.

(v) Applicant's contribution of, or ability to contribute, the 25% minimum share of allowable costs, or more.

(vi) Applicant's ability to prepare an adequate bid or proposal, if the loan is made.

(vii) Possibility of award to applicant pursuant to its bid or proposal.

NOTE: Normally, not more than three loans will be approved for the same competitive award.

(viii) Applicant's ability to perform pursuant to the bid or proposal.

(ix) Likelihood that applicant will repay the requested loan, regardless of success of applicant's bid or proposal.

(x) Optimal use of available program funds.

(xi) The Panel's recommendation.

(d) Panel review of other applications. If the application was submitted without a specific loan request, the Panel shall review the application in accordance with paragraph (b) of this section with the limited purpose of determining whether the applicant has complied with § 800.101, except as to matters determinable only with respect to a future specific loan request, and shall inform the Application Approving Official in writing as to its determinations.

§ 800.103 Review by Application Approving Official.

(a) The Application Approving Official shall consider the results of the Panel's review under section 102 (c) or (d), and such other information as the Application Approving Official determines to be relevant pursuant to the provisions of this regulation, and shall either approve or disapprove the application, giving it priority in accordance with the provisions of § 800.102(b).

(b) The Application Approving Official shall authorize a contracting officer to notify the applicant of approval or disapproval.

(c) An applicant whose application has been rejected will be informed, on request, of the reason for rejection. Rejection is not a bar to submission of an appropriately revised application.

Subpart C—Loans

§ 800.200 Maximum loan; allowable costs.

(a) A loan under this regulation shall not exceed 75 percent of allowable costs of a bid or proposal to obtain a DOE contract or other agreement (such as a procurement contract, cooperative agreement, grant, loan or loan guarantee), or a subcontract with a DOE operating contractor, or a contract with a first-tier subcontractor of a DOE operating contractor in furtherance of the research, development, demonstration or other contract activities of DOE.

(b) To be allowable, costs must, in DOE's judgment:

(1) Be consistent with the bidding cost principles of the Federal Procurement Regulation (41 CFR Ch. 1, 1-15.205-3) and DOE Procurement Regulation (41 CFR Ch. 9, 9-15.205-3); and;

(2) Be necessary, reasonable and customary for the bid or proposal contemplated by the application; and

(3) Be incurred, or expected to be incurred, by the applicant.

(c) Costs which are, in general, allowable, if consistent with paragraph

(b) of this section include, but are not limited to:

(1) Bid bond premiums.

(2) Financial, accounting, legal, engineering and other professional, consulting or similar fees and service charges.

(3) Printing and reproduction costs.

(4) Travel and transportation costs.

(5) Costs of the loan application under this rule.

(d) Costs that are not considered as allowable costs include the following:

(1) Fees and commissions charged to the applicant, including finder's fees, for obtaining Federal funds.

(2) Expenses, which, in DOE's judgment, have primarily an application broader than the specific loan request.

(3) Costs which, in DOE's judgment, fail to conform to paragraph (b) of this section.

[46 FR 44689, Sept. 4, 1981, as amended at 48 FR 17574, Apr. 25, 1983]

§ 800.201 Findings.

A loan shall issue under this regulation only if the Secretary, having reviewed the action of the Application Approving Official, and having considered such other information as the Secretary may deem pertinent, has made all the findings that follow:

(a) That the applicant is a minority business enterprise.

(b) That the loan will assist the enterprise to participate in the research, development, demonstration or contract activities of the Department of Energy by providing funds needed by applicant for bid or proposal purposes.

(c) That, by terms of the loan, applicant's use of the funds will be limited to bidding for and obtaining a contract or other agreement with the Department of Energy, a subcontract with a DOE operating contractor, or a contract with a first-tier subcontractor of a DOE operating contractor in furtherance of the research, development, demonstration or other contract activities of DOE.

(d) That the funds to be loaned will not exceed 75% of applicant's costs in bidding for and obtaining the contract or agreement.

(e) That the rate of interest on the loan has been determined in consultation with the Secretary of the Treasury.

(f) That there is a reasonable prospect that the applicant will make the bid or proposal which is the purpose of the loan, will perform according to its bid or proposal, and will repay the loan according to the terms thereof, regardless of the success of its bid or proposal.

(g) That the terms and conditions of the loan are acceptable to the Secretary and comply with this regulation and with section 211(e) of the Department of Energy Organization Act.

[46 FR 44689, Sept. 4, 1981, as amended at 48 FR 17574, Apr. 25, 1983]

§ 800.202 Loan terms and conditions.

(a) The loan shall be based upon a loan agreement and the borrower's separate promissory note for the proceeds of the loan, including interest. The agreement and note shall be executed in writing between the borrower and the Secretary. The contracting officer shall execute the loan agreement on behalf of the Secretary. The loan agreement and the promissory note shall provide as follows, either at full length or by incorporation by reference to terms of the other of the two documents.

(1) The borrower agrees to repay the loan of funds provided by the Secretary.

(2) The interest rate on the loan is as established in consultation with the Secretary of the Treasury, taking into consideration the current average market yields of outstanding marketable obligations of the United States having maturities comparable to the loan.

(3) The loan shall be repaid over a maximum period as follows, in equal monthly installments of principal and interest, unless a different frequency of installments is specified by the Secretary:

Loan value	Maximum repayment[1]
$0—$5,000	3 years 3 months
$5,000—$25,000	5 years 3 months
Excess of $25,000	8 years 3 months

[1] Maximum repayment period from date of initial disbursement.

Repayment of principal and interest shall begin within 90 days following the initial loan disbursement or such longer period as may be acceptable to the Secretary. Installments shall be applied to accrued interest first and then to repayment of principal. Past due installments shall accrue interest at the quarterly current-value-of-funds-rate specified by the Treasury for overdue accounts. Prepayments may be made at any time without penalty.

(4) The borrower shall have appropriate opportunities, as specified in the loan agreement, to cure any default, failure, or breach of any of the covenants, conditions and obligations undertaken by the borrower pursuant to the provisions of the loan agreement.

(5) Loans of $10,000 or less will be disbursed in a single disbursement. Disbursement of loans larger than $10,000 shall be per schedule and documentation specified by the Secretary.

(6) The loan may be used by the borrower to defray as much as, but no more than, 75 percent of the cost of the bid or proposal within the limitations specified in § 800.200, on allowable costs. Costs incurred by the borrower prior to the effective date of the loan agreement, and allowable under § 800.200, may be credited toward the borrower's share of costs if, in DOE's judgment, they were primarily related to the bid or proposal, but shall not be reimbursed from the loan.

(7) The borrower shall make periodic reports regarding the bid or proposal.

(8) The borrower shall maintain good standing under Federal, State and local laws and regulations applicable to the conduct of its business, including current payment of all taxes, fees and other charges and all requisite licenses and other governmental authorization necessary for the continued operation of the business throughout the term of the loan.

(9) The borrower shall remain a minority business enterprise throughout the term of the loan.

(10) The borrower shall return funds disbursed, but not required together with accrued interest thereon, to DOE, or to the servicing agent, if applicable, when its bid or proposal is ready for submission. The return of unrequired funds shall be by check separate from any payment of interest or principal, shall be identified by the borrower as a return of unrequired funds, and shall be accompanied by the borrower's certification that so much of the loan as has been disbursed to the borrower and not returned has been, or will be, expended by the borrower for costs allowable under § 800.200.

(11) Such other provisions as the Secretary deems appropriate.

(b) The loan agreement shall also provide for loan servicing and monitoring in accordance with § 800.300 and § 800.301, loan limitation in accordance with § 800.302, assignment and transfer in accordance with § 800.303, default in accordance with § 800.304 and appeals in accordance with § 800.307.

(c) The Secretary may require, as preconditions to disbursement, that the borrower have specified amounts of working capital (including amounts derived from Federal financial assistance) and maintain specified financial ratios, where in the Secretary's judgment satisfaction of such preconditions is necessary to assure the borrower's ability to make and perform the contract, agreement or subcontract according to the bid or proposal, or is otherwise necessary to protect the interests of the United States.

(d) The Secretary may require pledges, personal guarantees and other collateral security, and the maintenance of insurance on the borrower's assets and principals, in amounts and on terms appropriate in the Secretary's judgment, to protect the interests of the United States.

§ 800.203 Loan limits.

The Secretary shall not make a loan in excess of $50,000, or make aggregate loans to the same minority business enterprise, including its affiliates, in any Federal fiscal year in excess of $100,000. In addition, the Secretary shall not increase a loan to an amount which would cause the limits set forth in the previous sentence to be exceeded. Nothing in this regulation shall be interpreted to restrict the Secretary.

in making the various determinations provided for in this regulation, from taking into account considerations relating to the Office of Minority Economic Impact loan program as a whole.

§ 800.204 Deviations.

(a) To the extent consistent with the Act, relevant appropriations acts, and other applicable statutes, DOE may deviate on an individual application basis from the requirements of this regulation upon a finding by the Secretary that such deviation is necessary or appropriate in the individual case for the accomplishment of program objectives.

(b) The contracting officer may, subject to written agreement by other necessary parties, modify or amend the terms and conditions of a loan provided that such modification or amendment shall be consistent with this regulation.

Subpart D—Loan Administration

§ 800.300 Loan servicing.

(a) Servicing of a loan under this regulation may be performed by DOE, by another Federal agency, or by a servicing agent (commercial bank, broker, or other financial institution or entity) having the capability, and legally qualified, to service the loan consistently with the requirements of this regulation, which contracts with DOE to act as servicing agent. In determining the capability of a prospective servicing agent, DOE shall give due consideration to the experience of the agent in providing financial services to minority business enterprises.

(b) If the servicing of the loan is by contract or other agreement, such contract or other agreement shall provide that the loan shall be serviced in accordance with this regulation and with the terms and conditions of the loan, under a standard of performance that a reasonable and prudent lender would require as to its own similar loan. Servicing responsibilities shall include, but not necessarily be limited to, the following:

(1) Loan disbursements as set forth in the loan agreement.

(2) Collection of principal and interest payments on a monthly basis.

(3) Maintenance of records on loan accounts.

(4) Notification of the Secretary, without delay, as to the following:

(i) That the initial disbursement or loan drawdown is ready to be made, together with evidence from the borrower that the bid or proposal preparation has begun or is about to begin.

(ii) The date and amount of each subsequent disbursement under the loan.

(iii) Any nonreceipt of payment within 10 days after the date specified for payment, together with evidence of appropriate notification to the borrower.

(iv) Any known failure by the borrower to comply with the terms and conditions of the loan agreement.

(v) Evidence, if any, that the borrower is likely to default on any condition set forth in the loan agreement or may be unable to make the next scheduled payment of principal or interest.

(5) Submittal to DOE of periodic (semi-annual or annual) reports on the status and conditions of the loan and of the borrower.

§ 800.301 Monitoring.

The Secretary shall have the right to audit any and all costs of the bid or proposal for which the loan is sought or made and to exclude or reduce the includible amount of any cost in accordance with § 800.200. Auditors who are employees of the United States Government, who are designated by the Secretary of Energy or by the Comptroller General of the United States, shall have access to, and the right to examine, any directly pertinent documents and records of an applicant or borrower at reasonable times under reasonable circumstances. The servicing agent, if any, shall make information regarding the loan available to the Secretary of Energy and Comptroller General to the extent lawful and within its ability. The Secretary may direct the applicant or borrower to submit to an audit by public accountant or equivalent acceptable to the Secretary.

§ 800.302 Loan limitation.

The Secretary may limit the loan by written notice to the borrower to those amounts, if any, already disbursed under the loan, if the Secretary has determined that the borower has failed to comply with a material term or condition set forth in the loan agreement.

§ 800.303 Assignment or transfer of loan.

Assignment or transfer of the loan and obligations thereunder may be made only with the prior written consent of the Secretary.

§ 800.304 Default.

(a) In the event that the borrower fails to perform the terms and conditions of the loan, the borrower shall be in default and the Secretary shall have the right, at the Secretary's option, to accelerate the indebtedness and demand full payment of all principal and interest amounts outstanding under the loan.

(b) No failure on the part of the Secretary to make demand at any time shall constitute a waiver of the rights held by the Secretary.

(c) Upon demand by the Secretary, the borrower shall have a period of not more than 30 days from the date of receipt of the Secretary's demand to make payment in full.

(d) In the event that the failure on the part of the borrower to perform the terms and conditions of the loan does not constitute an intentional act, but is brought about as a result of circumstances largely beyond the control of the borrower, or is deemed by, the Secretary to be insubstantial, the Secretary may elect, at the Secretary's option, to defer such performance and/or restructure the repayment required by the loan agreement in any mutually acceptable manner.

(e) Should the borrower fail to pay after demand as provided in paragraph (c) of this section, and no deferral or restructuring is agreed to by the Secretary as provided in paragraph (d) of this section, the Secretary shall undertake collection in accordance with the terms of the loan agreement and the applicable law.

§ 800.305 Disclosure.

Information received from an applicant by DOE may be available to the public subject to the provision of 5 U.S.C. 552, 18 U.S.C. 1905 and 10 CFR Part 1004; provided that:

(a) Subject to the requirements of law, information such as trade secrets, commercial and financial information, and other information concerning the minority business enterprise that the enterprise submits to DOE in writing, in an application, or at other times throughout the duration of the loan on a privileged or confidential basis, will not be disclosed without prior notice to submitter in accordance with DOE regulations concerning public disclosure of information. Any submitter asserting that the information is privileged or confidential should appropriately identify and mark such information.

(b) Upon a showing satisfactory to the Secretary that any information or portion thereof obtained under this regulation would, if made public, divulge trade secrets or other proprietary information of the minority business enterprise, the Secretary may not disclose such information.

(c) This section shall not be construed as authority to withhold information from Congress or from any committee of Congress upon request of the Chairman.

§ 800.306 Noninterference with other laws.

Nothing in this regulation shall be construed to modify requirements imposed on the borrower by Federal, State and local government agencies in connection with permits, licenses, or other authorizations to conduct or finance its business.

§ 800.307 Appeals.

Any dispute concerning questions of fact arising under the loan agreement shall be decided in writing by the contracting officer. The borrower may request the contracting officer to reconsider any such decision, which reconsideration shall be promptly undertaken. If not satisfied with the contracting officer's final decision, the borrower, upon receipt of such written decision, may appeal the decision within

60 days in writing to the Chairman, Financial Assistance Appeals Board (FAAB), Department of Energy, Washington, D.C. 20585. The Board shall proceed in accordance with the Department of Energy's rules and regulations for such purpose. The decision of the Board with respect to such appeals shall be the final decision of the Secretary.

PART 810—ASSISTANCE TO FOREIGN ATOMIC ENERGY ACTIVITIES

Sec.

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AUTHORITY: Secs. 57, 127, 128, 129, 161, and 223, Atomic Energy Act of 1954, as amended by the Nuclear Non-Proliferation Act of 1978, Pub. L. 95-242, 68 Stat. 932, 948, 950, 958, 92 Stat. 126, 136, 137, 138 (42 U.S.C. 2077, 2156, 2157, 2158, 2201, 2273); Sec. 104 of the Energy Reorganization Act of 1974, Pub. L. 93-438; Sec. 301, Department of Energy Organization Act, Pub. L. 95-91.

SOURCE: 51 FR 44574, Dec. 10, 1986, unless otherwise noted.

§ 810.1 Purpose.

These regulations implement section 57b of the Atomic Energy Act which empowers the Secretary of Energy to authorize U.S. persons to engage directly or indirectly in the production of special nuclear material outside the United States. Their purpose is to:

(a) Indicate activities which have been generally authorized by the Secretary of Energy and thus require no further authorization;

(b) Indicate activities which require specific authorization by the Secretary and explain how to request authorization; and

(c) Explain reporting requirements for various activities.

§ 810.2 Scope.

10 CFR Part 810:

(a) Applies to all persons subject to the jurisdiction of the United States who engage directly or indirectly in the production of special nuclear material outside the United States.

(b) Applies to activities conducted either in the United States or abroad by such persons or by licensees, contractors or subsidiaries under their direction, supervision, responsibility or control.

(c) Applies, but is not limited to, activities involving nuclear reactors and other nuclear fuel cycle facilities for the following: fluoride or nitrate conversion; isotope separation (enrichment); the chemical, physical or metallurgical processing, fabricating, or alloying of special nuclear material; production of heavy water, zirconium (hafnium-free or low-hafnium), nuclear-grade graphite, or reactor-grade beryllium; production of reactor-grade uranium dioxide from yellowcake; and certain uranium milling activities.

(d) Does not apply to exports licensed by the Nuclear Regulatory Commission.

§ 810.3. Definitions.

As used in Part 810:

"Agreement for cooperation" means an agreement with another nation or group of nations concluded under Sections 123 or 124 of the Atomic Energy Act.

"Atomic Energy Act" means the Atomic Energy Act of 1954, as amended.

"Classified information" means National Security Information classified under Executive Order 12356 or any superseding order, or Restricted Data classified under the Atomic Energy Act.

"General authorization" means an authorization granted by the Secretary of Energy under section 57b(2) of the Atomic Energy Act to provide certain assistance to foreign atomic energy activities and which is effective without a specific request to the Secretary or the issuance of an authorization to a particular person.

"IAEA" means the International Atomic Energy Agency.

"NNPA" means the Nuclear Non-Proliferation Act of 1978.

"NPT" means the Treaty on the Non-Proliferation of Nuclear Weapons.

"Nuclear reactor" means an apparatus, other than a nuclear explosive device, designed or used to sustain nuclear fission in a self-supporting chain reaction.

"Open meeting" means a conference, seminar, trade show or other gathering that all technically qualified members of the public may attend and at which they may make written or other personal record of the proceedings, notwithstanding that (1) a reasonable registration fee may be charged, or (2) a reasonable numerical limit exists on actual attendance.

"Person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Department of Energy, any State or political entity within a State; and (2) any legal successor, representative, agent or agency of the foregoing. Persons under U.S. jurisdiction are responsible for their foreign licensees, contractors or subsidiaries to the extent that the former have control over the activities of the latter.

"Production reactor" means a nuclear reactor specially designed or used primarily for the production of plutonium or uranium-233.

"Public information" means: (1) Information available in periodicals, books or other print or electronic media for distribution to any member of the public, or to a community of persons such as those in a scientific, engineering, or educational discipline or in a particular commercial activity who are interested in a subject matter; (2) Information available in public libraries, public reading rooms, public document rooms, public archives, or public data banks, or in university courses; (3) Information that has been presented at an open meeting (see definition of "open meeting"); (4) Information that has been made available internationally without restriction on its further dissemination; or (5) Information contained in an application which has been filed with the U.S. Patent Office and eligible for foreign filing under 35 U.S.C. 184 or which has been made available under 5 U.S.C. 552, the Freedom of Information Act. Public information must be available to the public prior to or at the same time as it is transmitted to a foreign recipient. It does not include any technical embellishment, enhancement, explanation or interpretation which in itself is not public information, or information subject to Sections 147 and 148 of the Atomic Energy Act.

"Restricted Data" means all data concerning (1) design, manufacture or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act.

"Sensitive nuclear technology" means any information (including information incorporated in a production or utilization facility or important component part thereof) which is not available to the public [see definition of "public information"] which is important to the design, construction, fabrication, operation, or maintenance of a uranium enrichment or nuclear fuel reprocessing facility or a facility for the production of heavy water, but shall not include Restricted Data controlled pursuant to Chapter 12 of the Atomic Energy Act. The information may take a tangible form such as a model, prototype, blueprint, or operation manual or an intangible form such as technical services.

"Source Material" means: (1) Uranium or thorium, other than special nuclear material or (2) ores which contain by weight 0.05 percent or more of uranium or thorium, or any combination of these.

"Special nuclear material" means (1) plutonium, (2) uranium-233, or (3) uranium enriched above 0.711 percent by weight in the isotope uranium-235.

"Specific authorization" means an authorization granted by the Secretary of Energy under section 57b(2) of the Atomic Energy Act to a person to provide specified assistance to a foreign atomic energy activity in response to an application filed under 10 CFR Part 810.

"United States", when used in a geographical sense, includes all territories and possessions of the United States.

§ 810.4 Communications.

All communications concerning these regulations should be addressed to: U.S. Department of Energy, Washington, DC 20585. Attention: Director, Division of Politico-Military Security Affairs, DP-332, Office of International Security Affairs, Telephone: (202) 252-2112.

Communications also may be delivered to the Department's headquarters at 1000 Independence Avenue, SW., Washington, DC. All clearly marked proprietary information will be given the maximum protection allowed by law.

§ 810.5 Interpretations.

A person may request the advice of the Division of Politico-Military Security Affairs (PMSA) on whether a proposed activity falls outside the scope of Part 810, is generally authorized under § 810.7, or requires specific authorization under § 810.8; however, unless authorized by the Secretary of Energy in writing, no interpretation of these regulations other than a written interpretation by the General Counsel is binding upon the Department. When advice is requested from PMSA or a binding, written determination is requested from the General Counsel, a response normally will be made within 30 days and, if this is not feasible, an interim response will explain the delay.

§ 810.6 Authorization requirement.

Section 57b of the Atomic Energy Act in pertinent part provides that:

> It shall be unlawful for any person to directly or indirectly engage in the production of any special nuclear material outside of the United States except (1) as specifically authorized under an agreement for cooperation made pursuant to section 123, including a specific authorization in a subsequent arrangement under section 131 of this Act, or (2) upon authorization by the Secretary of Energy after a determination that such activity will not be inimical to the interest of the United States: *Provided*, That any such determination by the Secretary of Energy shall be made only with the concurrence of the Department of State and after consultation with the Arms Control and Disarmament Agency, the Nuclear Regulatory Commission, the Department of Commerce, and the Department of Defense.

§ 810.7 Generally authorized activities.

In accordance with section 57b(2) of the Atomic Energy Act, the Secretary of Energy has determined that the following activities are generally authorized, provided no sensitive nuclear technology is transferred:

(a) Furnishing public information as defined in § 810.3;

(b) Furnishing information or assistance to prevent or correct a current or imminent radiological emergency posing a significant danger to public health and safety, provided the Department of Energy is notified in advance and does not object;

(c) Implementing the Agreement between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States;

(d) Participation in exchange programs approved by the Department of State in consultation with the Department of Energy;

(e) Participation approved by a U.S. Government agency in IAEA programs, and activities of IAEA employees whose employment was approved by the U.S. Government;

(f) Participation in open meetings as defined in § 810.3 that are sponsored by educational, scientific, or technical organizations or institutions;

(g) Otherwise engaging directly or indirectly in the production of special nuclear material outside the United States in ways that (1) do not involve any of the countries listed in § 810.8(a) and (2) do not involve production reactors, enrichment, reprocessing, fabrication of nuclear fuel containing plutonium, or production of heavy water, as described in § 810.8(c) (1) through (5).

§ 810.8 Activities requiring specific authorization.

Unless generally authorized by § 810.7, a person requires specific authorization by the Secretary of Energy before:

(a) Engaging directly or indirectly in the production of special nuclear material in any of the countries listed below:

Afghanistan
Albania
Algeria
Andorra
Angola
Argentina
Bahrain
Brazil
Bulgaria
Burma
Chile
China, People's Republic of
Comoros
Cuba
Czechoslovakia
Djibouti
Estonia
German Democratic Republic (and East Berlin)
Guyana
Hungary
India
Iran
Iraq
Israel
Kampuchea
Korea, People's Democratic Republic of
Kuwait
Laos
Latvia
Libya
Lithuania
Mauritania
Monaco
Mongolian People's Democratic Republic
Mozambique
Niger
Oman
Pakistan
Poland
Qatar
Romania
Saudi Arabia
South Africa
Soviet Union
Syria
Tanzania
United Arab Emirates
Vanuatu
Vietnam
Yemen, People's Democratic Republic of
Zambia
Zimbabwe

Countries may be removed from or added to this list by amendments published in the FEDERAL REGISTER;

(b) Providing sensitive nuclear technology for an activity in any foreign country;

(c) Engaging in or providing assistance in any of the following activities with respect to any foreign country:

(1) Designing production reactors or facilities for the separation of isotopes of source or special nuclear material (enrichment), chemical processing of irradiated special nuclear material (reprocessing), fabrication of nuclear fuel containing plutonium, or the production of heavy water;

(2) Constructing, fabricating, operating, or maintaining such reactors or facilities;

(3) Designing, constructing, fabricating, operating or maintaining components specially designed, modified or adapted for use in such reactors or facilities;

(4) Designing, constructing, fabricating, operating or maintaining major critical components for use in such reactors or production-scale facilities; or

(5) Training in the activities of paragraphs (c) (1) to (4) of this section.

§ 810.9 Restrictions on general and specific authorization.

A general or specific authorization granted by the Secretary of Energy under these regulations:

(a) Is limited to activities involving only unclassified information and does not permit furnishing Restricted Data or other classified information.

(b) Does not relieve a person from complying with relevant laws or the regulations of other Government agencies applicable to exports;

(c) Does not authorize a person to engage in any activity when the person knows or has reason to know that the activity is intended to provide assistance in designing, developing, fabricating or testing a nuclear explosive device.

§ 810.10 Grant of specific authorization.

(a) Any person proposing to provide assistance for which §810.8 indicates specific authorization is required may apply for the authorization to the U.S. Department of Energy, Washington, DC 20585, Attention: Director, Division of Politico-Military Security Affairs, DP-332, Office of International Security Affairs.

(b) The Secretary of Energy will approve an application for specific authorization if he determines, with the concurrence of the Department of State and after consultation with the Arms Control and Disarmament Agency, the Nuclear Regulatory Commission, the Department of Commerce, and the Department of Defense, that the activity will not be inimical to the interest of the United States. In making this determination, the Secretary will take into account:

(1) Whether the United States has an agreement for nuclear cooperation

with the nation or group of nations involved;

(2) Whether the country involved is a party to the NPT, or a country for which the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) is in force;

(3) Whether the country involved has entered into an agreement with the IAEA for the application of safeguards on all its peaceful nuclear activities;

(4) Whether the country involved, if it has not entered into such an agreement, has agreed to accept IAEA safeguards when applicable to the proposed activity;

(5) Other nonproliferation controls or conditions applicable to the proposed activity;

(6) The relative significance of the proposed activity;

(7) The availability of comparable assistance from other sources;

(8) Any other factors that may bear upon the political, economic, or security interests of the United States, including U.S. obligations under international agreements or treaties.

(c) If the proposed assistance involves the export of "sensitive nuclear technology" as defined in § 810.3, the requirements of sections 127 and 128 of the Atomic Energy Act and of any applicable U.S. international commitments must also be met.

(d) Approximately 30 days after the Secretary's grant of a specific authorization, a copy of the Secretary's determination may be provided to any person requesting it at the Department's Public Reading Room, unless the applicant submits information showing that public disclosure will cause substantial harm to its competitive position. This provision does not affect any other authority provided by law for the Department not to disclose information.

§ 810.11 Revocation, suspension, or modification of authorization.

The Secretary may revoke, suspend, or modify a general or specific authorization:

(a) For any material false statement in an application for specific authorization or in any additional information submitted in its support;

(b) For failing to provide a report or for any material false statement in a report submitted pursuant to § 810.13;

(c) If any authorized assistance is subsequently determined to be inimical to the interest of the United States or otherwise no longer meets the legal criteria for approval; or

(d) Pursuant to Section 129 of the Atomic Energy Act.

§ 810.12 Information required in an application for specific authorization.

Each application shall contain:

(a) The name, address, and citizenship of the applicant, and complete disclosure of all real parties in interest; if the applicant is a corporation or other legal entity, where it is incorporated or organized, the location of its principal office, and the degree of any control or ownership by any foreign person or entity;

(b) A complete description of the proposed activity, including its approximate monetary value, the name and location of any facility or project involved, the name and address of the person or legal entity for which the activity is to be performed, and a detailed description of any specific project to which the activity relates;

(c) Any information the applicant may wish to provide concerning the factors listed in § 810.10(b); and

(d) Designation of any information considered proprietary whose public disclosure would cause substantial harm to the competitive position of the applicant.

§ 810.13 Reports.

(a) Any person who has received a specific authorization shall within 30 days after beginning the authorized activity provide to the Department of Energy a report containing the following information:

(1) The name, address, and citizenship of the person submitting the report;

(2) The name, address, and citizenship of the person or entity for which the activity is being performed;

(3) A description of the activity, the date it began, its location, status, and anticipated date of completion; and

(4) A copy of the Department of Energy's letter authorizing the activity.

(b) Any person carrying out a specifically authorized activity shall inform DOE when the activity is completed or if it is terminated before completion.

(c) Any person granted a specific authorization shall inform DOE when it is known that the proposed activity will not be undertaken and the granted authorization will not be used.

(d) Any person, within 30 days after beginning any generally authorized activity under § 810.7(b) or (g), shall provide to the Department of Energy:

(1) The name, address, and citizenship of the person submitting the report;

(2) The name, address, and citizenship of the person or entity for which the activity is being performed; and

(3) A description of the activity, the date it began, its location, status, and anticipated date of completion.

(e) Persons engaging in generally authorized activities as employees of persons required to report are not themselves required to report.

(f) Persons engaging in activities generally authorized under § 810.7 (a), (c), (d), (e), and (f) are not subject to reporting requirements.

(g) All reports should be sent to: U.S. Department of Energy, Washington, DC 20585, Attention: Director, Division of Politico-Military Security Affairs, DP-332, Office of International Security Affairs.

§ 810.14 Additional information.

The Department of Energy may at any time require a person engaging in any generally or specifically authorized activity to submit additional information.

§ 810.15 Violations.

(a) The Atomic Energy Act provides that:

(1) Permanent or temporary injunctions or restraining orders may be granted to prevent any person from violating any provision of the Atomic Energy Act or its implementing regulations.

(2) Any person convicted of violating or conspiring or attempting to violate any provision of section 57 of the Atomic Energy Act may be fined up to $10,000 or imprisoned up to 10 years, or both. If the offense is committed with intent to injure the United States or to aid any foreign nation, the penalty could be up to life imprisonment and a $20,000 fine.

(b) Title 18 of the United States Code, section 1001, provides that persons convicted of willfully falsifying, concealing, or covering up a material fact or making false, fictitious or fraudulent statements or representations may be fined up to $10,000 or imprisoned up to five years, or both.

§ 810.16 Effective date.

These regulations are effective upon publication as a final rule. Except for actions which may be taken by DOE pursuant to § 810.11, this revision does not affect the validity or terms of any specific authorization granted under the previous regulations. Persons engaging in activities that were generally authorized under the previous regulations but are no longer generally authorized under these regulations must apply for specific authorization within 90 days but may continue their activities until their application is acted upon.

PART 840—EXTRAORDINARY NUCLEAR OCCURRENCES

Sec.
840.1 Scope and purpose.
840.2 Procedures.
840.3 Determination of extraordinary nuclear occurrence.
840.4 Criterion I—Substantial discharge of radioactive material or substantial radiation levels offsite.
840.5 Criterion II—Substantial damages to persons offsite or property offsite.

AUTHORITY: Sec. 161 of the Atomic Energy Act of 1954, Pub. L. 83-703, 68 Stat. 919 (42 U.S.C. 2201); sec. 170 of the Atomic Energy Act of 1954, Pub. L. 85-256, 71 Stat. 576, as amended by Pub. L. 89-645, 80 Stat. 891 (42 U.S.C. 2210); Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565-613 (42 U.S.C. 7101-7352).

SOURCE: 49 FR 21473, May 21, 1984, unless otherwise noted.

§ 840.1 Scope and purpose.

(a) *Scope.* This subpart applies to those DOE contractor activities to which the nuclear hazards indemnity provisions in 41 CFR 9-50.704-6 apply, and to other persons indemnified with respect to such activities.

(b) *Purpose.* One purpose of this subpart is to set forth the criteria which the DOE proposes to follow in order to determine whether there has been an "extraordinary nuclear occurrence." The other purpose is to establish the conditions of the waivers of defenses proposed for incorporation in indemnity agreements.

(1) The system is to come into effect only where the discharge or dispersal constitutes a substantial amount of source, special nuclear or byproduct material, or has caused substantial radiation levels offsite. The various limits in present DOE regulations are not appropriate for direct application in the determination of an "extraordinary nuclear occurrence," for they were arrived at with other purposes in mind, and those limits have been set at a level which is conservatively arrived at by incorporating a significant safety factor. Thus, a discharge or dispersal which exceeds the limits in DOE regulations, or in DOE orders, although possible cause for concern, is not one which would be expected to cause substantial injury or damage unless it exceeds by some significant multiple the appropriate regulatory limit. Accordingly, in arriving at the values in the criteria to be deemed "substantial" it is more appropriate to adopt values separate from DOE health and safety orders, and, of course the selection of these values will not in any way affect such orders. A substantial discharge, for purposes of the criteria, represents a perturbation of the environment which is clearly above that which could be anticipated from the conduct of normal activities. The criteria are intended solely for the purposes of administration of DOE statutory responsibilities under Pub. L. 89-645, and are not intended to indicate a level of discharge or dispersal at which damage is likely to occur, or even a level at which some type of protective action is indicated. It should be clearly understood that the criteria in no way establish or indicate that there is a specific threshold of exposure at which biological damage from radiation will take place. It cannot be emphasized too frequently that the levels set to be used as criteria for the first part of the determination, that is, the criteria for amounts offsite or radiation levels offsite which are substantial, are not meant to indicate that, because such amounts or levels are determined to be substantial for purposes of administration, they are "substantial" in terms of their propensity for causing injury or damage.

(2) It is the purpose of the second part of the determination that DOE decide whether there have in fact been or will probably be substantial damages to persons offsite or property offsite. The criteria for substantial damages were formulated, and the numerical values selected, on a wholly different basis from that on which the criteria used for the first part of the determination with respect to substantial discharge were derived. The only interrelation between the values selected for the discharge criteria and the damage criteria is that the discharge values are set so low that it is extremely unlikely the damage criteria could be satisfied unless the discharge values have been exceeded.

(3) The first part of the test is designed so that DOE can assure itself that something exceptional has occurred; that something untoward and unexpected has in fact taken place and that this event is of sufficient significance to raise the possibility that some damage to persons or property offsite has resulted or may result. If there appears to be no damage, the waivers will not apply because DOE will be unable, under the second part of the test, to make a determination that "substantial damages" have resulted or will probably result. If damages have resulted or will probably result, they could vary from de minimis to serious, and the waivers will not apply until the damages, both actual and probable, are determined to be "substantial" within the second part of the test.

(4) The presence or absence of an extraordinary nuclear occurrence determination does not concomitantly de-

termine whether or not a particular claimant will recover on his claim. In effect, it is intended primarily to determine whether certain potential obstacles to recovery are to be removed from the route the claimant would ordinarily follow to seek compensation for his injury or damage. If there has not been an extraordinary nuclear occurrence determination, the claimant must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met, and whatever defenses are available to the defendant, under the law applicable in the relevant jurisdiction. If there has been an extraordinary nuclear occurrence determination, the claimant must still proceed (in the absence of settlement) with a tort action, but the claimant's burden is substantially eased by the elimination of certain issues which may be involved and certain defenses which may be available to the defendant. In either case the defendant may defend with respect to such of the following matters as are in issue in any given claim: the nature of the claimant's alleged damages, the causal relationship between the event and the alleged damages, and the amount of the alleged damages.

§ 840.2 Procedures.

(a) DOE may initiate, on its own motion, the making of a determination as to whether or not there has been an extraordinary nuclear occurrence. In the event DOE does not so initiate the making of a determination, any affected person, or any person with whom an indemnity agreement is executed may petition DOE for a determination of whether or not there has been an extraordinary nuclear occurrence. If DOE does not have, or does not expect to have, within 7 days after it has received notification of an alleged event, enough information available to make a determination that there has been an extraordinary nuclear occurrence, DOE will publish a notice in the FEDERAL REGISTER setting forth the date and place of the alleged event and requesting any persons having knowledge thereof to submit their information to DOE.

(b) When a procedure is initiated under paragraph (a) of this section, the principal staff which will begin immediately to assemble the relevant information and prepare a report on which the DOE can make its determination will consist of the Directors or their designees of the following Divisions or Offices: Office of Nuclear Safety, Office of Operational Safety, Office of Health and Environmental Research, the General Counsel or his designee, and a representative of the program division whose facility or device may be involved.

§ 840.3 Determination of extraordinary nuclear occurrence.

If the DOE determines that both of the criteria set forth in § 840.4 and § 840.5 have been met, it will make the determination that there has been an extraordinary nuclear occurrence. If the DOE publishes a notice in the FEDERAL REGISTER in accordance with § 840.2(a) and does not make a determination within 90 days thereafter that there has been an extraordinary nuclear occurrence, the alleged event will be deemed not to be an extraordinary nuclear occurrence. The time for the making of a determination may be extended by DOE by notice published in the FEDERAL REGISTER.

§ 840.4 Criterion I—Substantial discharge of radioactive material or substantial radiation levels offsite.

DOE will determine that there has been a substantial discharge or dispersal of radioactive material offsite, or that there have been substantial levels of radiation offsite, when as a result of an event comprised of one or more related happenings, radioactive material is released from its intended place of confinement or radiation levels occur offsite and either of the following findings are also made:

(a) DOE finds that one or more persons offsite were, could have been, or might be exposed to radiation or to radioactive material, resulting in a dose or in a projected dose in excess of one of the levels in the following table:

TOTAL PROJECTED RADIATION DOSES

Critical organ	Dose (rems)
Thyroid	30
Whole Body	20
Bone Marrow	20
Skin	60
Other organs or tissues	30

Exposures from the following types of sources of radiation shall be included:

(1) Radiation from sources external to the body;

(2) Radioactive material that may be taken into the body from its occurrence in air or water; and

(3) Radioactive material that may be taken into the body from its occurrence in food or on terrestrial surfaces.

(b) DOE finds that—

(1) Surface contamination of at least a total of any 100 square meters of offsite property has occurred as the result of a release of radioactive material from a production or utilization facility or device and such contamination is characterized by levels of radiation in excess of one of the values listed in column 1 or column 2 of the following table, or

(2) Surface contamination of any offsite property has occurred as the result of a release of radioactive material in the course of transportation and such contamination is characterized by levels of radiation in excess of one of the values listed in column 2 of the following table:

TOTAL SURFACE CONTAMINATION LEVELS [1]

Type of emitter	Column 1—Offsite property [2]	Column 2—Other offsite property
Alpha emission from transuranic isotopes	3.5 microcuries per square meter	0.35 microcuries per square meter
Alpha emission from isotopes other than transuranic isotopes	35 microcuries per square meter	3.5 microcuries per square meter
Beta or gamma emission	40 millirads/hour 1 cm (measured through not more than 7 milligrams per square centimeter of total absorber)	4 millirads/hour 1 cm (measured through not more than 7 milligrams per square centimeter of total absorber)

[1] The maximum levels (above background), observed or projected, 8 or more hours after initial deposition.

[2] Contiguous to site, owned or leased by person with whom an indemnity agreement is executed.

[49 FR 21473, May 21, 1984; 49 FR 24374, June 13, 1984]

§ 840.5 Criterion II—Substantial damages to persons offsite or property offsite.

(a) After DOE has determined that an event has satisfied Criterion I, DOE will determine that the event has resulted or will probably result in substantial damages to persons offsite or property offsite if any of the following findings are made:

(1) DOE finds that such event has resulted in the death or hospitalization, within 30 days of the event, of five or more people located offsite showing objective clinical evidence of physical injury from exposure to the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material; or

(2) DOE finds that $2,500,000 or more of damage offsite has been or will probably be sustained by any one person, or $5 million or more of such damage in the aggregate has been or will probably be sustained, as the result of such event; or

(3) DOE finds that $5,000 or more of damage offsite has been or will probably be sustained by each of 50 or more persons, provided that $1 million or more of such damage in the aggregate has been or will probably be sustained, as the result of such event.

(b) As used in paragraphs (a) (2) and (3) of this section "damage" shall be that arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material, and shall be based upon estimates of one or more of the following:

(1) Total cost necessary to put affected property back into use.

(2) Loss of use of affected property.

(3) Value of affected property where not practical to restore to use.

(4) Financial loss resulting from protective actions appropriate to reduce or avoid exposure to radiation or to radioactive materials.

PART 860—TRESPASSING ON ADMINISTRATION PROPERTY

Sec.
860.1 Purpose.
860.2 Scope.
860.3 Trespass.
860.4 Unauthorized introduction of weapons or dangerous materials.
860.5 Violations and penalties.
860.6 Posting.
860.7 Effective date of prohibition on designated locations.
860.8 Applicability of other laws.

Authority: Sec. 161, 68 Stat. 948, sec. 229, 70 Stat. 1070; (42 U.S.C. 2201; 2278a); sec. 104, 88 Stat. 1237, sec. 105, 88 Stat. 1238 (42 U.S.C. 5814, 5815).

Source: 40 FR 28789, July 9, 1975, unless otherwise noted.

§ 860.1 Purpose.

The regulations in this part are issued for the protection and security of facilities, installations and real property subject to the jurisdiction or administration, or in the custody of, the Department of Energy.

§ 860.2 Scope.

The regulations in this part apply to all facilities, installations and real property subject to the jurisdiction or administration of the Department of Energy or in its custody which have been posted with a notice of the prohibitions and penalties set forth in this part.

§ 860.3 Trespass.

Unauthorized entry upon any facility, installation or real property subject to this part is prohibited.

§ 860.4 Unauthorized introduction of weapons or dangerous materials.

Unauthorized carrying, transporting, or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon any facility, installation or real property subject to this part, is prohibited.

§ 860.5 Violations and penalties.

(a) Whoever willfully violates either § 860.3 or § 860.4 shall, upon conviction, be punishable by a fine of not more than $1,000.

(b) Whoever willfully violates either § 860.3 or § 860.4 with respect to any facility, installation or real property enclosed by a fence, wall, floor, roof, or other structural barrier shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not to exceed $5,000 or imprisonment for not more than one year, or both.

§ 860.6 Posting.

Notices stating the pertinent prohibitions of §§ 860.3 and 860.4 and penalties of § 860.5 will be conspicuously posted at all entrances of each designated facility, installation or parcel of real property and at such intervals along the perimeter as will provide reasonable assurance of notice to persons about to enter.

§ 860.7 Effective date of prohibition on designated locations.

The prohibitions in §§ 860.3 and 860.4 shall take effect as to any facility, installation or real property on publication in the Federal Register of the notice designating the facility, installation or real property and posting in accordance with § 860.6.

§ 860.8 Applicability of other laws.

Nothing in this part shall be construed to affect the applicability of the provisions of State or other Federal laws.

PART 861—CONTROL OF TRAFFIC AT NEVADA TEST SITE

Sec.
861.1 Purpose.
861.2 Scope.
861.3 Definitions.
861.4 Use of site streets.
861.5 Penalties.
861.6 Posting and distribution.

861.7 Applicability of other laws.

APPENDIX A TO PART 861—PERIMETER DESCRIPTION OF DOE'S NEVADA TEST SITE

AUTHORITY: 62 Stat. 281, as amended; sec. 103, 63 Stat. 380, as amended, sec. 205, 63 Stat. 389; sec. 161, 68 Stat. 948, as amended, sec. 1, 81 Stat. 54; 40 U.S.C. 318; 42 U.S.C. 2201; 5 U.S.C. 552; Federal Property Management Regulations T.R. D-11, 34 FR 1997, and Delegation of Authority to Manager, Nevada Operations Office.

SOURCE: 41 FR 56788, Dec. 30, 1976, unless otherwise noted.

§ 861.1 Purpose.

The regulations in this part are designed to facilitate the control of traffic at the Nevada Test Site.

§ 861.2 Scope.

This part applies to all persons who use the streets of the Nevada Test Site.

§ 861.3 Definitions.

As used in this part:

(a) "DOE" means the Department of Energy.

(b) "Nevada Test Site" means DOE's Nevada Test Site located in Nye County, Nev. A perimeter description is attached as Appendix A to this part.

(c) "Nevada Test Site Traffic Regulations" means the traffic directives promulgated by the Manager of the Nevada Operations Office pursuant to § 861.4.

(d) "Person" means every natural person, firm, trust partnership, association or corporation.

(e) "Street" means the entire width between the boundary lines of every way when any part thereof is open to the use of those admitted to the Nevada Test Site for purposes of vehicular travel.

(f) "Traffic" means pedestrians, ridden or herded animals, vehicles, and other conveyances, either singly or together, while using any roadway for purposes of travel.

(g) "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a roadway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

§ 861.4 Use of site streets.

All persons using the streets of the Nevada Test Site shall do so in a careful and safe manner.

(a) The Nevada Test Site Traffic Regulations supplement this section by identifying the specific traffic requirements relating to such matters as:

(1) Enforcement and obedience to Traffic Regulations, including the authority of police officers and traffic regulations, and responsibility to report accidents.

(2) Traffic signs, signals, and markings, including required compliance with traffic lanes and traffic control devices, and prohibitions on display of unauthorized traffic signs, signals, or marking or interference with authorized traffic control devices.

(3) Speeding or driving under the influence of intoxicating liquor or drugs, including prohibitions on reckless driving, and promulgation of maximum permissible speeds.

(4) Turning movements, including required position and method of turning at intersections, limitations on turning around, and obedience to turning markers and no-turn signs.

(5) Stopping and yielding, including obedience to stop and yield signs, requirements, when entering stop or yield intersections, emerging from alleys, driveways, or buildings, operation of vehicles on approach of authorized emergency vehicles and stops when traffic is obstructed.

(6) Pedestrians' rights and duties, including pedestrian's right-of-way in crosswalks, when a pedestrian must yield, required use or right half of crosswalks and requirements concerning walking along roadways and prohibited pedestrian crossings.

(7) Parking, stopping, and standing, specifying when parking, stopping, and standing are prohibited, including special provisions applicable to buses, requirements that parking not obstruct traffic and be close to curb, and concerning lamps on parked vehicles.

(8) Privileges of drivers of authorized emergency vehicles, including exemptions from parking and standing, stopping, speeding and turning limita-

tions, under specified circumstances and within specified limitations.

(9) Miscellaneous driving rules, including requirements for convoys, and limitations on backing, opening and closing vehicle doors, following fire apparatus, crossing a fire hose, driving through a safety zone, through convoys, on sidewalks or shoulders of roadways, boarding or alighting from vehicles, passing a bus on the right, and unlawful riding.

(b) The Nevada Test Site Traffic Regulations, when posted and distributed as specified in § 861.6, shall have the same force and effect as if made a part hereof.

§ 861.5 Penalties.

Any person doing any act forbidden or failing to do any act required by the Nevada Test Site Traffic Regulations shall, upon conviction, be punishable by a fine of not more than $50 or imprisonment for not more than 30 days, or both.

§ 861.6 Posting and distribution.

Notices including the provisions of the Nevada Test Site Traffic Regulations will be conspicuously posted at the Nevada Test Site. Such other distribution of the Nevada Test Site Regulations will be made by the Manager as will provide reasonable assurance of notice to persons subject to the regulations.

§ 861.7 Applicability of other laws.

Nothing in this part shall be construed to affect the applicability of the provisions of State laws or of other Federal laws.

APPENDIX A TO PART 861—PERIMETER DESCRIPTION OF DOE'S NEVADA TEST SITE

The Nevada Test Site, containing approximately 858,764 acres located in Nye County, Nev., is described as follows:

Beginning at the northwesterly corner of the tract of land hereinafter described, said corner being at latitude 37°20′45″, longitude 116°34′20″;

Thence easterly approximately 6.73 miles, to a point at latitude 37°20′45″ longitude 116°27′00″;

Thence northeasterly approximately 4.94 miles to a point at latitude 37°23′07″, longitude 116°22′30″;

Thence easterly approximately 4.81 miles to a point at latitude 37°23′07″, longitude 116°17′15″;

Thence southeasterly approximately 6.77 miles to a point at latitude 37°19′47″, longitude 116°11′10″;

Thence southerly approximately 5.27 miles to a point at latitude 37°15′12.043″, longitude 116°11′10″;

Thence easterly approximately 14.21 miles to a point at latitude 37°15′07.268″, longitude 115°55′42.268″;

Thence southerly approximately 39.52 miles to a point at latitude 36°40′43.752″, longitude 115°55′37.687″;

Thence westerly approximately 2.87 miles to a point at latitude 36°40′40.227″, longitude 115°58′43.956″;

Thence southerly approximately 5.23 miles to a point at latitude 36°36′07.317″, longitude 115°58′41.227″;

Thence southwesterly along a perimeter distance approximately 5.82 miles to a point at latitude 36°34′39.754″, longitude 116°04′11.167″;

Thence northerly approximately 3.20 miles to a point at latitude 36°37′26.804″, longitude 116°04′11.355″;

Thence northwesterly approximately 5.16 miles to a point at latitude 36°40′28.854″, longitude 116°08′17.749″;

Thence westerly approximately 8.63 miles to a point at latitude 36°40′23.246″, longitude 116°17′37.466″;

Thence southerly approximately 0.19 mile to a point at latitude 36°40′13.330″, longitude 116°17′37.461″;

Thence westerly approximately 8.49 miles to a point at latitude 36°40′13.666″, longitude 116°26′47.915″;

Thence northerly approximately 32.87 miles to a point at latitude 37°08′50″, longitude 116°26′44.125″;

Thence northwesterly approximately 15.37 miles to a point at latitude 37°20′45″, longitude 116°34′20″, the point of beginning herein.

[41 FR 56788, Dec. 30, 1978, as amended at 44 FR 37939, June 29, 1979]

PART 862—RESTRICTIONS ON AIRCRAFT LANDING AND AIR DELIVERY AT DEPARTMENT OF ENERGY NUCLEAR SITES

Sec.

862.1 Purpose.
862.2 Scope.
862.3 Definitions.
862.4 Prohibitions and penalties.

Sec.
862.5 Procedures for removal of downed aircraft.
862.6 Voluntary minimum altitude.
862.7 Designation of sites.

AUTHORITY: 42 U.S.C. 2201(b), 2201(i) and 2278(a).

SOURCE: 52 FR 29838, Aug. 12, 1987, unless otherwise noted.

§ 862.1 Purpose.

The purpose of this part is to set forth Department of Energy, hereinafter "DOE", security policy regarding aircraft and air delivery on nuclear sites under the jurisdiction of DOE pursuant to the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.).

§ 862.2 Scope.

(a) This part applies to all persons or aircraft entering or otherwise within or above areas within the boundaries of lands or waters subject to the jurisdiction, administration, or in the custody of the DOE at sites designated by DOE.

(b) This part is not applicable to:

(1) Aircraft operating pursuant to official business of the Federal Government;

(2) Aircraft over-flying or in the process of landing pursuant to official business of a state or local law enforcement authority with prior notification to DOE; or

(3) Aircraft in the process of landing on a DOE site due to circumstances beyond the control of the operator and with prior notification to DOE, if possible.

(c) Aircraft in paragraphs (b)(2) and (b)(3) of this section are within the scope of this part upon landing at a DOE designated site.

§ 862.3 Definitions.

(a) *Air delivery.* Delivering or retrieving a person or object by airborne means, including but not limited to, aircraft.

(b) *Aircraft.* A manned a unmanned device or any portion thereof, that is commonly used or intended to be used for flight in the air, including powerless flight. Such devices include but are not limited to any parachute, hovercraft, helicopter, glider, airplane or lighter than air vehicle.

(c) *Boundary.* A delineation on a map of Federal interest in land or water utilized by DOE pursuant to the Atomic Energy Act of 1954, as amended:

(1) Authorized by Congress, or

(2) Published pursuant to law in the FEDERAL REGISTER, or

(3) Filed or recorded with a State or political subdivision in accordance with applicable law.

(d) *Designated site.* An area of land or water identified in accordance with § 862.7 of this part.

(e) *Downed aircraft.* An aircraft that is on a designated site due to emergency landing or for any other reason.

(f) *Manager of Operations.* The Manager of a DOE Operations Office, the Manager of the Pittsburgh Naval Reactors Office, the Manager of the Schnectady Naval Reactors Office and, for designated sites administered directly by DOE Headquarters, the Director of the Office of Safeguards and Security.

§ 862.4 Prohibitions and penalties.

(a) The following activities are prohibited by his part:

(1) Operation or use of aircraft on lands or waters of designated sites.

(2) Air delivery to or from designated sites.

(3) Removal or movement of downed aircraft, or participation in the removal or movement of downed aircraft, from or on a designated site unless prior authorization is obtained pursuant to § 862.5 of this part.

(4) Failure to remove a downed aircraft from a designated site in accordance with an order issued by the cognizant DOE Manager of Operations under § 862.5 of this part.

(5) Violation of Federal Aviation Administration regulations regarding minimum altitudes and prohibited flight maneuvers over a designated site.

(b) A person willfully engaging in activities prohibited by this Part may be subject to the imposition of criminal penalties set forth in sections 223 and 229 of the Atomic Energy Act, as amended (42 U.S.C. 2273 and 2278(a)).

§ 862.5 Procedures for removal of downed aircraft.

(a) An aircraft on or brought on to a designated site, except as provided in § 862.2 (b)(1), shall not be moved within or removed from such areas except as provided for in this section. All such aircraft are subject to full inspection by DOE security personnel upon landing upon order of the Manager of Operations or his designee. Any attempt to depart or remove the aircraft from a designated site without clearance obtained pursuant to this section, may be assumed to be indicative of hostile intent by security forces at such sites.

(b)(1) The cognizant DOE Manager of Operations for a designated site may, on his own initiative, issue a written order to the owner or operator of a downed aircraft to require the removal of that aircraft from the site within 20 days of this notice. Such an order shall specify:

(i) The date upon which removal operations must be completed;

(ii) The times and means of access to and from the downed aircraft to be removed;

(iii) The manner of removal; and

(iv) An estimate of the cost of removal to DOE for which the owner or operator will be held liable if removal is accomplished by DOE.

(2) The owner or operator of the downed aircraft may file a written petition, supported by affidavits, to the cognizant Manager of Operations requesting that the order be modified or set aside. The petition may be granted by the Manager of Operations for good cause shown, upon a finding that it is clearly consistent with the national security, public safety, and federal property interests. Such petition must be filed at least 10 days prior to the date upon which removal is to be initiated, as specified in the order. The written decision of the Manager of Operations shall be a final agency action.

(c)(1) The owner of a downed aircraft may petition the cognizant Manager of Operations of permission to move or remove the downed aircraft from or within a designated site. The petition must provide assurances that the owner will fully compensate DOE for all costs incurred or damages experienced as a result of landing or removal through a contact for services. The Manager of Operations may, for good cause shown, waive part or all of the compensation which might otherwise be due DOE.

(2) The Manager of Operations may deny such petition in whole or part and prohibit removal of a downed aircraft upon finding that:

(i) The removal of a downed aircraft would create an unacceptable safety or security risk;

(ii) The removal of a downed aircraft would result in excessive resource loss of property damage or an unacceptable disruption of federal activities;

(iii) The removal of downed aircraft is impracticable or impossible;

(iv) The owner has failed to provide adequate assurances that all costs incurred or damages experienced by DOE due to landing or removal of aircraft will be fully paid immediately upon removal by the owner under a contract for services;

(v) An inspection of the aircraft has not been conducted by DOE security personnel.

(3) In the event that such petition is granted in whole or part, the cognizant Manager of Operations may issue an order, as set forth in (b)(1) (i) through (iv) of this section. In the event that a petition is denied in whole or part, the Manager of Operations shall issue a written decision which shall set forth the reasons for such denial.

(d) Failure to comply with an order issued by the Manager of Operations pursuant to this section is basis for DOE to consider the downed aircraft to be abandoned property. DOE may take whatever measures it deems necessary when it determines that downed aircraft is abandoned property.

(e) Notwithstanding paragraphs (b) and (c) of this section, the Manager of Operations may move or remove a downed aircraft from such an area upon oral or written notification to the owner or operator of such aircraft upon a finding that national security or operational requirements necessitate expedited movement or removal. The owner or operator may be held jointly and separately liable for all expenses incurred by DOE in the movement or removal of such aircraft. Such expenses shall be deemed to be incurred through an implied contract at law for services.

§ 862.6 Voluntary minimum altitude.

In addition to complying with all applicable FAA prohibitions or restrictions, aircraft are requested to maintain a minimum altitude of 2,000 feet above the terrain of a designated site. Applicable FAA prohibitions or restrictions take precedence over this voluntary minimum altitude.

§ 862.7 Designation of sites.

(a) DOE shall designate sites covered by this part as deemed necessary, consistent with the national security and public safety, through notice in the FEDERAL REGISTER.

(b) This part shall be effective as to any facility, installation, or real property on publication in the FEDERAL REGISTER of the notice designating the site.

(c) Upon designation of a site, the cognizant Manager of Operations may inform the public of such designation through press release or posting of notice at airfields in the vicinity of the designated site.

PART 871—AIR TRANSPORTATION OF PLUTONIUM

Sec.
871.1 National security exemption.
871.2 Public health and safety exemption.
871.3 Records.
871.4 Limitation on redelegation of authority.

AUTHORITY: Pub. L. 94-187, 88 Stat. 1077, 1078 (42 U.S.C. 2391 et seq.); Energy Reorganization Act, Pub. L. 93-438, 88 Stat. 1233 (42 U.S.C. 5801 et seq.); secs. 2, 3, 91, 123, and 161 of the Atomic Energy Act of 1954, as amended.

SOURCE: 42 FR 48332, Sept. 23, 1977, unless otherwise noted.

§ 871.1 National security exemption.

(a) The following DOE air shipments of plutonium are considered as being made for the purposes of national security within the meaning of Section 502(2) of Pub. L. 94-187:

(1) Shipments made in support of the development, production, testing, sampling, maintenance, repair, modification, or retirement of atomic weapons or devices;

(2) Shipments made pursuant to international agreements for cooperation for mutual defense purposes; and

(3) Shipments necessary to respond to an emergency situation involving a possible threat to the national security.

(b) The Managers of DOE's Albuquerque, San Francisco, Oak Ridge, Savannah River, and Nevada Operations Offices may authorize air shipments falling within paragraph (a)(1) of this section, on a case-by-case basis: *Provided*, That the matter falls within their respective scopes of responsibility and that they determine such shipment is required to be made by aircraft either because:

(1) The delay resulting from using ground transportation methods would have serious adverse impact upon a national security requirement;

(2) Safeguards or safety considerations dictate the use of air transportation;

(3) The nature of the item to be shipped necessitates the use of air transportation in order to avoid possible damage which may be expected from other available transportation environments; or

(4) The nature of the item being shipped necessitates rapid shipment by air in order to preserve the chemical, physical, or isotopic properties of the item.

They may also authorize air shipments falling within paragraph (a)(2) of this section in all cases since the inherent time delays of surface transportation for such shipments are considered unacceptable. They may also authorize air shipments falling within paragraph (a)(3) of this section in cases where failure to make shipments by air could jeopardize the national security of the United States.

§ 871.2 Public health and safety exemption.

The Managers of DOE's Albuquerque, San Francisco, Oak Ridge, Savannah River, Nevada, Chicago, Idaho, and Richland Operations Offices may authorize, on a case-by-case basis, DOE air shipments of plutonium where they determine that rapid shipment by air is required to respond to an emergency situation involving possible loss of life, serious personal injuries, considerable property damage, or other significant threat to the public health and safety.

§ 871.3 Records.

Determinations made by the authorizing officials pursuant to these rules shall be matters of record. Such authorizations shall be reported to the Assistant Administrator for National Security within twenty-four hours after authorization is granted.

§ 871.4 Limitation on redelegation of authority.

The authority delegated in this part may not be redelegated without the prior approval of the Assistant Administrator for National Security.

PART 903—POWER AND TRANSMISSION RATES

Subpart A—Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions for the Alaska, Southeastern, Southwestern, and Western Area Power Administrations

Sec.

903.1 Purpose and scope; application.
903.2 Definitions.
903.11 Advance announcement of rate adjustment.
903.13 Notice of proposed rates.
903.14 Consultation and comment period.
903.15 Public information forums.
903.16 Public comment forums.
903.17 Informal public meetings for minor rate adjustments.
903.18 Revision of proposed rates.
903.21 Completion of rate development; provisional rates.
903.22 Final rate approval.
903.23 Rate extensions.

AUTHORITY: Secs. 301(b), 302(a), and 644 of Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7101 *et seq.*); sec. 5 of the Flood Control Act of 1944 (16 U.S.C. 825s); the Reclamation Act of 1902 (43 U.S.C. 372 *et seq.*), as amended and supplemented by subsequent enactments, particularly sec. 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)); and the Acts specifically applicable to individual projects or power systems.

SOURCE: 50 FR 37837, Sept. 18, 1985, unless otherwise noted.

Subpart A—Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions for the Alaska, Southeastern, Southwestern, and Western Area Power Administrations

§ 903.1 Purpose and scope; application.

(a) Except as otherwise provided herein, these regulations establish procedures for the development of power and transmission rates by the Administrators of the Alaska, Southeastern, Southwestern, and Western Area Power Administrations; for the providing of opportunities for interested members of the public to participate in the development of such rates; for the confirmation, approval, and placement in effect on an interim basis by the Deputy Secretary of the Department of Energy of such rates; and for the submission of such rates to the Federal Energy Regulatory Commission with or without prior interim approval. These regulations supplement Delegation Order No. 0204-108 of the Secretary of Energy, which was published in the FEDERAL REGISTER and became effective on December 14, 1983 (48 FR 55664), with respect to the activities of the Deputy Secretary and the Administrators.

(b) These procedures shall apply to all power and transmission rate adjustment proceedings for the Power Marketing Administrations (PMAs) which are commenced after these regulations become effective or were in process on the effective date of these regulations, but for which the FERC had not issued any substantive orders on or before December 14, 1983. These procedures supersede "Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions for the Alaska, Southeastern, Southwestern, and Western Area Power Administrations" published in 45 FR 86983 (December 31, 1980) and amended at 46 FR 6864 (January 22, 1981) and 46 FR 25427 (May 7, 1981).

(c) Except to the extent deemed appropriate by the Administrator in accordance with applicable law, these procedures do not apply to rates for short term sales of capacity, energy, or transmission service.

[50 FR 37837, Sept. 18, 1985; 50 FR 48075, Nov. 21, 1985]

§ 903.2 Definitions.

As used herein—

(a) "Administrator" means the Administrator of the PMA whose rate is involved in the rate adjustment, or anyone acting in such capacity.

(b) "Department" means the Department of Energy, including the PMAs but excluding the Federal Energy Regulatory Commission.

(c) "Deputy Secretary" means the Deputy Secretary of the Department of Energy, or anyone acting in such capacity.

(d) "FERC" means the Federal Energy Regulatory Commission.

(e) "Major rate adjustment" means a rate adjustment other than a minor rate adjustment.

(f) "Minor rate adjustment" means a rate adjustment which (1) will produce ess than 1 percent change in the annual revenues of the power system or (2) is for a power system which has either annual sales normally less than 100 million kilowatt hours or an installed capacity of less than 20,000 kilowatts.

(g) "Notice" means the statement which informs customers and the general public of Proposed Rates or proposed rate extensions, opportunities for consultation and comment, and public forums. The Notice shall be by and effective on the date of publication in the FEDERAL REGISTER. Whenever a time period is provided, the date of publication in the FEDERAL REGISTER shall determine the commencement of the time period, unless otherwise provided in the Notice. The Notice shall nclude the name, address, and telephone number of the person to contact if participation or further information is sought.

(h) "Power Marketing Administration" or "PMA" means the Alaska Power Administration, Southeastern Power Administration, Southwestern Power Administration, or Western Area Power Administration.

(i) "Power system" means a powerplant or a group of powerplants and related facilities, including transmission facilities, or a transmission system, that the PMA treats as one unit for the purposes of establishing rates and demonstrating repayment.

(j) "Proposed Rate" means a rate revision or a rate for a new service which is under consideration by the Department on which public comment is invited.

(k) "Provisional Rate" means a rate which has been confirmed, approved, and placed in effect on an interim basis by the Deputy Secretary.

(l) "Rate" means the monetary charge or the formula for computing such a charge for any electric service provided by the PMA, including but not limited to charges for capacity (or demand), energy, or transmission service; however, it does not include leasing fees, service facility charges, or other types of facility use charges. A rate may be set forth in a rate schedule or in a contract.

(m) "Rate adjustment" means a change in an existing rate or rates, or the establishment of a rate or rates for a new service. It does not include a change in rate schedule provisions or in contract terms, other than changes in the price per unit of service, nor does it include changes in the monetary charge pursuant to a formula stated in a rate schedule or a contract.

(n) "Rate schedule" means a document identified as a "rate schedule," "schedule of rates," or "schedule rate" which designates the rate or rates applicable to a class of service specified therein and may contain other terms and conditions relating to the service.

(o) "Short term sales" means sales that last for no longer than one year.

(p) "Substitute Rate" means a rate which has been developed in place of the rate that was disapproved by the FERC.

[50 FR 37837, Sept. 18, 1985; 50 FR 48075, Nov. 21, 1985]

§ 903.11 Advance announcement of rate adjustment.

The Administrator may announce that the development of rates for a new service or revised rates for an existing service is under consideration. The announcement shall contain pertinent information relevant to the rate adjustment. The announcement may be through direct contact with customers, at public meetings, by press release, by newspaper advertisement, and/or by FEDERAL REGISTER publication. Written comments relevant to rate policy and design and to the rate adjustment process may be submitted by interested parties in response to the announcement. Any comments received shall be considered in the development of Proposed Rates.

§ 903.13 Notice of proposed rates.

(a) The Administrator shall give Notice tht Proposed Rates have been prepared and are under consideration. The Notice shall include:

(1) The Proposed Rates;

(2) An explanation of the need for and derivation of the Proposed Rates;

(3) The locations at which data, studies, reports, or other documents used in developing the Proposed Rates are available for inspection and/or copying;

(4) The dates, times, and locations of any initially scheduled public forums; and

(5) Address to which written comments relative to the Proposed Rates and requests to be informed of FERC actions concerning the rates may be submitted.

(b) Upon request, customers of the power system and other interested persons will be provided with copies of the principal documents used in developing the Proposed Rates.

§ 903.14 Consultation and comment period.

All interested persons will have the opportunity to consult with and obtain information from the PMA, to examine backup data, and to make suggestions for modification of the Proposed Rates for a period ending (a) 90 days in the case of major rate adjustments, or 30 days in the case of minor rate adjustments, after the Notice of Proposed Rates is published in the FEDERAL REGISTER, except that such periods may be shortened for good cause shown; (b) 15 days after any answer which may be provided pursuant to § 903.15(b) hereof; (c) 15 days after the close of the last public forum; or (d) such other time as the Administrator may designate; whichever is later. At anytime during this period, interested persons may submit written comments to the PMA regarding the Proposed Rates. The Administrator may also provide additional time for the submission of written rebuttal comments. All written comments shall be available at a designated location for inspection, and copies also will be furnished on request for which the Administrator may assess a fee. Prior to the action described in § 903.21, the Administrator may, by appropriate announcement postpone any procedural date or make other procedural changes for good cause shown at the request of any party or on the Administrator's own motion. The Administrator shall maintain, and distribute on request, a list of interested persons.

§ 903.15 Public information forums.

(a) One or more public information forums shall be held for major rate adjustments, except as otherwise provided in paragraph (c) of this section, and may be held for minor adjustments, to explain, and to answer questions concerning, the Proposed Rates and the basis of and justification for proposing such rates. The number, dates, and locations of such forums will be determined by the Administrator in accordance with the anticipated or demonstrated interest in the Proposed Rates. Notice shall be given in advance of such forums. A public information forum may be combined with a public comment forum held in accordance with § 903.16.

(b) The Administrator shall appoint a forum chairperson. Questions raised at the forum concerning the Proposed Rates and the studies shall be answered by PMA representatives at the forum, at a subsequent forum, or in writing at least 15 days before the end of the consultation and comment period. However, questions that involve voluminous data contained in the PMA records may be answered by providing an opportunity for consultation and for a review of the records at the PMA offices. As a minimum, the proceedings of the forum held at the principal location shall be transcribed. Copies of all documents introduced, and of questions and written answers shall be available at a designated location for inspection and copies will be furnished by the Administrator on request, for which a fee may be assessed. Copies of the transcript may be obtained from the transcribing service.

(c) No public information forum need be held for major rate adjustments if, after the Administrator has given Notice of a scheduled forum, no person indicates in writing by a prescribed date an intent to appear at such public forum.

§ 903.16 Public comment forums.

(a) One or more public comment forums shall be held for major rate adjustments, except as otherwise provided in paragraph (c) of this section, and may be held for minor rate adjustments, to provide interested persons an opportunity for oral presentation of views, data, and arguments regarding the Proposed Rates. The number, dates, and locations of such forums will be determined by the Administrator in accordance with the anticipated or demonstrated interest in the Proposed Rates. Notice shall be given at least 30 days in advance of the first public comment forum at each location and shall include the purpose, date, time, place, and other information relative to the forum, as well as the locations where pertinent documents are available for examination and/or copying.

(b) The Administrator shall designate a forum chairperson. At the forum, PMA representatives may question those persons making oral statements and comments. The chairperson shall have discretion to establish the sequence of, and the time limits for, oral presentations and to determine if the comments are relevant and noncumulative. Forum proceedings shall be transcribed. Copies of all documents introduced shall be available at a designated location for inspection, and copies shall be furnished on request for which the Administrator may assess a fee. Copies of the transcript may be obtained from the transcribing service.

(c) No public comment forum need be held for major rate adjustments if, after the Administrator has given notice of a scheduled forum, no person indicates in writing by a prescribed date an intent to appear at such public forum.

§ 903.17 Informal public meetings for minor rate adjustments.

In lieu of public information or comment forums in conjunction with a minor rate adjustment, informal public meetings may be held if deemed appropriate by the Administrator. Such informal meetings will not require a Notice or a transcription.

§ 903.18 Revision of proposed rates.

During or after the consultation and comment period and review of the oral and written comments on the Proposed Rates, the Administrator may revise the Proposed Rates. If the Administrator determines that further public comment should be invited, the Administrator shall afford interested persons an appropriate period to submit further written comments to the PMA regarding the revised Proposed Rates. The Administrator may convene one or more additional public information and/or public comment forums. The Administrator shall give Notice of any such additional forums.

§ 903.21 Completion of rate development; provisional rates.

(a) Following completion of the consultation and comment period and review of any oral and written comments on the Proposed Rates, the Administrator may: (1) Withdraw the proposal; (2) develop rates which in the Administrator's and the Deputy Secretary's judgment should be confirmed, approved, and placed into effect on an interim basis (Provisional Rates); or (3) develop rates which in the Administrator's judgment should be confirmed, approved, and placed into effect by the FERC on a final basis without being placed into effect on an interim basis. A statement shall be prepared and made available to the public setting forth the principal factors on which the Deputy Secretary's or the Administrator's decision was based. The statement shall include an explanation responding to the major comments, criticisms, and alternatives offered during the comment period. The Administrator shall certify that the rates are consistent with applicable law and that they are the lowest possible rates to customers consistent with sound business principles. The rates shall be submitted promptly to the FERC for confirmation and approval on a final basis.

(b) The Deputy Secretary shall set the effective date for Provisional Rates. The effective date shall be at least 30 days after the Deputy Secretary's decision except that the effective date may be sooner when appropriate to meet a contract deadline, to avoid financial difficulties, to provide a rate for a new service, or to make a minor rate adjustment.

(c) The effective date may be adjusted by the Administrator to coincide with the beginning of the next billing period following the effective date set by the Deputy Secretary for the Provisional Rates.

(d) Provisional Rates shall remain in effect on an interim basis until: (1) They are confirmed and approved on a final basis by the FERC; (2) they are disapproved and the rates last previously confirmed and approved on a final basis become effective; (3) they are disapproved and higher Substitute Rates are confirmed and approved on a final basis and placed in effect by the FERC; (4) they are disapproved and lower Substitute Rates are confirmed and approved on a final basis by the FERC; or (5) they are superseded by other Provisional Rates placed in effect by the Deputy Secretary, whichever occurs first.

§ 903.22 Final rate approval.

(a) Any rate submitted to the FERC for confirmation and approval on a final basis shall be accompanied with such supporting data, studies, and documents as the FERC may require, and also with the transcripts of forums, written answers to questions, written comments, the Administrator's certification, and the statement of principal factors leading to the decision. The FERC shall also be furnished a listing of those customers and other participants in the rate proceeding who have requested they be informed of FERC action concerning the rates.

(b) If the FERC confirms and approves Provisional Rates on a final basis, such confirmation and approval shall be effective as of the date such rates were placed in effect by the Deputy Secretary, as such date may have been adjusted by the Administrator. If the FERC confirms and approves on a final basis rates submitted by the Administrator without interim approval, such confirmation and approval shall be effective on a date set by the FERC.

(c) If the FERC disapproves Provisional Rates or other submitted rates, the Administrator shall develop Substitute Rates which take into consideration the reasons given by the FERC for its disapproval. If, in the Administrator's judgment, public comment should be invited upon proposed Substitute Rates, the Administrator may provide for a public consultation and comment period before submitting the Substitute Rates. Whether or not such public consultation and comment periods are provided, the Administrator will, upon request, provide customers of the power system and other interested persons with copies of the principal documents used in the development of the Substitute Rates. Within 120 days of the date of FERC disapproval of submitted rates, including Substitute Rates, or such additional time periods as the FERC may provide, the Administrator will submit the Substitute Rates to the FERC. A statement explaining the Administrator's decision shall accompany the submission.

(d) A Provisional Rate that is disapproved by the FERC shall remain in effect until higher or lower rates are confirmed and approved by the FERC on a final basis or are superseded by other rates placed into effect by the Deputy Secretary on an interim basis: *Provided*, That if the Administrator does not file a Substitute Rate within

120 days of the disapproval or such greater time as the FERC may provide, and if the rate has been disapproved because the FERC determined that it would result in total revenues in excess of those required by law, the rate last previously confirmed and approved on a final basis will become effective on a date and for a period determined by the FERC and revenues collected in excess of such rate during such period will be refunded in accordance with paragraph (g) of this section.

(e) If a Substitute Rate confirmed and approved on a final basis by the FERC is higher than the provisional rate which was disapproved, the Substitute Rate shall become effective on a subsequent date set by the FERC, unless a subsequent Provisional Rate even higher than the Substitute Rate has been put into effect. FERC confirmation and approval of the higher Substitute Rate shall constitute final confirmation and approval of the lower disapproved Provisional Rate during the interim period that it was in effect.

(f) If a Substitute Rate confirmed and approved by the FERC on a final basis is lower than the disapproved provisional rate, such lower rate shall be effective as of the date the higher disapproved rate was placed in effect.

(g) Any overpayment shall be refunded with interest unless the FERC determines that the administrative cost of a refund would exceed the amount to be refunded, in which case no refund will be required. The interest rate applicable to any refund will be determined by the FERC.

(h) A rate confirmed and approved by the FERC on a final basis shall remain in effect for such period or periods as the FERC may provide or until a different rate is confirmed, approved and placed in effect on an interim or final basis: *Provided*, That the Deputy Secretary may extend a rate on an interim basis beyond the period specified by the FERC.

§ 903.23 Rate extensions.

(a) The following regulations shall apply to the extension of rates which were previously confirmed and approved by the FERC or the Federal Power Commission, or established by the Secretary of the Interior, and for which no adjustment is comtemplated:

(1) The Administrator shall give Notice of the proposed extension at least 30 days before the expiration of the prior confirmation and approval, except that such period may be shortened for good cause shown.

(2) The Administrator may allow for consultation and comment, as provided in these procedures, for such period as the Administrator may provide. One or more public information and comment forums may be held, as provided in these procedures, at such times and locations and with such advance Notice as the Administrator may provide.

(3) Following notice of the proposed extension and the conclusion of any consultation and comment period, the Deputy Secretary may extend the rates on an interim basis.

(b) Provisional Rates and other existing rates may be extended on a temporary basis by the Deputy Secretary without advance notice or comment pending further action pursuant to these regulations or by the FERC. The Deputy Secretary shall publish notice in the FEDERAL REGISTER of such extension and shall promptly advise the FERC of the extension.

PART 904—GENERAL REGULATIONS FOR THE CHARGES FOR THE SALE OF POWER FROM THE BOULDER CANYON PROJECT

Subpart A—Power Marketing

Sec.
904.1 Purpose.
904.2 Scope.
904.3 Definitions.
904.4 Marketing responsibilities.
904.5 Revenue requirements.
904.6 Charge for capacity and firm energy.
904.7 Base charge.
904.8 Lower basin development fund contribution charge.
904.9 Excess capacity.
904.10 Excess energy.
904.11 Lay off of energy.
904.12 Payments to contractors.
904.13 Disputes.
904.14 Future regulations.

AUTHORITY: Reclamation Act of 1902 (32 Stat. 388); Boulder Canyon Project Act of 1928 (43 U.S.C. 617 *et seq.*); Boulder Canyon Project Adjustment Act of 1940 (43 U.S.C. 618 *et seq.*); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*); Colorado River Storage Project Act of 1956 (43 U.S.C. 620 et *seq.*); Colorado River Basin Project Act of 1968 (43 U.S.C. 1501 et *seq.*); and Hoover Power Plant Act of 1984 (98 Stat. 1333 (43 U.S.C. 619 et *seq.*)).

SOURCE: 51 FR 43154, Nov. 28, 1986, unless otherwise noted.

Subpart A—Power Marketing

§ 904.1 Purpose.

(a) The Secretary of Energy, acting by and through the Administrator of the Western Area Power Administration (Administrator), is authorized and directed to promulgate charges for the sale of power generated at the Boulder Canyon Project powerplant, and also to promulgate such general regulations as the Secretary finds necessary and appropriate in accordance with the power marketing authorities in the Reclamation Act of 1902 (32 Stat. 388) and all acts amendatory thereof and supplementary thereto, and the Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*).

(b) In accordance with the Boulder Canyon Project Act of 1928 (43 U.S.C. 617 *et seq.*), as amended and supplemented (Project Act); the Boulder Canyon Project Adjustment Act of 1940 (43 U.S.C. 618 *et seq.*), as amended and supplemented (Adjustment Act); the Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*); and the Hoover Power Plant Act of 1984 (98 Stat. 1333 (43 U.S.C. 619 *et seq.*)) (Hoover Power Plant Act); the Western Area Power Administration (Western) promulgates these General Regulations for the Charges for the Sale of Power From the Boulder Canyon Project (General Regulations) defining the methodology to be used in the computation of the charges for the sale of power from the Boulder Canyon Project.

§ 904.2 Scope.

These General Regulations are effective June 1, 1987, and shall apply as the basis for computation of all charges applicable to any sale of power from the Boulder Canyon Project after May 31, 1987. "General Regulations for Power Generation, Operation, Maintenance, and Replacement at the Boulder Canyon Project, Arizona/Nevada" are the subject of a separate rulemaking of the Department of the Interior under 43 CFR Part 431. The "General Regulations for Generation and Sale of Power in Accordance with the Boulder Canyon Project Adjustment Act" (1941 General Regulations) dated May 20, 1941, and the "General Regulations for Lease of Power" dated April 25, 1930, terminate May 31, 1987.

§ 904.3 Definitions.

The following terms wherever used herein shall have the following meanings:

(a) "Billing Period" shall mean the service period beginning on the first day and extending through the last day of any calendar month.

(b) "Boulder City Area Projects" shall mean the Boulder Canyon Project, the Parker-Davis Project, and the United States entitlement in the Navajo Generating Station (a feature of the Central Arizona Project).

(c) "Capacity" shall mean the aggregate of contingent capacity specified in section 105(a)(1)(A) and the contingent capacity specified in section 105(A)(1)(B) of the Hoover Power Plant Act (43 U.S.C. 619).

(d) "Central Arizona Project" shall mean those works as described in section 1521(a) of the Colorado River Basin Project Act of 1968 (43 U.S.C. 1501 et seq.), as amended.

(e) "Colorado River Dam Fund" or "Fund" shall mean that special fund established by section 2 of the Project Act and which is to be used only for the purposes specified in the Project Act, the Adjustment Act, the Colorado River Basin Project Act of 1968, and the Hoover Power Plant Act.

(f) "Contract" shall mean any contract for the sale of Boulder Canyon Project capacity and energy for delivery after May 31, 1987, between Western and any contractor.

(g) "Contractor" shall mean the entities entering into contracts with

Western for electric service pursuant to the Hoover Power Plant Act.

(h) "Excess Capacity" shall mean capacity which is in excess of the lesser of: (1) Capacity that Hoover Powerplant is capable of generating with all units in service at a net effective head of 498 feet, or (2) 1,951,000 kW.

(i) "Excess Energy" shall mean energy obligated from the Project pursuant to section 105(a)(1)(C) of the Hoover Power Plant Act (43 U.S.C. 619).

(j) "Firm Energy" shall mean energy obligated from the Project pursuant to section 105(a)(1)(A) and section 105(a)(1)(B) of the Hoover Power Plant Act (43 U.S.C. 619).

(k) "Overruns" shall mean the use of capacity or energy, without the approval of Western, in amounts greater than Western's contract delivery obligation in effect for each type of service provided for in the Contract.

(l) "Project" or "Boulder Canyon Project" shall mean all works authorized by the Project Act, the Hoover Power Plant Act, and any future additions authorized by Congress, to be constructed and owned by the United States, but exclusive of the main canal and appurtenances authorized by the Project Act, now known as the All-American Canal.

(m) "Replacements" shall mean such work, materials, equipment, or facilities as determined by the United States to be necessary to keep the Project in good operating condition, but shall not include (except where used in conjunction with the word "emergency" or the phrase "however necessitated") work, materials, equipment, or facilities made necessary by any act of God, or of the public enemy, or by any major catastrophe.

(n) "Uprating Program" shall mean the program authorized by section 101(a) of the Hoover Power Plant Act (43 U.S.C. 619(a)) for increasing the capacity of existing generating equipment and appurtenances at the Hoover Powerplant, as generally described in the report of the Department of the Interior, Bureau of Reclamation, entitled "Hoover Powerplant Uprating, Special Report," issued in May 1980, as supplemented in the report entitled, "January 1985 Supplement (revised September 1985) to Hoover Powerplant Uprating, Special Report-May 1980."

§ 904.4 Marketing responsibilities.

(a) Capacity and energy available from the Project will be marketed by Western under terms of the Conformed General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects (Conformed Criteria) published in the FEDERAL REGISTER (49 FR 50582) on December 28, 1984. Western shall dispose of capacity and energy from the Project in accordance with section 105(a)(1) of the Hoover Power Plant Act (43 U.S.C. 619(a)(1)), these General Regulations, and the Contracts between the Contractors and Western.

(b) Procedures for the scheduling and delivery of capacity and energy shall be provided for in the Contracts between the Contractors and Western.

§ 904.5 Revenue requirements.

(a) Western shall collect all electric service revenues from the Project in accordance with applicable statutes and regulations and deposit such revenues into the Colorado River Dam Fund. All receipts from the Project shall be available for payment of the costs and financial obligations associated with the Project. The Secretary of the Interior is responsible for the administration of the Colorado River Dam Fund.

(b) The electric service revenue of the Project shall be collected through a charge, computed to be sufficient, together with other net revenues from the Project, to recover the following costs and financial obligations associated with the Project over the appropriate repayment periods set out in paragraph (c) of this section:

(1) Annual costs of operation and maintenance;

(2) Annual interest on unpaid investments in accordance with appropriate statutory authorities;

(3) Annual repayment of funds, and all reasonable costs incurred in obtaining such funds, advanced by non-Federal Contractors to the Secretary of the Interior for the Uprating Program;

(4) The annual payment of $300,000 to each of the States of Arizona and Nevada provided for in section 618(c) of the Adjustment Act and section 1543(c)(2) of the Colorado River Basin Project Act (43 U.S.C. 1501 *et seq.*) (Basin Act), as amended or supplemented;

(5) Capital costs of investments and Replacements, including amounts readvanced from the United States Treasury (Treasury);

(6) Repayment to the Treasury of the advances to the Colorado River Dam Fund for the Project made prior to May 31, 1987, for which payment was deferred because of a deficiency in firm energy generation due to a shortage of available water, as provided for in article 14(a) of the 1941 General Regulations and section 8 of the Boulder City Act of 1958 (72 Stat. 1726), as shown on the books of accounts of Reclamation as of May 31, 1987;

(7) Repayment to the Treasury of the first $25,000,000 of advances made to the Colorado River Dam Fund deemed to be allocated to flood control by section 617a(b) of the Project Act as provided by section 618f of the Adjustment Act; and

(8) Any other financial obligations of the Project imposed in accordance with law.

(c) The Project repayment period shall extend to the final year allowed under applicable cost recovery criteria. The revenue for the costs and financial obligations set out in paragraph (b) of this section shall be collected over the following repayment periods:

(1) The repayment period for advances made to the Colorado River Dam Fund from funds advanced to the Secretary of the Interior by non-Federal entities for the Uprating Program and associated work shall be the period commencing with the first day of the month following completion of each segment of the Uprating Program, or June 1, 1987, whichever is later, and ending September 30, 2017;

(2) The repayment period for the payments to the Treasury of the advances to the Colorado River Dam Fund for the Project which were payable prior to May 31, 1987, but which were deferred pursuant to article 14(a) of the 1941 General Regulations and section 8 of the Boulder City Act of 1958, shall be the power contract period beginning June 1, 1987, and ending September 30, 2017. Such repayment period is based on a 50-year repayment period beginning June 1, 1937, adjusted for the periods the initial payments were deferred;

(3) The repayment period for the payment to the Treasury of the first $25,000,000 of advances made to the Colorado River Dam Fund deemed to be allocated to flood control by section 617a(b) of the Project Act and deferred by section 618(f) of the Adjustment Act shall be the 50-year period beginning June 1, 1987;

(4) The repayment period for advances to the Colorado River Dam Fund for the Project made on or after June 1, 1937, and prior to June 1, 1987, shall be the 50-year period beginning June 1 immediately following the year of operation in which the funds were advanced;

(5) The repayment period for investments, other than for the visitor facilities authorized by section 101(a) of the Hoover Power Plant Act (43 U.S.C. 619(a)), made from Federal appropriations on or after June 1, 1987, shall be a 50-year period beginning with the first day of the fiscal year following the fiscal year the investment is placed in service; and

(6) The repayment period for the visitor facilities authorized by section 101(a) of the Hoover Power Plant Act (43 U.S.C. 619(a)) shall be the 50-year period beginning June 1, 1987, or when substantially completed, as determined by the Secretary of the Interior, if later.

(d) Annual costs for operation and maintenance and payments to States as set out in paragraph (b) of this section shall be collected as long as revenues accrue from the operation of the Project.

(e) Surplus revenues will also be collected for transfer from the Colorado River Dam Fund for contribution to the Lower Colorado River Basin Development Fund pursuant to section 1543(c)(2) of the Basin Act as amended by the Hoover Power Plant Act to provide revenue for the purposes of sections 1543(f) and 1543(g) of the Basin Act.

(f) All annual costs will be calculated based on a Federal fiscal year. To accommodate the transition from the pre-1987 operating year of June 1 to May 31 to a fiscal year, there will be a 4-month transition period beginning June 1, 1987, and ending September 30, 1987.

(g) If integrated operation of the Boulder Canyon Project with other Boulder City Area Projects and other Federal projects on the Colorado River, as provided in § 904.9 of these General Regulations, confers a direct power benefit upon such other Boulder City Area Projects and such other Federal projects, or if a direct power benefit is conferred by other Boulder City Area Projects or other Federal projects on the Colorado River upon the Boulder Canyon Project, Western shall equitably apportion such benefits and appropriate charges among the Boulder Canyon Project, other Boulder City Area Projects, and other Federal projects on the Colorado River.

§ 904.6 Charge for capacity and firm energy.

The charge for Capacity and Firm Energy from the Project shall be composed of two separate charges; a charge to provide for the basic revenue requirements, as identified in paragraphs (b), (c), and (d) of § 904.5 of these General Regulations (Base Charge), and a charge to provide the surplus revenue for the Lower Colorado River Basin Development Fund contribution, as identified in paragraph (e) of § 904.5 of these General Regulations (Lower Basin Development Fund Contribution Charge).

§ 904.7 Base charge.

(a) The Base Charge shall be developed by the Administrator and promulgated in accordance with appropriate DOE regulations. The Base Charge shall be composed of a capacity component and an energy component.

(b) The capacity component of the Base Charge shall be a dollar per kilowattmonth amount determined by (1) multiplying the estimated average annual revenue requirement developed pursuant to paragraphs (b), (c), and (d) of § 904.5 of these General Regulations by 50 percent, and (2) dividing the results of that multiplication by the estimated average annual kW rating of the Project, and (3) dividing the quotient by 12. The total estimated kW rating will be based on the powerplant output capability with all units in service at 498 feet of net effective head or 1,951,000 kW, whichever is less. The capacity component of the Base Charge shall be applied each billing period to each kW of rated output to which each Contractor is entitled by Contract. Adjustments to the application of the capacity component shall be made during outages which cause significant reductions in capacity as provided by the Contract.

(c) The energy component of the Base Charge shall be a mills per kWh amount determined by (1) multiplying the estimated average annual revenue requirements developed pursuant to paragraphs (b), (c), and (d) of § 904.5 of these General Regulations by 50 percent and (2) dividing the results of that multiplication by the average annual kWh estimated to be available from the Project. The energy component of the Base Charge shall be applied to each kWh made available to each Contractor, as provided for by Contract, except for the energy purchased by Western, at the request of a Contractor, to meet that Contractor's deficiency in Firm Energy pursuant to section 105(a)(2) of the Hoover Power Plant Act (43 U.S.C. 619(a)(2)) and section F of the Conformed Criteria, and that Contractor's Uprating Program credit carry forward, as provided by Contract.

(d) Application of the Base Charge to capacity and energy overruns will be provided for by Contract. The capacity component and the energy component of the Base Charge shall be applied each billing period for each Contractor.

(e) The Base Charge shall be reviewed annually. The Base Charge shall be adjusted either upward or downward, when necessary and administratively feasible, to assure sufficient revenues to effect payment of all costs and financial obligations associated with the Project pursuant to paragraphs (b), (c), and (d) of § 904.5 of these General Regulations. The Administrator shall provide all Contractors an opportunity to comment on any proposed adjustment to the Base Charge pursuant to the DOE's power rate adjustment procedures then in effect.

§ 904.8 Lower basin development fund contribution charge.

(a) The Lower Basin Development Fund Contribution Charge will be developed by the Administrator of Western on the basis that the equivalent of 4½ mills or 2½ mills per kWh, as appropriate, required to be included in the rates charged to purchasers pursuant to section 1543(c)(2) of the Basin Act, as amended by the Hoover Power Plant Act, shall be collected from the energy sales of the Project.

(b) The Lower Basin Development Fund Contribution Charge shall be applied to each kWh made available to each Contractor, as provided for by Contract, except for the energy purchased by Western at the request of a Contractor to meet:

(1) That Contractor's deficiency in Firm Energy, pursuant to section 105(a)(2) of the Hoover Power Plant Act (43 U.S.C. 619(a)(2)) and section F of the Conformed Criteria; and

(2) That Contractor's Uprating Program credit carry forward as provided by Contract. A 4½ mills per kWh charge shall be applied to each kWh made available to an Arizona Contractor, and a 2½ mills per kWh charge shall be applied to each kWh made available to a California or Nevada Contractor; provided, that after the repayment period of the Central Arizona Project, a 2½ mills per kWh charge shall be applied to each kWh made available to the Arizona, California, and Nevada Contractors. The Lower Basin Development Fund Contribution Charge shall be applied to energy overruns. The Lower Basin Development Fund Contribution Charge shall be applied each billing period for each Contractor.

§ 904.9 Excess capacity.

(a) If the Uprating Program results in Excess Capacity, Western shall be entitled to such Excess Capacity to integrate the operation of the Boulder City Area Projects and other Federal
Projects on the Colorado River. Spe
cific criteria for the use of Excess Ca
pacity by Western will be provided b
Contract. All Excess Capacity not re
quired by Western for the purpose
specified by Contract will be availabl
to all Contractors at no additional cos
on a pro rata basis based on the ratio
of each Contractor's Capacity alloca
tion to the total Capacity allocation.

(b) Credits for benefits resultin
from project integration shall be de
termined by Western and such bene
fits shall be apportioned in accordanc
with paragraph (9) of § 904.5 of these
General Regulations.

§ 904.10 Excess energy.

(a) If excess Energy is determined b
the United States to be available, i
shall be made available to the Con
tractors, in accordance with the priori
ty entitlement of section 105(a)(1)(C
of the Hoover Power Plant Act (4
U.S.C. 619(a)(1)(c)). After the annua
first- and second-priority entitlemen
to excess energy has been obligate
for delivery, Western will make avail
able one-third of the third-priorit
excess energy to the Arizona Powe
Authority, one-third to the Colorad
River Commission of Nevada, and one
third to the California Contractors.

(b) Western will make availabl
third-priority excess energy to th
California Contractors based on th
following formula:

$F = \frac{1}{2}(A/B + C/D)(E)$; Where:
A = Contractor's allocated Capacity
B = Total California allocated Capacity
C = Contractor's allocated Firm Energy
D = Total California allocated Firm Energy
E = Third-priority Excess Energy availabl to California
F = Contractor's third-priority Exces Energy

(c) The charge for all Excess Energ
shall be the charge for Boulde
Canyon Project Firm Energy existin
at the time the Excess Energy is mad
available to the Contractor, includin
the appropriate Lower Basin Develop
ment Fund Contribution Charge.

§ 904.11 Lay off of energy.

(a) If any Contractor determine
that it is temporarily unable to utiliz
Firm Energy or Excess Energy, West

ern will, at the Contractor's request, attempt to lay off the Firm Energy or Excess Energy the Contractor declares to be available for lay off, pursuant to the provisions for lay off of energy specified in the Contract.

(b) If Western is unable to lay off such energy, or if the Contractor fails to request Western to attempt to lay off the energy, the Contractor will be billed for the Firm Energy or Excess Energy that was available to the Contractor but could not be delivered to the Contractor or sold to another customer.

(c) In the event that Western must lay off the Firm Energy or Excess Energy at a rate lower than the effective Firm Energy rate, the Contractor will be billed for the difference between the amount that Western would have received at the then existing Firm Energy rate, including the appropriate Lower Basin Development Fund Contribution Charge, and the amount actually received.

§ 904.12 Payments to contractors.

(a) Funds advanced to the Secretary of the Interior for the Uprating Program and costs reasonably incurred by the Contractor in advancing such funds, as approved by Western, shall be returned to the Contractor advancing the funds during the Contract period through credits on that Contractor's power bills. Appropriate credits will be developed and applied pursuant to terms and conditions agreed to by contract or agreement.

(b) All other obligations of the United States to return funds to a Contractor shall be repaid to such Contractor through credits on power bills, with or without interest, pursuant to terms and conditions agreed to by contract or agreement.

§ 904.13 Disputes.

(a) All actions by the Secretary of Energy, acting by and through the Administrator of Western, shall be binding unless or until reversed or modified in accordance with provisions contained herein.

(b) Any disputes or disagreements as to interpretation or performance of the provisions of these General Regulations under the responsibility of Western shall first be presented to and decided by the Administrator. The Administrator shall be deemed to have denied the Contractor's contention or claim if it is not acted upon within ninety (90) days of its having been presented.

(c) The decision of the Administrator shall be final unless, within thirty (30) days from the date of such decision, a written request for arbitration is received by the Administrator. The Administrator shall have ninety (90) days from the date of receipt of a request for arbitration either to concur in or deny in writing the request for such arbitration. Failure by the Administrator to take any action within the ninety (90) day period shall be deemed a denial of the request for arbitration. In the event of a denial of a request for arbitration, the decision of the Administrator shall become final. Upon a decision becoming final, the disputing Contractor's remedy lies with the appropriate Federal court. Any claim that a final decision of the Administrator violates any right accorded the Contractor under the Project Act, the Adjustment Act, or Title I of the Hoover Power Plant Act is barred unless suit asserting such claim is filed in a Federal court of competent jurisdiction within one (1) year after final refusal by the Administrator to correct the action complained of, in accordance with section 105(h) of the Hoover Power Plant Act.

(d) When a timely request for arbitration is received by the Administrator and the Administrator concurs in writing, the disputing Contractor and the Administrator shall, within thirty (30) days after receipt of notice of such concurrence, each name one arbitrator to the panel of arbitrators which will decide the dispute. All arbitrators shall be skilled and experienced in the field pertaining to the dispute. In the event there is more than one disputing Contractor, the disputing Contractors shall collectively name one arbitrator to the panel of arbitrators. In the event of their failure collectively to name such an arbitrator within fifteen (15) days after their first meeting, that arbitrator shall be named as provided in the Commercial Arbitration Rules of the

American Arbitration Association. The two arbitrators thus selected shall name a third arbitrator within thirty (30) days of their first meeting. In the event of their failure to so name such third arbitrator, that arbitrator shall be named as provided in the Commercial Arbitration Rules of the American Arbitration Association. The third arbitrator shall act as chairperson of the panel. The arbitration shall be governed by the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be limited to the issue submitted. The panel of arbitrators shall not rewrite, change, or amend these General Regulations or the Contracts of any of the parties to the dispute. The panel of arbitrators shall render a final decision in this dispute within sixty (60) days after the date of the naming of the third arbitrator. A decision of any two of the three arbitrators named to the panel shall be final and binding on all parties involved in the dispute.

§ 904.14 Future regulations.

(a) Western may from time to time promulgate such additional or amendatory regulations as deemed necessary for the administration of the Project in accordance with applicable law; *Provided*, That no right under any Contract shall be impaired or obligation thereunder be extended thereby.

(b) Any modification, extension, or waiver of any provision of these General Regulations granted for the benefit of any one or more Contractors shall not be denied to any other Contractor.

(c) Western reserves the right to terminate, modify, or extend these regulations, either partially or in their entirety, to the extent permitted by law or existing contract.

PART 960—GENERAL GUIDELINES FOR THE RECOMMENDATION OF SITES FOR NUCLEAR WASTE REPOSITORIES

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AUTHORITY: The Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.); Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.); Department of Energy Organization Act of 1977 (42 U.S.C. 7101 et seq.); Nuclear Waste Policy Act of 1982 (Pub. L. 97-425, 96 Stat. 2201).

SOURCE: 49 FR 47752, Dec. 6, 1984, unless otherwise noted.

Subpart A—General Provisions

§ 960.1 Applicability.

These guidelines were developed in accordance with the requirements of Section 112(a) of the Nuclear Waste Policy Act of 1982 for use by the Secretary of Energy in evaluating the suitability of sites for the development of repositories. The guidelines will be used for suitability evaluations and determinations made pursuant to Section 112(b) and any preliminary suitability determinations required by Section 114(f). The guidelines set forth in this Part are intended to complement the requirements set forth in the Act, 10 CFR Part 60, and 40 CFR Part 191. The DOE recognizes NRC jurisdiction for the resolution of differences between the guidelines and 10 CFR Part 60. The guidelines have received the concurrence of the NRC. The DOE contemplates revising the guidelines from time to time, as permitted by the Act, to take into account revisions made to the above regulations and to otherwise update the guidelines as necessary. The DOE will submit the revisions to the NRC and obtain its concurrence before issuance.

§ 960.2 Definitions.

As used in this part:

"Accessible environment" means the atmosphere, the land surface, surface water, oceans, and the portion of the lithosphere that is outside the controlled area.

"Act" means the Nuclear Waste Policy Act of 1982.

"Active fault" means a fault along which there is recurrent movement, which is usually indicated by small, periodic displacements or seismic activity.

"Affected area" means either the area of socioeconomic impact or the area of environmental impact, each of which will vary in size among potential repository sites.

"Affected Indian tribe" means any Indian tribe (1) within whose reservation boundaries a repository for radioactive waste is proposed to be located or (2) whose federally defined possessory or usage rights to other lands outside the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: *Provided*, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe.

"Affected State" means any State that (1) has been notified by the DOE in accordance with Section 116(a) of the Act as containing a potentially acceptable site; (2) contains a candidate site for site characterization or repository development; or (3) contains a site selected for repository development.

"Application" means the act of making a finding of compliance or noncompliance with the qualifying or disqualifying conditions specified in the guidelines of Subparts C and D, in accordance with the types of findings specified in Appendix III.

"Aquifer" means a formation, a group of formations, or a part of a formation that contains sufficient saturated permeable material to yield significant quantities of water to wells and springs.

"Barrier" means any material or structure that prevents or substantially delays the movement of water or radionuclides.

"Candidate site" means an area, within a geohydrologic setting, that is recommended by the Secretary of Energy under Section 112 of the Act for site characterization, approved by the President under Section 112 of the Act for characterization, or undergoing site characterization under Section 113 of the Act.

"Closure" means final backfilling of the remaining open operational areas of the underground facility and boreholes after the termination of waste emplacement, culminating in the sealing of shafts.

"Confining unit" means a body of impermeable or distinctly less permeable material stratigraphically adjacent to one or more aquifers.

"Containment" means the confinement of radioactive waste within a designated boundary.

"Controlled area" means a surface location, to be marked by suitable monuments, extending horizontally no more than 10 kilometers in any direction from the outer boundary of the underground facility, and the underlying subsurface, which area has been committed to use as a geologic repository and from which incompatible activities would be prohibited before and after permanent closure.

"Cumulative releases of radionuclides" means the total number of curies of radionuclides entering the accessible environment in any 10,000-year period, normalized on the basis of radiotoxicity in accordance with 40 CFR Part 191. The peak cumulative release of radionuclides refers to the 10,000-year period during which any such release attains its maximum predicted value.

"Decommissioning" means the permanent removal from service of surface facilities and components neceessary for preclosure operations only
after repository closure, in accordanc
with regulatory requirements and en
vironmental policies.

"Determination" means a decisio
by the Secretary that a site is suitabl
for site characterization for the selec
tion of a repository site or that a sit
is suitable for the development of a re
pository, consistent with application
of the guidelines of Subparts C and
in accordance with the provisions se
forth in Subpart B.

"Disposal" means the emplacemen
in a repository of high-level radioac
tive waste, spent nuclear fuel, or othe
highly radioactive material with n
foreseeable intent of recovery, wheth
er or not such emplacement permit
the recovery of such waste, and th
isolation of such waste from the acce
sible environment.

"Disqualifying condition" means
condition that, if present at a sit
would eliminate that site from furthe
consideration.

"Disturbed zone" means that po
tion of the controlled area, excludin
shafts, whose physical or chemic
properties are predicted to change as
result of underground facility con
struction or heat generated by the em
placed radioactive waste such that th
resultant change of properties coul
have a significant effect on the prefo
mance of the geologic repository.

"DOE" means the U.S. Departmen
of Energy or its duly authorized repr
sentatives.

"Effective porosity" means th
amount of interconnected pore spac
and fracture openings available fo
the transmission of fluids, expresse
as the ratio of the volume of intercon
nected pores and openings to th
volume of rock.

"Engineered-barrier system" mean
the manmade components of a dispo
al system designed to prevent the re
lease of radionuclides from the unde
ground facility or into the geohydrolo
gic setting. Such term includes the ra
dioactive-waste form, radioactiv
waste canisters, materials placed ove
and around such canisters, any othe
components of the waste package, an
barriers used to seal penetrations i
and into the underground facility.

"Environmental assessment" means the document required by Section 112(b)(1)(E) of the Nuclear Waste Policy Act of 1982.

"Environmental impact statement" means the document required by Section 102(2)(C) of the National Environmental Policy Act of 1969. Sections 114(a) and 114(f) of the Nuclear Waste Policy Act of 1982 include certain limitations on the National Environmental Policy Act requirements as they apply to the preparation of an environmental impact statement for the development of a repository at a characterized site.

"EPA" means the U.S. Environmental Protection Agency or its duly authorized representatives.

"Evaluation" means the act of carefully examining the characteristics of a site in relation to the requirements of the qualifying or disqualifying conditions specified in the guidelines of Subparts C and D. Evaluation includes the consideration of favorable and potentially adverse conditions.

"Excepted" means assumed to be probable or certain on the basis of existing evidence and in the absence of significant evidence to the contrary.

"Expected repository performance" means the manner in which the repository is predicted to function, consideration those conditions, processes, and events that are likely to prevail or may occur during the time period of interest.

"Facility" means any structure, system, or system component, including engineered barriers, created by the DOE to meet repository-performance or functional objectives.

"Fault" means a fracture or a zone of fractures along which there has been displacement of the side relative to one another parallel to the fracture or zone of fractures.

"Faulting" means the process of fracturing and displacement that produces a fault.

"Favorable condition" means a condition that, though not necessary to qualify a site, is presumed, if present, to enhance confidence that the qualifying condition of a particular guideline can be met.

"Finding" means a conclusion that is reached after evaluation.

"Geohydrologic setting" means the system of geohydrologic units that is located within a given geologic setting.

"Geohydrologic system" means the geohydrologic units within a geologic setting, including any recharge, discharge, interconnections between units, and any natural or man-induced processes or events that could affect ground-water flow within or among those units.

"Geohydrologic unit" means an aquifer, a confining unit, or a combination of aquifers and confining units comprising a framework for a reasonably distinct geohydrologic system.

"Geologic repository" means a system, requiring licensing by the NRC, that is intended to be used, or may be used, for the disposal of radioactive waste in excavated geologic media. A geologic repository includes (1) the geologic-repository operations area and (2) the portion of the geologic setting that provides isolation of the radioactive waste and is located within the controlled area.

"Geologic-repository operations area" means a radioactive-waste facility that is part of the geologic repository, including both surface and subsurface areas and facilities where waste-handling activities are conducted.

"Geologic setting" means the geologic, hydrologic, and geochemical systems of the region in which a geologic-repository operations area is or may be located.

"Geomorphic processes" means geologic processes that are responsible for the general configuration of the Earth's surface, including the development of present landforms and their relationships to underlying structures, and are responsible for the geologic changes recorded by these surface features.

"Ground water" means all subsurface water as distinct from surface water.

"Ground-water flux" means the rate of ground-water flow per unit area of porous or fractured media measured perpendicular to the direction of flow.

"Ground-water sources" means aquifers that have been or could be economically and technologically developed as sources of water in the foreseeable future.

"Ground-water travel time" means the time required for a unit volume of ground water to travel between two locations. The travel time is the length of the flow path divided by the velocity, where velocity is the average ground-water flux passing through the cross-sectional area of the geologic medium through which flow occurs, perpendicular to the flow direction, divided by the effective porosity along the flow path. If discrete segments of the flow path have different hydrologic properties, the total travel time will be the sum of the travel times for each discrete segment.

"Guideline" means a statement of policy or procedure that may include, when appropriate, qualifying, disqualifying, favorable, or potentially adverse conditions as specified in the "guidelines."

"Guidelines" means Part 960 of Title 10 of the Code of Federal Regulations—General Guidelines for the Recommendation of Sites for Nuclear Waste Repositories.

"High-level radioactive waste" means (1) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations and (2) other highly radioactive material that the NRC, consistent with existing law, determines by rule requires permanent isolation.

"Highly populated area" means any incoporated place (recognized by the decennial reports of the U.S. Bureau of the Census) of 2,500 or more persons, or any census designated place (as defined and delineated by the Bureau) of 2,500 or more persons, unless it can be demonstrated that any such place has a lower population density than the mean value for the continental United States. Counties or county equivalents, whether incorporated or not, are specifically excluded form the definition of "place" as used herein.

"Host rock" means the geologic medium in which the waste is emplaced, specifically the geologic mate-
rials that directly encompass and ar
in close proximity to the undergroun
facility.

"Hydraulic conductivity" means th
volume of water that will mov
through a medium in a unit of tim
under a unit hydraulic gradien
through a unit area measured perpen
dicular to the direction of flow.

"Hydraulic gradient" means
change in the static pressure o
ground water, expressed in terms o
the height of water above a datum
per unit of distance in a given direc
tion.

"Hydrologic process" means any hy
drologic phenomenon that exhibits
continuous change in time, whethe
slow or rapid.

"Hydrologic properties" means thos
properties of a rock that govern th
entrance of water and the capacity t
hold, transmit, and deliver water, suc
as porosity, effective porosity, specifi
retention, permeability, and the direc
tions of maximum and minimum pe
meabilities.

"Igneous activity" means the em
placement (intrusion) of molten roc
material (magma) into material in th
Earth's crust or the expulsion (extru
sion) of such material onto the Earth'
surface or into its atmosphere or su
face water.

"Isolation" means inhibiting th
transport of radioactive material s
that the amounts and concentration
of this material entering the accessibl
environment will be kept within pr
scribed limits.

"Likely" means processing or di
playing the qualities, characteristic
or attributes that provide a reasonabl
basis for confidence that what is ex
pected indeed exists or will occur.

"Lithosphere" means the solid par
of the Earth, including any groun
water contained within it.

"Member of the public" means an
individual who is not engaged in ope
ations involving the managemen
storage, and disposal of radioactiv
waste. A worker so engaged is
member of the public except when o
duty at the geologic-repository ope
ations area.

"Mitigation" means: (1) Avoiding th
impact altogether by not taking a ce
tain action or parts of an action; (

minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or (5) compensating for the impact by replacing or providing substitute resources or environments.

"Model" means a conceptual description and the associated mathematical representation of a system, subsystem, component, or condition that is used to predict changes from a baseline state as a function of internal and/or external stimuli and as a function of time and space.

"NRC" means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

"Perched ground water" means unconfined ground water separated from an underlying body of ground water by an unsaturated zone. Its water table is a perched water table. Perched ground water is held up by a perching bed whose permeability is so low that water percolating downward through it is not able to bring water in the underlying unsaturated zone above atmospheric pressure.

"Performance assessment" means any analysis that predicts the behavior of a system or system component under a given set of constant and/or transient conditions. Performance assessments will include estimates of the effects of uncertainties in data and modeling.

"Permanent closure" is synonymous with "closure."

"Postclosure" means the period of time after the closure of the geologic repository.

"Potentially acceptable site" means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the DOE undertakes preliminary drilling and geophysical testing for the definition of site location.

"Potentially adverse condition" means a condition that is presumed to detract from expected system performance, but further evaluation, additional data, or the identification of compensating or mitigating factors may indicate that its effect on the expected system performance is acceptable.

"Preclosure" means the period of time before and during the closure of the geologic repository.

"Pre-waste-emplacement" means before the authorization of repository construction by the NRC.

"Qualifying condition" means a condition that must be satisfied for a site to be considered acceptable with respect to a specific guideline.

"Quaternary Period" means the second period of the Cenozoic Era, following the Tertiary, beginning 2 to 3 million years ago and extending to the present.

"Radioactive waste" or "waste" means high-level radioactive waste and other radioactive materials, including spent nuclear fuel, that are received for emplacement in a geologic repository.

"Radioactive-waste facility" means a facility subject to the licensing and related regulatory authority of the NRC pursuant to Sections 202(3) and 202(4) of the Energy Reorganization Act of 1974 (88 Stat. 1244).

"Radionuclide retardation" means the process or processes that cause the time required for a given radionuclide to move between two locations to be greater than the ground-water travel time, because of physical and chemical interactions between the radionuclide and the geohydrologic unit through which the radionuclide travels.

"Reasonably available technology" means technology which exists and has been demonstrated or for which the results of any requisite development, demonstration, or confirmatory testing efforts before application will be available within the required time period.

"Repository" is synonymous with "geologic repository."

"Repository closure" is synonymous with "closure."

"Repository construction" means all excavation and mining activities associated with the construction of shafts, shaft stations, rooms, and necessary openings in the underground facility, preparatory to radioactive-waste emplacement, as well as the construction of necessary surface facilities, but excluding site-characterization activities.

"Repository operation" means all of the functions at the site leading to and involving radioactive-waste emplacement in the underground facility, including receiving, transportation, handling, emplacement, and, if necessary, retrieval.

"Repository support facilities" means all permanent facilities constructed in support of site-characterization activities and repository construction, operation, and closure activities, including surface structures, utility lines, roads, railroads, and similar facilities, but excluding the underground facility.

"Restricted area" means any area access to which is controlled by the DOE for purposes of protecting individuals from exposure to radiation and radioactive materials before repository closure, but not including any areas used as residential quarters, although a separate room or rooms in a residential building may be set apart as a restricted area.

"Retrieval" means the act of intentionally removing radioactive waste before repository closure from the underground location at which the waste had been previously emplaced for disposal.

"Saturated zone" means that part of the Earth's crust beneath the water table in which all voids, large and small, are ideally filled with water under pressure greater than atmospheric.

"Secretary" means the Secretary of Energy.

"Site" means a potentially acceptable site or a candidate site, as appropriate, until such time as the controlled area has been established, at which time the site and the controlled area are the same.

"Site characterization" means activities, whether in the laboratory or in the field, undertaken to establish the geologic conditions and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

"Siting" means the collection of exploration, testing, evaluation, and decision-making activities associated with the process of site screening, site nomination, site recommendation, and site approval for characterization or repository development.

"Source term" means the kinds and amounts of radionuclides that make up the source of a potential release of radioactivity.

"Spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

"Surface facilities" means repository support facilities within the restricted area.

"Surface water" means any waters on the surface of the Earth, including fresh and salt water, ice, and snow.

"System" means the geologic setting at the site, the waste package, and the repository, all acting together to contain and isolate the waste.

"System performance" means the complete behavior of a repository system in response to the conditions, processes, and events that may affect it.

"Tectonic" means of, or pertaining to, the forces involved in, or the resulting structures or features of, "tectonics."

"Tectonics" means the branch of geology dealing with the broad architecture of the outer part of the Earth, that is, the regional assembling of structural or deformational features and the study of their mutual relations, origin, and historical evolution.

"To the extent practicable" means the degree to which an intended course of action is capable of being effected in a manner that is reasonable and feasible within a framework of constraints.

"Underground facility" means the underground structure and the rock required for support, including mined openings and backfill materials, but excluding shafts, boreholes, and their seals.

"Unsaturated zone" means the zone between the land surface and the water table. Generally, water in this zone is under less than atmospheric pressure, and some of the voids may contain air or other gases at atmospheric pressure. Beneath flooded areas or in perched water bodies, the water pressure locally may be greater than atmospheric.

"Waste form" means the radioactive waste materials and any encapsulating or stabilizing matrix.

"Waste package" means the waste form and any containers, shielding, packing, and other sorbent materials immediately surrounding an individual waste container.

"Water table" means that surface in a body of ground water at which the water pressure is atmospheric.

Subpart B—Implementation Guidelines

§ 960.3 Implementation guidelines.

The guidelines of this subpart establish the procedure and basis for applying the postclosure and the preclosure guidelines of Subparts C and D, respectively, to evaluations of the suitability of sites for the development of repositories. As may be appropriate during the siting process, this procedure requires consideration of a variety of geohydrologic settings and rock types, regionality, and environmental impacts and consultation with affected States, affected Indian tribes, and Federal agencies.

§ 960.3-1 Siting provisions.

The siting provisions establish the framework for the implementation of the siting process specified in § 960.3-2. Sections 960.3-1-1 and 960.3-1-2 require that consideration be given to sites situated in different geohydrologic settings and different types of host rock, respectively. These diversity guidelines are intended to balance the process of site selection by requiring consideration of a variety of geologic conditions and media, and thereby enhance confidence in the technical suitability of sites selected for the development of repositories. As required by the Act, § 960.3-1-3 specifies consideration of a regional distribution of repositories after recommendation of a site for development of the first repository. Section 960.3-1-4 describes the evidence that is required to support siting decisions. Section 960.3-1-5 establishes the basis for site evaluations against the postclosure and the preclosure guidelines of Subparts C and D during the various phases of the siting process.

§ 960.3-1-1 Diversity of geohydrologic settings.

Consideration shall be given to a variety of geohydrologic settings in which sites for the development of repositories may be located. To the extent practicable, sites recommended as candidate sites for characterization shall be located in different geohydrologic settings.

§ 960.3-1-2 Diversity of rock types.

Consideration shall be given to a variety of geologic media in which sites for the development of repositories may be located. To the extent practicable, and with due consideration of candidate sites characterized previously or approved for such characterization if the circumstances apply, sites recommended as candidate sites for characterization shall have different types of host rock.

§ 960.3-1-3 Regionality.

In making site recommendations for repository development after the site for the first repository has been recommended, the Secretary shall give due consideration to the need for, and the advantages of, a regional distribution in the siting of subsequent repositories. Such consideration shall take into account the proximity of sites to locations at which waste is generated or temporarily stored and at which other repositories have been or are being developed.

§ 960.3-1-4 Evidence for siting decisions.

The siting process involves a sequence of four decisions: The identification of potentially acceptable sites; the nomination of sites as suitable for characterization; the recommendation of sites as candidate sites for site characterization; and after the completion of site characterization and nongeologic data gathering, the recommendation of a candidate site for the development of a repository. Each of these decisions will be supported by the evidence specified below.

§ 960.3-1-4-1 Site identification as potentially acceptable.

The evidence for the identification of a potentially acceptable site shall be the types of information specified in Appendix IV of this part. Such evidence will be relatively general and less detailed than that required for the nomination of a site as suitable for characterization. Because the gathering of detailed geologic data will not take place until after the recommendation of a site for characterization, the levels of information may be relatively greater for the evaluation of those guidelines in Subparts C and D that pertain to surface-identifiable factors for such site. The sources of information shall include the literature in the public domain and the private sector, when available, and will be supplemented in some instances by surface investigations and conceptual engineering design studies conducted by the DOE. Geologic surface investigations may include the mapping of identifiable rock masses, fracture and joint characteristics, and fault zones. Other surface investigations will consider the aquatic and terrestrial ecology; water rights and uses; topography; potential offsite hazards; natural resource concentrations; national or State protected resources; existing transportation systems; meteorology and climatology; population densities, centers, and distributions; and general socioeconomic characteristics.

§ 960.3-1-4-2 Site nomination for characterization.

The evidence required to support the nomination of a site as suitable for characterization shall include the types of information specified in Appendix IV of this part and shall be contained or referenced in the environmental assessments to be prepared in accordance with the requirements of the Act. The source of this information shall include the literature and related studies in the public domain and the private sector, when available, and various meteorological, environmental, socioeconomic, and transportation studies conducted by the DOE in the affected area; exploratory boreholes in the region of such site, including lithologic logging and hydrologic and geophysical testing of such boreholes, laboratory testing of core samples for the evaluation of geochemical and engineering rock properties, and chemical analyses of water samples from such boreholes; surface investigations, including geologic mapping and geophysical surveys, and compilations of satellite imagery data; in situ or laboratory testing of similar rock types under expected repository conditions; evaluations of natural and man-made analogs of the repository and its subsystems, such as geothermally active areas, underground excavations, and case histories of socioeconomic cycles in areas that have experienced intermittent large-scale construction and industrial activities; and extrapolations of regional data to estimate site-specific characteristics and conditions. The exact types and amounts of information to be collected within the above categories, including such details as the specific types of hydrologic tests, combinations of geophysical tests, or number of exploratory boreholes, are dependent on the site-specific needs for the application of the guidelines of Subparts C and D, in accordance with the provisions of this Subpart and the application requirements set forth in Appendix III of this part. The evidence shall also include those technical evaluations that use the information specified above and that provide additional bases for evaluating the ability of a site to meet the qualifying conditions of the guidelines of Subparts C and D. In developing the above-mentioned bases for evaluation, as may be necessary, assumptions that approximate the characteristics or conditions considered to exist at a site, or expected to exist or occur in the future, may be used. These assumptions will be realistic but conservative enough to underestimate the potential for a site to meet the qualifying condition of a guideline; that is, the use of such assumptions should not lead to an exaggeration of the ability of a site to meet the qualifying condition.

§ 960.3-1-4-3 Site recommendation for characterization.

The evidence required to support the recommendation of a site as a candidate site for characterization shall consist of the evaluations and data contained or referenced in the environmental assessment for such site, unless the Secretary certifies that such information, in the absence of additional preliminary borings or excavations, will not be adequate to satisfy applicable requirements of the Act.

§ 960.3-1-4-4 Site recommendation for repository development.

The evidence required to support the recommendation of a candidate site for the development of a repository, after the completion of characterization activities at such site, shall consist of the information specified in Section 114(a) of the Act for the comprehensive statement of the basis for such recommendation and Section 114(f) of the Act for the environmental impact statement. This evidence shall be obtained by the characterization of such site, according to the requirements specified in Section 113(b) of the Act and in 10 CFR 60.11, and by nongeologic data gathering.

§ 960.3-1-5 Basis for site evaluations.

Evaluations of individual sites and comparisons between and among sites shall be based on the postclosure and preclosure guidelines specified in Subparts C and D, respectively. Except for screening for potentially acceptable sites as specified in § 960.3-2-1, such evaluations shall place *primary significance* on the postclosure guidelines and *secondary significance* on the preclosure guidelines, with each set of guidelines considered collectively for such purposes. Both the postclosure and the preclosure guidelines consist of a system guideline or guidelines and corresponding groups of technical guidelines. The postclosure guidelines of Subpart C contain eight technical guidelines in one group. The preclosure guidelines of Subpart D contain eleven technical guidelines separated into three groups that represent, *in decreasing order of importance*, preclosure radiological safety; environment, socioeconomics, and transportation; and ease and cost of siting, construction, operation, and closure. The relative significance of any technical guideline to its corresponding system guideline is site specific. Therefore, for each technical guideline, an evaluation of compliance with the qualifying condition shall be made in the context of the collection of system elements and the evidence related to that guideline, considering on balance the favorable conditions and the potentially adverse conditions identified at a site. Similarly, for each system guideline, such evaluation shall be made in the context of the group of technical guidelines and the evidence related to that system guideline. For purposes of recommending sites for development as respositories, such evidence shall include analyses of expected respository performance to assess the likelihood of demonstrating compliance with 40 CFR Part 191 and 10 CFR Part 60, in accordance with § 960.4-1. A site shall be disqualified at any time during the siting process if the evidence supports a finding by the DOE that a disqualifying condition exists or the qualifying condition of any system or technical guideline cannot be met. Comparisons between and among sites shall be based on the system guidelines, to the extent practicable and in accordance with the levels of relative significance specified above for the postclosure and the preclosure guidelines. Such comparisons are intended to allow comparative evaluations of sites in terms of the capabilities of the natural barriers for waste isolation and to identify innate deficiencies that could jeopardize compliance with such requirements. If the evidence for the sites is not adequate to substantiate such comparisons, then the comparisons shall be based on the groups of technical guidelines under the postclosure and the preclosure guidelines, considering the levels of relative significance appropriate to the postclosure and the preclosure guidelines and the order of importance appropriate to the subordinate groups within the preclosure guidelines. Comparative site evaluations shall place primary importance on the natural barriers of the site. In such evaluations for the postclosure guidelines of Subpart C, engineered barriers shall be considered only to the extent necessary to obtain realistic source terms for comparative site evaluations based on the sensitivity of the natural barriers to such realistic engineered barriers. For a better understanding of the potential effects of engineered barriers on the overall performance of the repository system, these comparative evaluations shall consider a range of levels in the performance of the engineered barriers. That range of performance levels shall vary by at least a factor of 10 above and below the engineered-barrier performance requirements set forth in 10 CFR 60.113, and the range considered shall be identical for all sites compared. The comparisons shall assume equivalent engineered-barrier performance for all sites compared and shall be structured so that engineered barriers are not relied upon to compensate for deficiencies in the geologic media. Furthermore, engineered barriers shall not be used to compensate for an inadequate site; mask the innate deficiencies of a site; disguise the strengths and weaknesses of a site and the overall system; and mask differences between sites when they are compared. Site comparisons performed to support the recommendation of sites for the development of repositories in § 960.3-2-4 shall evaluate predicted releases of radionuclides to the accessible environment. For the purposes of such comparison, the accessible environment shall consist of the atmosphere, the land surface, any nearby surface water, and those portions of the lithosphere that are situated more than 10 kilometers in a horizontal direction from the outer boundary of the original location of the waste emplacement in the geologic repository. Releases of different radionuclides shall be combined by the methods specified in Appendix A of 40 CFR Part 191. The comparisons specified above shall consist of two comparative evaluations that predict radionuclide releases for 100,000 years after repository closure and shall be conducted as follows. First, the sites shall be compared by means of evaluations that emphasize the performance of the natural barriers at the site. Second, the sites shall be compared by means of evaluations that emphasize the performance of the total repository system. These second evaluations shall consider the expected performance of the repository system; be based on the expected performance of waste packages and waste forms, in compliance with the requirements of 10 CFR 60.113, and on the expected hydrologic and geochemical conditions at each site; and take credit for the expected performance of all other engineered components of the repository system. The comparison of isolation capability shall be one of the significant considerations in the recommendation of sites for the development of repositories. The first of the two comparative evaluations specified in the preceding paragraph shall take precedence unless the second comparative evaluation would lead to substantially different recommendations. In the latter case, the two comparative evaluations shall receive comparable consideration. Sites with predicted isolation capabilities that differ by less than a factor of 10, with similar uncertainties, may be assumed to provide equivalent isolation.

§ 960.3-2 Siting process.

The siting process begins with site screening for the identification of potentially acceptable sites. This process was completed for purposes of the first repository before the enactment of the Act, and the identification of such sites was made after enactment in accordance with the provisions of section 116(a) of the Act. The screening process for the identification of potentially acceptable sites for the second and subsequent repositories shall be conducted in accordance with the requirements specified in § 960.3-2-1 of this Subpart. The nomination of any site as suitable for characterization shall follow the process specified in § 960.3-2-2, and such nomination shall be accompanied by an environmental assessment as specified in section 112(b)(1)(E) of the Act. The recommendation of sites as candidate sites for characterization and the recommendation of a characterized site for the development of a repository shall be accomplished in accordance with the requirements specified in §§960.3-2-3 and 960.3-2-4, respectively.

§ 960.3-2-1 Site screening for potentially acceptable sites.

To identify potentially acceptable sites for the development of other than the first repository, the process shall begin with site-screening activities that consider large land masses that contain rock formations of suitable depth, thickness, and lateral extent and have structural, hydrologic, and tectonic features favorable for waste containment and isolation. Within those large land masses, subsequent site-screening activities shall focus on successively smaller and increasingly more suitable land units. This process shall be developed in consultation with the States that contain land units under consideration. It shall be implemented in a sequence of steps that first applies the applicable disqualifying conditions to eliminate land units on the basis of the evidence specified in § 960.3-1-4-1 and in accordance with the application requirements set forth in Appendix III of this Part. After the disqualifying conditions have been applied, the favorable and potentially adverse conditions, as identified for each remaining land unit, shall be evaluated. The presence of favorable conditions shall favor a given land unit, while the presence of potentially adverse conditions shall penalize that land unit. Recognizing that favorable conditions and potentially adverse conditions for different technical guidelines can exist in the same land unit, the DOE shall seek to evaluate the composite favorability of each land unit. Land units that, in the aggregrate, exhibit potentially adverse conditions shall be deferred in favor of land units that exhibit favorable conditions. The siting provisions that require diversity of geohydrologic settings and rock types and consideration of regionality, as specified in §§ 960.3-1-1, 960.3-1-2, and 960.3-1-3, respectively, may be used to discriminate between land units and to establish the range of options in site screening. To identify a site as potentially acceptable, the evidence shall support a finding that the site is not disqualified in accordance with the application requirements set forth in Appendix III of this Part and shall support the decision by the DOE to proceed the continued investigation of the site on the basis of the favorable and potentially adverse conditions identified to date. In continuation of the screening process after such identification and before site nomination, the DOE may defer from further consideration land units or potentially acceptable sites or portions thereof on the basis of additional information or by the application of the siting provisions for diversity of geohydrologic settings, diversity of rock types, and regionality (§§ 960.3-1-1, 960.3-1-2, and 960.3-1-3, respectively). The deferral of potentially acceptable sites will be described in the environmental assessments that accompany the nomination of at least five sites as suitable for characterization. In order to identify potentially acceptable sites for the second and subsequent repositories, the Secretary shall *first* identify the State within which the site is located in a decision-basis document that describes the process and the considerations that led to the identification of such site and that has been issued previously in draft for review and comment by such State. *Second*, when such document is final, the Secretary shall notify the Governor and the legislature of that State and the tribal council of any affected Indian tribe of the potentially acceptable site.

§ 960.3-2-2 Nomination of sites as suitable for characterization.

From the sites identified as potentially acceptable, the Secretary shall nominate at least five sites determined suitable for site characterization for the selection of each repository site. For the second repository, at least three of the sites shall not have been nominated previously. Any site nominated as suitable for characterization for the first repository, but not recommended as a candidate site for characterization, may not be nominated as suitable for characterization for the second repository. The nomination of a site as suitable for characterization shall be accompanied by an environmental assessment as specified in section 112(b)(1)(E) of the Act. Such nomination shall be based on evaluations in accordance with the guidelines of this Part, and the bases and relevant details of those evaluations and of the decision processes involved therein shall be contained in the environmental assessment for the site in the manner specified in this Subpart. The evidence required to support such evaluations and siting decisions is specified in § 960.3-1-4-2.

§ 960.3-2-2-1 Evaluation of all potentially acceptable sites.

First, in considering sites for nomination, each of the potentially acceptable sites shall be evaluated on the basis of the disqualifying conditions specified in the technical guidelines of Subparts C and D, in accordance with the application requirements set forth in Appendix III of this part. This evaluation shall support a finding by the DOE that such sites is not disqualified.

§ 960.3-2-2-2 Selection of sites within geohydrologic settings.

Second, the siting provision requiring diversity of geohydrologic settings, as specified in § 960.3-1-1, shall be applied to group all potentially acceptable sites according to their geohydrologic settings. *Third*, for those geohydrologic settings that contain more than one potentially acceptable site, the preferred site shall be selected on the basis of a comparative evaluation of all potentially acceptable sites in that setting. This evaluation shall consider the distinguishing characteristics displayed by the potentially acceptable sites within the setting and the related guidelines from Subparts C and D. That is, the appropriate guidelines shall be selected primarily on the basis of the kinds of evidence among sites for which distinguishing characteristics can be identified. Such comparative evaluation shall be made on the basis of the qualifying conditions for those guidelines, considering, on balance, the favorable conditions and potentially adverse conditions identified at each site. Due consideration shall also be given to the siting provisions specifying the basis for site evaluations in § 960.3-1-5, to the extent practicable, and diversity of rock types in § 960.3-1-2, if the circumstances so apply. If less than five geohydrologic settings are available for consideration, the above process shall be used to select two or more preferred sites from those settings that contain more than one potentially acceptable site, as required to obtain the number of sites to be nominated as suitable for characterization. For purposes of the second and subsequent repositories, due consideration shall also be given to the siting provision for regionality as specified in § 960.3-1-3. *Fourth*, each preferred site within a geohydrologic setting shall be evaluated as to whether such site is suitable for the development of a repository under the qualifying condition of each guideline specified in Subparts C and D that does not require site characterization as a prerequisite for the application of such guideline. The guidelines considered appropriate to this evaluation have been selected on the basis of their exclusion under the definition of site characterization as specified in § 960.2. Although the final application of these guidelines, in accordance with the provisions set forth in Appendix III of this part, does not require geologic data from site-characterization activities, such application will require additional data beyond those specified in Appendix IV of this part, which will be obtained concurrently with site characterization. Such guidelines include those specified in § 960.4-2-8-2 (Site Ownership and Control) of Subpart C; §§ 960.5-1(a)(1) and 960.5-1(a)(2) of Subpart D (preclosure system guidelines for radiological safety and environmental quality, socioeconomics, and transportation); and §§ 960.5-2-1 through 960.5-2-7 of Subpart D (Population Density and Distribution, Site Ownership and Control, Meteorology, Offsite Installations and Operations, Environmental Quality, Socioeconomic Impacts, and Transportation). This evaluation shall consider on balance those favorable conditions and potentially adverse conditions identified as such at a preferred site in relation to the qualifying condition of each such guideline. For each such guideline, this evaluation shall focus on the suitability of the site for the development of a repository by considering the activities from the start of site characterization through decommissioning and shall support a finding by the DOE in accordance with the application requirements set forth in Appendix III of this part. *Fifth*, each preferred site within a geohydrologic setting shall be evaluated as to whether such site is suitable for site characterization under the qualifying conditions of those guidelines specified in Subparts C and D that require characterization (i.e., subsurface geologic, hydrologic, and geochemical data gathering). Such guidelines include those specified in § 960.4-1(a) (postclosure system guideline); §§ 960.4-2-1 through 960.4-2-8-1 of Subpart C (Geohydrology, Geochemistry, Rock Characteristics, Climatic Changes, Erosion, Dissolution, Tectonics, Human Interference, and Natural Resources); §960.5-1(a)(3) (preclosure system guideline for ease and cost of siting, construction, operation, and closure); and § 960.5-2-8 through 960.5-2-11 of Subpart D (Surface Characteristics, Rock Characteristics, Hydrology, and Tectonics). This evaluation shall consider on balance the favorable conditions and potentially adverse conditions identified as such at a preferred site in relation to the qualifying condition of each such guideline. For each such guideline, this evaluation shall focus on the suitability of the site for characterization and shall support a finding by the DOE in accordance with the application requirements set forth in Appendix III of this part.

§ 960.3-2-2-3 Comparative evaluation of all sites proposed for nomination.

Sixth, for those potentially acceptable sites to be proposed for nomination, as determined by the process specified in § 960.3-2-2-2, a reasonable comparative evaluation of each such site with all other such sites shall be made. For each site and for each guideline specified in Subparts C and D, the DOE shall summarize the evaluations and findings specified under § 960.3-2-2-1 and under the fourth and fifth provisions of § 960.3-2-2-2. Each such summary shall allow comparisons to be made among sites on this basis of each guideline.

§ 960.3-2-2-4 The environmental assessment.

To document the process specified above, and in compliance with section 112(b)(1)(E) of the Act, an environmental assessment shall be prepared for each site proposed for nomination as suitable for characterization. Each such environmental assessment shall describe the decision process by which such site was proposed for nomination as described in the preceding six steps and shall contain or reference the evidence that supports such process according to the requirements of § 960.3-1-4-2 and Appendix IV of this part. As specified in the Act, each environmental assessment shall include an evaluation of the effects of the site-characterization activities at the site on public health and safety and the environment; a discussion of alternative activities related to site characterization that may be taken to avoid such impact; and an assessment of the regional and local impacts of locating a repository at the site. The draft environmental assessment for each site proposed for nomination as suitable for characterization shall be made available by the DOE for public comment after the Secretary has notified the Governor and legislature of the State in which the site is located, and the governing body of the affected Indian tribe where such site is located, of such impending availability.

§ 960.3-2-2-5 Formal site nomination.

After the final environmental assessments have been prepared, the Secretary shall nominate at least five sites that he determines suitable for site characterization for the selection of a repository site, and, in so doing, he shall cause to have published in the FEDERAL REGISTER a notice specifying the sites so nominated and announcing the availability of the final environmental assessments for such sites. This determination by the Secretary shall be based on the final environmental assessments for such sites, including, in particular, consideration of the available evidence, evaluations, and the resultant findings for the guidelines of Subparts C and D so specified under the fourth and fifth provisions of § 960.3-2-2-2. Before nominating a site, the Secretary shall notify the Governor and legislature of the State in which the site is located, and the governing body of the affected Indian tribe where such site is located, of such nomination and the basis for such nomination.

§ 960.3-2-3 Recommendation of sites for characterization.

After the nomination of at least five sites as suitable for site characterization for the selection of the first repository, the Secretary shall recommend in writing to the President not less than three candidate sites for such characterization. The recommendation decision shall be based on the available geophysical, geologic, geochemical, and hydrologic data; other information; associated evaluations and findings reported in the environmental assessments accompanying the nominations; and the considerations specified below, unless the Secretary certifies that such available data will not be adequate to satisfy applicable requirements of the Act in the absence of further preliminary borings or excavations. On the basis of the evidence and in accordance with the siting provision specifying the basis for site evaluations in § 960.3-1-5, the sites nominated as suitable for characterization shall be considered as to their order of preference as candidate sites for characterization. Subsequently, the siting provisions specifying diversity of geohydrologic settings, diversity of rock types, and, after the first repository, consideration of regionality in §§ 960.3-1-1, 960.3-1-2, and 960.3-1-3, respectively, shall be considered to determine a final order of preference for the characterization of such sites. Considering this order of preference together with the available siting alternatives specified in the Act, the sites recommended as candidate sites for characterization shall offer, on balance, the most advantageous combination of characteristics and conditions for the successful development of repositories at such sites. The process for the recommendation of sites as candidate sites for characterization for the selection of any subsequent repository shall be the same as that specified above for the first repository.

§ 960.3-2-4 Recommendation of sites for the development of repositories.

After completion of site characterization and nongeologic data gathering activities at the candidate sites for the development of the first repository, or from all of the characterized sites for the development of subsequent repositories, the candidate sites shall be compared with each other on the basis of the guidelines specified in Subparts C and D according to the siting provision specifying the basis for site evaluations in § 960.3-1-5. This comparison shall lead to a recommendation by the Secretary to the President of a site for the development of a repository. Together with any recommendation to the President to approve a site for the development of a repository, the Secretary shall make available to the public, and submit to the President, a comprehensive statement of the basis of such recommendation pursuant to the requirements specified in section 114(a)(1) of the Act, including an environmental impact statement prepared in accordance with the provisions of sections 114(a)(1)(D) and 114(f) of the Act. The environmental impact statement shall include the results of the comparative evaluation specified above and a description of the decision process that resulted in the selection of the candidate site recommended for the development of such repository.

§ 960.3-3 Consultation.

The DOE shall provide to designated officials of the affected States and to the governing bodies of any affected Indian tribe timely and complete information regarding determinations or plans made with respect to the siting, site characterization, design, development, construction, operation, closure, decommissioning, licensing, or regulation of a repository. Written responses to written requests for information from the designated officials of affected States or affected Indian tribes will be provided within 30 days after receipt of the written requests. In performing any study of an area for the purpose of determining the suitability of such area for the development of a repository, the DOE shall consult and cooperate with the Governor and the legislature of an affected State and the governing body of an affected Indian tribe in an effort to resolve concerns regarding public health and safety, environmental impacts, socioeconomic impacts, and technical aspects of the siting process. After notifying affected States and affected Indian tribes that potentially acceptable sites have been identified, or that a site has been approved for characterization, the DOE shall seek to enter into binding written agreements with such affected States or affected Indian tribes in accordance with the requirements of the Act. The DOE shall also consult, as appropriate, with other Federal agencies.

§ 960.3-4 Environmental impacts.

Environmental impacts shall be considered by the DOE throughout the site characterization, site selection, and repository development process. The DOE shall mitigate significant adverse environmental impacts, to the extent practicable, during site characterization and repository construction, operation, closure, and decommissioning.

Subpart C—Postclosure Guidelines

§ 960.4 Postclosure guidelines.

The guidelines in this subpart specify the factors to be considered in evaluating and comparing sites on the basis of expected repository performance after closure. The postclosure guidelines are separated into a system guideline and eight technical guidelines. The system guideline establishes waste containment and isolation requirements that are based on NRC and EPA regulations. These requirements must be met by the repository system, which contains natural barriers and engineered barriers. The engineered barriers will be designed to complement the natural barriers, which provide the primary means for waste isolation.

§ 960.4-1 System guideline.

(a) *Qualifying Condition.* The geologic setting at the site shall allow for the physical separation of radioactive waste from the accessible environment after closure in accordance with the requirements of 40 CFR Part 191, Subpart B, as implemented by the provisions of 10 CFR Part 60. The geologic setting at the site will allow for the use of engineered barriers to ensure compliance with the requirements of 40 CFR Part 191 and 10 CFR Part 60 (see Appendix I of this part).

§ 960.4-2 Technical guidelines.

The technical guidelines in this subpart set forth qualifying, favorable, potentially adverse, and, in five guidelines, disqualifying conditions on the characteristics, processes, and events that may influence the performance of a repository system after closure. The favorable conditions and the potentially adverse conditions under each guideline are *not* listed in any assumed order of importance. Potentially adverse conditions will be considered if they affect waste isolation within the controlled area even though such conditions may occur outside the controlled area. The technical guidelines that follow establish conditions that shall be considered in determining compliance with the qualifying condition of the postclosure system guideline. For each technical guideline, an evaluation of qualification or disqualification shall be made in accordance with the requirements specified in Subpart B.

§ 960.4-2-1 Geohydrology.

(a) *Qualifying Condition.* The present and expected geohydrologic setting of a site shall be compatible with waste containment and isolation. The geohydrologic setting, considering the characteristics of and the processes operating within the geologic setting, shall permit compliance with (1) the requirements specified in § 960.4-1 for radionuclide releases to the accessible environment and (2) the requirements specified in 10 CFR 60.113 for radionuclide releases from the engineered-barrier system using reasonably available technology.

(b) *Favorable Conditions.* (1) Site conditions such that the pre-waste-emplacement ground-water travel time along any path of likely radionuclide travel from the disturbed zone to the accessible environment would be more than 10,000 years.

(2) The nature and rates of hydrologic processes operating within the geologic setting during the Quaternary Period would, if continued into the future, not affect or would favorably affect the ability of the geologic repository to isolate the waste during the next 100,000 years.

(3) Sites that have stratigraphic, structural, and hydrologic features such that the geohydrologic system can be readily characterized and modeled with reasonable certainty.

(4) For disposal in the saturated zone, at least one of the following pre-waste-emplacement conditions exists:

(i) A host rock and immediately surrounding geohydrologic units with low hydraulic conductivities.

(ii) A downward or predominantly horizontal hydraulic gradient in the host rock and in the immediately surrounding geohydrologic units.

(iii) A low hydraulic gradient in and between the host rock and the immediately surrounding geohydrologic units.

(iv) High effective porosity together with low hydraulic conductivity in rock units along paths of likely radionuclide travel between the host rock and the accessible environment.

(5) For disposal in the unsaturated zone, at least one of the following pre-waste-emplacement conditions exists:

(i) A low and nearly constant degree of saturation in the host rock and in the immediately surrounding geohydrologic units.

(ii) A water table sufficiently below the underground facility such that the fully saturated voids continuous with the water table do not encounter the host rock.

(iii) A geohydrologic unit above the host rock that would divert the downward infiltration of water beyond the limits of the emplaced waste.

(iv) A host rock that provides for free drainage.

(v) A climatic regime in which the average annual historical precipitation is a small fraction of the average annual potential evapotranspiration.

NOTE: The DOE will, in accordance with the general principles set forth in § 960.1 of these regulations, revise the guidelines as necessary, to ensure consistency with the final NRC regulations on the unsaturated zone, which were published as a proposed rule on February 16, 1984, in 49 FR 5934.

(c) *Potentially Adverse Conditions.* (1) Expected changes in geohydrologic conditions—such as changes in the hydraulic gradient, the hydraulic conductivity, the effective porosity, and the ground-water flux through the host rock and the surrounding geohydrologic units—sufficient to significantly increase the transport of radionuclides to the accessible environment as compared with pre-waste-emplacement conditions.

(2) The presence of ground-water sources, suitable for crop irrigation or human consumption without treatment, along ground-water flow paths from the host rock to the accessible environment.

(3) The presence in the geologic setting of stratigraphic or structural features—such as dikes, sills, faults, shear zones, folds, dissolution effects, or brine pockets—if their presence could significantly contribute to the difficulty of characterizing or modeling the geohydrologic system.

(d) *Disqualifying Condition.* A site shall be disqualified if the pre-waste-emplacement ground-water travel time from the disturbed zone to the accessible environment is expected to be less than 1,000 years along any pathway of likely and significant radionuclide travel.

§ 960.4-2-2 Geochemistry.

(a) *Qualifying Condition.* The present and expected geochemical characteristics of a site shall be compatible with waste containment and isolation. Considering the likely chemical interactions among radionuclides, the host rock, and the ground water, the characteristics of and the processes operating within the geologic setting shall permit compliance with (1) the requirements specified in § 960.4-1 for radionuclide releases to the accessible environment and (2) the requirements specified in 10 CFR 60.113 for radionuclide releases from the engineered-barrier system using reasonably available technology.

(b) *Favorable Conditions.* (1) The nature and rates of the geochemical processes operating within the geologic setting during the Quaternary Period would, if continued into the future, not affect or would favorably affect the ability of the geologic repository to isolate the waste during the next 100,000 years.

(2) Geochemical conditions that promote the precipitation, diffusion into the rock matrix, or sorption of radionuclides; inhibit the formation of particulates, colloids, inorganic complexes, or organic complexes that increase the mobility of radionuclides; or inhibit the transport of radionuclides by particulates, colloids, or complexes.

(3) Mineral assemblages that, when subjected to expected repository conditions, would remain unaltered or would alter to mineral assemblages with equal or increased capability to retard radionuclide transport.

(4) A combination of expected geochemical conditions and a volumetric flow rate of water in the host rock that would allow less than 0.001 percent per year of the total radionuclide inventory in the repository at 1,000 years to be dissolved.

(5) Any combination of geochemical and physical retardation processes that would decrease the predicted peak cumulative releases of radionuclides to the accessible environment by a factor of 10 as compared to those predicted on the basis of ground-water travel time without such retardation.

(c) *Potentially Adverse Conditions.* (1) Ground-water conditions in the host rock that could affect the solubility or the chemical reactivity of the engineered-barrier system to the extent that the expected repository performance could be compromised.

(2) Geochemical processes or conditions that could reduce the sorption of radionuclides or degrade the rock strength.

(3) Pre-waste-emplacement ground-water conditions in the host rock that are chemically oxidizing.

§ 960.4-2-3 Rock characteristics.

(a) *Qualifying condition.* The present and expected characteristics of the host rock and surrounding units shall be capable of accommodating the thermal, chemical, mechanical, and radiation stresses expected to be induced by repository construction, operation, and closure and by expected interactions among the waste, host rock, ground water, and engineered components. The characteristics of and the processes operating within the geologic setting shall permit compliance with (1) the requirements specified in § 960.4-1 for radionuclide releases to the accessible environment and (2) the requirements set forth in 10 CFR 60.113 for radionuclide releases from the engineered-barrier system using reasonably available technology.

(b) *Favorable Conditions.* (1) A host rock that is sufficiently thick and laterally extensive to allow significant flexibility in selecting the depth, configuration, and location of the underground facility to ensure isolation.

(2) A host rock with a high thermal conductivity, a low coefficient of thermal expansion, or sufficient ductility to seal fractures induced by repository construction, operation, or closure or by interactions among the waste, host rock, ground water, and engineered components.

(c) *Potentially Adverse Conditions.* (1) Rock conditions that could require engineering measures beyond reasonably available technology for the construction, operation, and closure of the repository, if such measures are necessary to ensure waste containment or isolation.

(2) Potential for such phenomena as thermally induced fractures, the hydration or dehydration of mineral components, brine migration, or other physical, chemical, or radiation-related phenomena that could be expected to affect waste containment or isolation.

(3) A combination of geologic structure, geochemical and thermal properties, and hydrologic conditions in the

host rock and surrounding units such that the heat generated by the waste could significantly decrease the isolation provided by the host rock as compared with pre-waste-emplacement conditions.

§ 960.4-2-4 Climatic changes.

(a) *Qualifying Condition.* The site shall be located where future climatic conditions will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4-1. In predicting the likely future climatic conditions at a site, the DOE will consider the global, regional, and site climatic patterns during the Quaternary Period, considering the geomorphic evidence of the climatic conditions in the geologic setting.

(b) *Favorable Conditions.* (1) A surface-water system such that expected climatic cycles over the next 100,000 years would not adversely affect waste isolation.

(2) A geologic setting in which climatic changes have had little effect on the hydrologic system throughout the Quaternary Period.

(c) *Potentially Adverse Conditions.* (1) Evidence that the water table could rise sufficiently over the next 10,000 years to saturate the underground facility in a previously unsaturated host rock.

(2) Evidence that climatic changes over the next 10,000 years could cause perturbations in the hydraulic gradient, the hydraulic conductivity, the effective porosity, or the ground-water flux through the host rock and the surrounding geohydrologic units, sufficient to significantly increase the transport of radionuclides to the accessible environment.

§ 960.4-2-5 Erosion.

(a) *Qualifying Condition.* The site shall allow the underground facility to be placed at a depth such that erosional processes acting upon the surface will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4-1. In predicting the likelihood of potentially disruptive erosional processes, the DOE will consider the climatic, tectonic, and geomorphic evidence of rates and patterns of erosion in the geologic setting during the Quaternary Period.

(b) *Favorable Conditions.* (1) Site conditions that permit the emplacement of waste at a depth of at least 300 meters below the directly overlying ground surface.

(2) A geologic setting where the nature and rates of the erosional processes that have been operating during the Quaternary Period are predicted to have less than one chance in 10,000 over the next 10,000 years of leading to releases of radionuclides to the accessible environment.

(3) Site conditions such that waste exhumation would not be expected to occur during the first one million years after repository closure.

(c) *Potentially Adverse Conditions.* (1) A geologic setting that shows evidence of extreme erosion during the Quaternary Period.

(2) A geologic setting where the nature and rates of geomorphic processes that have been operating during the Quaternary Period could, during the first 10,000 years after closure, adversely affect the ability of the geologic repository to isolate the waste.

(d) *Disqualifying Condition.* The site shall be *disqualified* if site conditions do not allow all portions of the underground facility to be situated at least 200 meters below the directly overlying ground surface.

§ 960.4-2-6 Dissolution.

(a) *Qualifying Condition.* The site shall be located such that any subsurface rock dissolution will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4-1. In predicting the likelihood of dissolution within the geologic setting at a site, the DOE will consider the evidence of dissolution within that setting during the Quaternary Period, including the locations and characteristics of dissolution fronts or other dissolution features, if identified.

(b) *Favorable Condition.* No evidence that the host rock within the site was subject to significant dissolution during the Quaternary Period.

(c) *Potentially Adverse Condition.* Evidence of dissolution within the geologic setting—such as breccia pipes, dissolution cavities, significant volumetric reduction of the host rock or surrounding strata, or any structural collapse—such that a hydraulic interconnection leading to a loss of waste isolation could occur.

(d) *Disqualifying Condition.* The site shall be *disqualified* if it is likely that, during the first 10,000 years after closure, active dissolution, as predicted on the basis of the geologic record, would result in a loss of waste isolation.

§ 960.4-2-7 Tectonics.

(a) *Qualifying Condition.* The site shall be located in a geologic setting where future tectonic processes or events will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4-1. In predicting the likelihood of potentially disruptive tectonic processes or events, the DOE will consider the structural, stratigraphic, geophysical, and seismic evidence for the nature and rates of tectonic processes and events in the geologic setting during the Quaternary Period.

(b) *Favorable Condition.* The nature and rates of igneous activity and tectonic processes (such as uplift, subsidence, faulting, or folding), if any, operating within the geologic setting during the Quaternary Period would, if continued into the future, have less than one chance in 10,000 over the first 10,000 years after closure of leading to releases of radionuclides to the accessible environment.

(c) *Potentially Adverse Conditions.* (1) Evidence of active folding, faulting, diapirism, uplift, subsidence, or other tectonic processes or igneous activity within the geologic setting during the Quaternary Period.

(2) Historical earthquakes within the geologic setting of such magnitude and intensity that, if they recurred, could affect waste containment or isolation.

(3) Indications, based on correlations of earthquakes with tectonic processes and features, that either the frequency of occurrence or the magnitude of earthquakes within the geologic setting may increase.

(4) More-frequent occurrences of earthquakes or earthquakes of higher magnitude than are representative of the region in which the geologic setting is located.

(5) Potential for natural phenomena such as landslides, subsidence, or volcanic activity of such magnitudes that they could create large-scale surface-water impoundments that could change the regional ground-water flow system.

(6) Potential for tectonic deformations—such as uplift, subsidence, folding, or faulting—that could adversely affect the regional ground-water flow system.

(d) *Disqualifying Condition.* A site shall be disqualified if, based on the geologic record during the Quaternary Period, the nature and rates of fault movement or other ground motion are expected to be such that a loss of waste isolation is likely to occur.

§ 960.4-2-8 Human interference.

The site shall be located such that activities by future generations at or near the site will not be likely to affect waste containment and isolation. In assessing the likelihood of such activities, the DOE will consider the estimated effectiveness of the permanent markers and records required by 10 CFR Part 60, taking into account site-specific factors, as stated in §§ 960.4-2-8-1 and 960.4-2-8-2, that could compromise their continued effectiveness.

§ 960.4-2-8-1 Natural resources.

(a) *Qualifying Condition.* This site shall be located such that—considering permanent markers and records and reasonable projections of value, scarcity, and technology—the natural resources, including ground water suitable for crop irrigation or human consumption without treatment, present at or near the site will not be likely to give rise to interference activities that would lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4-1.

(b) *Favorable Conditions.* (1) No known natural resources that have or are projected to have in the foreseeable future a value great enough to be considered a commercially extractable resource.

(2) Ground water with 10,000 parts per million or more of total dissolved solids along any path of likely radionuclide travel from the host rock to the accessible environment.

(c) *Potentially Adverse Conditions.* (1) Indications that the site contains naturally occurring materials, whether or not actually identified in such form that (i) economic extraction is potentially feasible during the foreseeable future or (ii) such materials have a greater gross value, net value, or commercial potential than the average for other areas of similar size that are representative of, and located in, the geologic setting.

(2) Evidence of subsurface mining or extraction for resources within the site if it could affect waste containment or isolation.

(3) Evidence of drilling within the site for any purpose other than repository-site evaluation to a depth sufficient to affect waste containment and isolation.

(4) Evidence of a significant concentration of any naturally occurring material that is not widely available from other sources.

(5) Potential for foreseeable human activities—such as ground-water withdrawal, extensive irrigation, subsurface injection of fluids, underground pumped storage, military activities, or the construction of large-scale surface-water impoundments—that could adversely change portions of the ground-water flow system important to waste isolation.

(d) *Disqualifying Conditions.* A site shall be disqualified if—

(1) Previous exploration, mining, or extraction activities for resources of commercial importance at the site have created significant pathways between the projected underground facility and the accessible environment; or

(2) Ongoing or likely future activities to recover presently valuable natural mineral resources outside the controlled area would be expected to lead to an inadvertent loss of waste isolation.

§ 960.4-2-8-2 Site ownership and control.

(a) *Qualifying Condition.* The site shall be located on land for which the DOE can obtain, in accordance with the requirements of 10 CFR Part 60, ownership, surface and subsurface rights, and control of access that are required in order that potential surface and subsurface activities at the site will not be likely to lead to radionuclide releases greater than those allowable under the requirements specified in § 960.4-1.

(b) *Favorable Condition.* Present ownership and control of land and all surface and subsurface rights by the DOE.

(c) *Potentially Adverse Condition.* Projected land-ownership conflicts that cannot be successfully resolved through voluntary purchase-sell agreements, nondisputed agency-to-agency transfers of title, or Federal condemnation proceedings.

Subpart D—Preclosure Guidelines

§ 960.5 Preclosure guidelines.

The guidelines in this subpart specify the factors to be considered in evaluating and comparing sites on the basis of expected repository performance before closure. The preclosure guidelines are separated into three system guidelines and eleven technical guidelines.

§ 960.5-1 System guidelines.

(a) *Qualifying Conditions*—(1) *Preclosure Radiological Safety.* Any projected radiological exposures of the general public and any projected releases of radioactive materials to restricted and unrestricted areas during repository operation and closure shall meet the applicable safety requirements set forth in 10 CFR Part 20, 10 CFR Part 60, and 40 CFR 191, Subpart A (see Appendix II of this part).

(2) *Environment, Socioeconomics, and Transportation.* During repository siting, construction, operation, closure, and decommissioning the public and the environment shall be adequately protected from the hazards posed by the disposal of radioactive waste.

(3) *Ease and Cost of Siting, Construction, Operation, and Closure.* Repository siting, construction, operation, and closure shall be demonstrated to be technically feasible on the basis of reasonably available technology, and the associated costs shall be demonstrated to be reasonable relative to other available and comparable siting options.

§ 960.5-2 Technical guidelines.

The technical guidelines in this subpart set forth qualifying, favorable, potentially adverse, and, in seven guidelines, disqualifying conditions for the characteristics, processes, and events that influence the suitability of a site relative to the preclosure system guidelines. These conditions are separated into three main groups: Preclosure radiological safety; environment, socioeconomics, and transportation; and ease and cost of siting, construction, operation, and closure. The first group includes conditions on population density and distribution, site ownership and control, meteorology, and offsite installations and operations. The second group includes conditions related to environmental quality and socioeconomic impacts in areas potentially affected by a repository and to the transportation of waste to a repository site. The third group includes conditions on the surface characteristics of the site, the characteristics of the host rock and surrounding strata, hydrology, and tectonics. The individual technical guidelines within each group, as well as the favorable conditions and the potentially adverse conditions under each guideline, are not listed in any assumed order of importance. The technical guidelines that follow establish conditions that shall be considered in determining compliance with the qualifying conditions of the preclosure system guidelines. For each technical guideline, an evaluation of qualification or disqualification shall be made in accordance with the requirements specified in Subpart B.

PRECLOSURE RADIOLOGICAL SAFETY

§ 960.5-2-1 Population Density and Distribution.

(a) *Qualifying Condition.* The site shall be located such that, during repository operation and closure, (1) the expected average radiation dose to members of the public within any highly populated area will not be likely to exceed a small fraction of the limits allowable under the requirements specified in § 960.5-1(a)(1), and (2) the expected radiation dose to any member of the public in an unrestricted area will not be likely to exceed the limit allowable under the requirements specified in § 960.5-1(a)(1).

(b) *Favorable Conditions.* (1) A low population density in the general region of the site.

(2) Remoteness of site from highly populated areas.

(c) *Potentially Adverse Conditions.* (1) High residential, seasonal, or daytime population density within the projected site boundaries.

(2) Proximity of the site to highly populated areas, or to areas having at least 1,000 individuals in an area 1 mile by 1 mile as defined by the most recent decennial count of the U.S. census.

(d) *Disqualifying Conditions.* A site shall be *disqualified* if—

(1) Any surface facility of a repository would be located in a highly populated area; or

(2) Any surface facility of a repository would be located adjacent to an area 1 mile by 1 mile having a population of not less than 1,000 individuals as enumerated by the most recent U.S. census; or

(3) The DOE could not develop an emergency preparedness program which meets the requirements specified in DOE Order 5500.3 (Reactor and Non-Reactor Facility Emergency Planning, Preparedness, and Response Program for Department of Energy Operations) and related guides or, when issued by the NRC, in 10 CFR Part 60, Subpart I, "Emergency Planning Criteria."

§ 960.5-2-2 Site Ownership and Control.

(a) *Qualifying Condition.* The site shall be located on land for which the DOE can obtain, in accordance with the requirements of 10 CFR 60.121, ownership, surface and subsurface rights, and control of access that are required in order that surface and subsurface activities during repository operation and closure will not be likely to lead to radionuclide releases to an unrestricted area greater than those allowable under the requirements specified in § 960.5-1(a)(1).

(b) *Favorable Condition.* Present ownership and control of land and all surface and subsurface mineral and water rights by the DOE.

(c) *Potentially Adverse Condition.* Projected land-ownership conflicts that cannot be successfully resolved through voluntary purchase-sell agreements, nondisputed agency-to-agency transfers of title, or Federal condemnation proceedings.

§ 960.5-2-3 Meteorology.

(a) *Qualifying Condition.* The site shall be located such that expected meteorological conditions during repository operation and closure will not be likely to lead to radionuclide releases to an unrestricted area greater than those allowable under the requirements specified in § 960.5-1(a)(1).

(b) *Favorable Condition.* Prevailing meteorological conditions such that any radioactive releases to the atmosphere during repository operation and closure would be effectively dispersed, thereby reducing significantly the likelihood of unacceptable exposure to any member of the public in the vicinity of the repository.

(c) *Potentially Adverse Conditions.* (1) Prevailing meteorological conditions such that radioactive emissions from repository operation of closure could be preferentially transported toward localities in the vicinity of the repository with higher population densities than are the average for the region.

(2) History of extreme weather phenomena—such as hurricanes, tornadoes, severe floods, or severe and frequent winter storms—that could significantly affect repository operation or closure.

§ 960.5-2-4 Offsite installations and operations.

(a) *Qualifying Condition.* The site shall be located such that present projected effects from nearby industrial, transportation, and military installations and operations, including atomic energy defense activities, (1) will not significantly affect repository siting, construction, operation, closure, or decommissioning or can be accommodated by engineering measures and (2), when considered together with emissions from repository operation and closure, will not be likely to lead to radionuclide releases to an unrestricted area greater than those allowable under the requirements specified in § 960.5-1(a)(1).

(b) *Favorable Condition.* Absence of contributing radioactive releases from other nuclear installations and operations that must be considered under the requirements of 40 CFR 191, Subpart A.

(c) *Potentially Adverse Conditions.* (1) The presence of nearby potentially hazardous installations or operations that could adversely affect repository operation or closure.

(2) Presence of other nuclear installations and operations, subject to the requirements of 40 CFR Part 190 or 40 CFR 191, Subpart A, with actual or projected releases near the maximum value permissible under those standards.

(d) *Disqualifying Condition.* A site shall be disqualified if atomic energy defense activities in proximity to the site are expected to conflict irreconcilably with repository siting, construction, operation, closure, or decommissioning.

ENVIRONMENT, SOCIOECONOMICS, AND TRANSPORTATION

§ 960.5-2-5 Environmental quality.

(a) *Qualifying Condition.* The site shall be located such that (1) the quality of the environment in the affected area during this and future generations will be adequately protected during repository siting, construction, operation, closure, and decommissioning, and projected environmental impacts in the affected area can be mitigated to an acceptable degree, taking into account programmatic, technical, social, economic, and environmental factors; and (2) the requirements specified in § 960.5-1(a)(2) can be met.

(b) *Favorable Conditions.* (1) Projected ability to meet, within time constraints, all Federal, State, and local procedural and substantive environmental requirements applicable to the site and the activities proposed to take place thereon.

(2) Potential significant adverse environmental impacts to present and future generations can be mitigated to an insignificant level through the application of reasonable measures, taking into account programmatic, technical, social, economic, and environmental factors.

(c) *Potentially Adverse Conditions.* (1) Projected major conflict with applicable Federal, State, or local environmental requirements.

(2) Projected significant adverse environmental impacts that cannot be avoided or mitigated.

(3) Proximity to, or projected significant adverse environmental impacts of the repository or its support facilities on, a component of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Land.

(4) Proximity to, and projected significant adverse environmental impacts of the repository or its support facilities on, a significant State or regional protected resource area, such as a State park, a wildlife area, or a historical area.

(5) Proximity to, and projected significant adverse environmental impacts of the repository and its support facilities on, a significant Native American resource, such as a major Indian religious site, or other sites of unique cultural interest.

(6) Presence of critical habitats for threatened or endangered species that may be compromised by the repository or its support facilities.

(d) *Disqualifying Conditions.* Any of the following conditions shall *disqualify* a site:

(1) During repository siting, construction, operation, closure, or decommissioning the quality of the environment in the affected area could not be adequately protected or projected environmental impacts in the affected area could not be mitigated to an acceptable degree, taking into account programmatic, technical, social, economic, and environmental factors.

(2) Any part of the restricted area or repository support facilities would be located within the boundaries of a component of the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, or the National Wild and Scenic Rivers System.

(3) The presence of the restricted area or the repository support facilities would conflict irreconcilably with the previously designated resource-preservation use of a component of the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Wild and Scenic Rivers System, or National Forest Lands, or any comparably significant State protected resource that was dedicated to resource preservation at the time of the enactment of the Act.

§ 960.5-2-6 Socioeconomic impacts.

(a) *Qualifying Condition.* The site shall be located such that (1) any significant adverse social and/or economic impacts induced in communities and surrounding regions by repository siting, construction, operation, closure, and decommissioning can be offset by reasonable mitigation or compensation, as determined by a process of analysis, planning, and consultation among the DOE, affected State and local government jurisdictions, and affected Indian tribes; and (2) the requirements specified in § 960.5-1(a)(2) can be met.

(b) *Favorable Conditions.* (1) Ability of an affected area to absorb the project-related population changes without significant disruptions of community services and without significant impacts on housing supply and demand.

(2) Availability of an adequate labor force in the affected area.

(3) Projected net increases in employment and business sales, improved

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community services, and increased government revenues in the affected area.

(4) No projected substantial disruption of primary sectors of the economy of the affected area.

(c) *Potentially Adverse Conditions.* (1) Potential for significant repository-related impacts on community services, housing supply and demand, and the finances of State and local government agencies in the affected area.

(2) Lack of an adequate labor force in the affected area.

(3) Need for repository-related purchase or acquisition of water rights, if such rights could have significant adverse impacts on the present or future development of the affected area.

(4) Potential for major disruptions of primary sectors of the economy of the affected area.

(d) *Disqualifying Condition.* A site shall be disqualified if repository construction, operation, or closure would significantly degrade the quality, or significantly reduce the quantity, of water from major sources of offsite supplies presently suitable for human consumption or crop irrigation and such impacts cannot be compensated for, or mitigated by, reasonable measures.

§ 960.5-2-7 Transportation.

(a) *Qualifying Condition.* The site shall be located such that (1) the access routes constructed from existing local highways and railroads to the site (i) will not conflict irreconcilably with the previously designated use of any resource listed in § 960.5-2-5(d) (2) and (3); (ii) can be designed and constructed using reasonably available technology; (iii) will not require transportation system components to meet performance standards more stringent than those specified in the applicable DOT and NRC regulations, nor require the development of new packaging containment technology; (iv) will allow transportation operations to be conducted without causing an unacceptable risk to the public or unacceptable environmental impacts, taking into account programmatic, technical, social, economic, and environmental factors; and (2) the requirements of § 960.5-1(a)(2) can be met.

(b) *Favorable Conditions.* (1) Availability of access routes from local existing highways and railroads to the site which have any of the following characteristics:

(i) Such routes are relatively short and economical to construct as compared to access routes for other comparable siting options.

(ii) Federal condemnation is not required to acquire rights-of-way for the access routes.

(iii) Cuts, fills, tunnels, or bridges are not required.

(iv) Such routes are free of sharp curves or steep grades and are not likely to be affected by landslides or rock slides.

(v) Such routes bypass local cities and towns.

(2) Proximity to local highways and railroads that provide access to regional highways and railroads and are adequate to serve the repository without significant upgrading or reconstruction.

(3) Proximity to regional highways, mainline railroads, or inland waterways that provide access to the national transportation system.

(4) Availability of a regional railroad system with a minimum number of interchange points at which train crew and equipment changes would be required.

(5) Total projected life-cycle cost and risk for transportation of all wastes designated for the repository site which are significantly lower than those for comparable siting options, considering locations of present and potential sources of waste, interim storage facilities, and other repositories.

(6) Availability of regional and local carriers—truck, rail, and water—which have the capability and are willing to handle waste shipments to the repository.

(7) Absence of legal impediment with regard to compliance with Federal regulations for the transportation of waste in or through the affected State and adjoining States.

(8) Plans, procedures, and capabilities for response to radioactive waste transportation accidents in the affected State that are completed or being developed.

(9) A regional meteorological history indicating that significant transportation disruptions would not be routine seasonal occurrences.

(c) *Potentially Adverse Conditions.* (1) Access routes to existing local highways and railroads that are expensive to construct relative to comparable siting options.

(2) Terrain between the site and existing local highways and railroads such that steep grades, sharp switchbacks, rivers, lakes, landslides, rock slides, or potential sources of hazard to incoming waste shipments will be encountered along access routes to the site.

(3) Existing local highways and railroads that could require significant reconstruction or upgrading to provide adequate routes to the regional and national transportation system.

(4) Any local condition that could cause the transportation-related costs, environmental impacts, or risk to public health and safety from waste transportation operations to be significantly greater than those projected for other comparable siting options.

EASE AND COST OF SITING, CONSTRUCTION, OPERATION, AND CLOSURE

§ 960.5-2-8 Surface characteristics.

(a) *Qualifying Condition.* The site shall be located such that, considering the surface characteristics and conditions of the site and surrounding area, including surface-water systems and the terrain, the requirements specified in § 960.5-1(a)(3) can be met during repository siting, construction, operation, and closure.

(b) *Favorable Conditions.* (1) Generally flat terrain.

(2) Generally well-drained terrain.

(c) *Potentially Adverse Condition.* Surface characteristics that could lead to the flooding of surface or underground facilities by the occupancy and modification of flood plains, the failure of existing or planned man-made surface-water impoundments, or the failure of engineered components of the repository.

§ 960.5-2-9 Rock characteristics.

(a) *Qualifying Condition.* The site shall be located such that (1) the thickness and lateral extent and the characteristics and composition of the host rock will be suitable for accommodation of the underground facility; (2) repository construction, operation, and closure will not cause undue hazard to personnel; and (3) the requirements specified in § 960.5-1(a)(3) can be met.

(b) *Favorable Conditions.* (1) A host rock that is sufficiently thick and laterally extensive to allow significant flexibility in selecting the depth, configuration, and location of the underground facility.

(2) A host rock with characteristics that would require minimal or no artificial support for underground openings to ensure safe repository construction, operation, and closure.

(c) *Potentially Adverse Conditions.* (1) A host rock that is suitable for repository construction, operation, and closure, but is so thin or laterally restricted that little flexibility is available for selecting the depth, configuration, or location of an underground facility.

(2) In situ characteristics and conditions that could require engineering measures beyond reasonably available technology in the construction of the shafts and underground facility.

(3) Geomechanical properties that could necessitate extensive maintenance of the underground openings during repository operation and closure.

(4) Potential for such phenomena as thermally induced fracturing, the hydration and dehydration of mineral components, or other physical, chemical, or radiation-related phenomena that could lead to safety hazards or difficulty in retrieval during repository operation.

(5) Existing faults, shear zones, pressurized brine pockets, dissolution effects, or other stratigraphic or structural features that could compromise the safety of repository personnel because of water inflow or construction problems.

(d) *Disqualifying Condition.* The site shall be *disqualified* if the rock characteristics are such that the activities associated with repository construction, operation, or closure are predicted to cause significant risk to the health and safety of personnel, taking into account mitigating measures that use reasonably available technology.

§ 960.5-2-10 Hydrology.

(a) *Qualifying Condition.* The site shall be located such that the geohydrologic setting of the site will (1) be compatible with the activities required for repository construction, operation, and closure; (2) not compromise the intended functions of the shaft liners and seals; and (3) permit the requirements specified in § 960.5-1(a)(3) to be met.

(b) *Favorable Conditions.* (1) Absence of aquifers between the host rock and the land surface.

(2) Absence of surface-water systems that could potentially cause flooding of the repository.

(3) Availability of the water required for repository construction, operation, and closure.

(c) *Potentially Adverse Condition.* Ground-water conditions that could require complex engineering measures that are beyond reasonably available technology for repository construction, operation, and closure.

(d) *Disqualifying Condition.* A site shall be disqualified if, based on expected ground-water conditions, it is likely that engineering measures that are beyond reasonably available technology will be required for exploratory-shaft construction or for repository construction, operation, or closure.

§ 960.5-2-11 Tectonics.

(a) *Qualifying Conditions.* The site shall be located in a geologic setting in which any projected effects of expected tectonic phenomena or igneous activity on repository construction, operation, or closure will be such that the requirements specified in § 960.5-1(a)(3) can be met.

(b) *Favorable Condition.* The nature and rates of faulting, if any, within the geologic setting are such that the magnitude and intensity of the associated seismicity are significantly less than those generally allowable for the construction and operation of nuclear facilities.

(c) *Potentially Adverse Conditions.* (1) Evidence of active faulting within the geologic setting.

(2) Historical earthquakes or past man-induced seismicity that, if either were to recur, could produce ground motion at the site in excess of reasonable design limits.

(3) Evidence, based on correlations of earthquakes with tectonic processes and features, (e.g., faults) within the geologic setting, that the magnitude of earthquakes at the site during repository construction, operation, and closure may be larger then predicted from historical seismicity.

(d) *Disqualifying Condition.* A site shall be disqualified if, based on the expected nature and rates of fault movement or other ground motion, it is likely that engineering measures that are beyond reasonably available technology will be required for exploratory-shaft construction or for repository construction, operation, or closure.

APPENDIX I—NRC AND EPA REQUIREMENTS FOR POSTCLOSURE REPOSITORY PERFORMANCE

Under proposed 40 CFR Part 191, Subpart B—*Environmental Standards for Disposal,* § 191.13, "Containment Requirements", specifies that for 10,000 years after disposal (a) releases of radioactive materials to the accessible environment that are estimated to have more than one chance in 100 of occurring over a 10,000 year period ("reasonably foreseeable releases") shall be projected to be less than the quantities permitted by Table 2 of that regulation's Appendix; and (b) for "very unlikely releases" (i.e., those estimated to have between one chance in 100 and one chance in 10,000 of occurring over a 10,000 year period), the limits specified in Table 2 would be multiplied by 10. The basis for Table 2 is an upper limit on long term risks of 1,000 health effects over 10,000 years for a repository containing wastes generated from 100,000 metric tons of heavy metal of reactor fuel. For releases involving more than one radionuclide, the allowed release for each radionuclide is reduced to the fraction of its limit that insures that the overall limit on harm is not exceeded. Additionally, to provide confidence needed for compliance with the containment requirements specified above, § 191.14, "Assurance Requirements", specifies the disposal of radioactive waste in accordance with seven requirements, relating to prompt disposal of waste; selection and design of disposal systems to keep releases to the accessible environment as small as reasonably achievable; engineered and natural barriers; nonreliance on active institutional controls after closure; passive controls after closure; natural resource areas; and design of disposal systems to allow future recovery of wastes.

The guidelines will be revised as necessary after the adoption of final regulations by the EPA.

The implementation of 40 CFR Part 191, Subpart B is required by 10 CFR 60.112. 10 CFR 60.113 establishes minimum conditions to be met for engineered components and ground-water flow; specifically: (1) Containment of radioactive waste within the waste packages will be substantially complete for a period to be determined by the NRC taking into account the factors specified in 10 CFR 60.113(b) provided that such period shall be not less than 300 years nor more than 1,000 years after permanent closure of the geologic repository; (2) the release rate of any radionuclide from the engineered barrier system following the containment period shall not exceed one part in 100,000 per year of the inventory of that radionuclide calculated to be present at 1,000 years following permanent closure, or such other fraction of the inventory as may be approved or specified by the NRC, provided that this requirement does not apply to any radionuclide which is released at a rate less than 0.1% of the calculated total release rate limit. The calculated total release rate limit shall be taken to be one part in 100,000 per year of the inventory of radioactive waste originally emplaced in the underground facility that remains after 1,000 years of radioactive decay; and (3) the geologic repository shall be located so that pre-waste-emplacement ground-water travel time along the fastest path of likely radionuclide travel from the disturbed zone to the accessible environment shall be at least 1,000 years or such other travel time as may be approved or specified by the NRC.

The guidelines will be revised as necessary to ensure consistency with 10 CFR Part 60.

APPENDIX II—NRC AND EPA REQUIREMENTS FOR PRECLOSURE REPOSITORY PERFORMANCE

Under proposed 40 CFR Part 191, Subpart A—*Environmental Standards for Management and Storage*, Section 191.03, "Standards for Normal Operations", specifies: (1) That operations should be conducted so as to reduce exposure to members of the public to the extent reasonably achievable, taking into account technical, social, and economic considerations; and (2) that, except for variances permitted for unusual operations under Section 191.04 as an upper limit, normal operations shall be conducted in such a manner as to provide reasonable assurance that the combined annual dose equivalent to any member of the public due to: (i) operations covered by 40 CFR Part 190, (ii) planned discharges of radioactive material to the general environment from operations covered by this Subpart, and (iii) direct radiation from these operations; shall not exceed 25 millirems to the whole body, 75 millirems to the thyroid, or 25 millirems to any other organ.

The guidelines will be revised as necessary after the adoption of final regulations by the EPA.

The implementation of 40 CFR Part 191, Subpart A and 10 CFR Part 20 is required by 10 CFR 60.111. 10 CFR 60.111 also specifies requirements for waste retrieval, if necessary, including considerations of design, backfilling, and schedule. 10 CFR Part 20 establishes (a) exposure limits for operating personnel and (b) permissible concentrations of radionuclides in uncontrolled areas for air and water. The latter are generally less restrictive than 40 CFR 191, Subpart A, but may be limiting under certain conditions (i.e., if used as a maximum for short durations rather than annual averages).

The guidelines will be revised as necessary to ensure consistency with 10 CFR Part 60.

APPENDIX III—APPLICATION OF THE SYSTEM AND TECHNICAL GUIDELINES DURING THE SITING PROCESS

1. This appendix presents a table that specifies how the guidelines of Subparts C and D are to be applied at the principal decision points of the siting process. The decision points, as referenced in the table, are defined as follows:

"Potentially acceptable" means the decision point at which a site is identified as potentially acceptable.

"Nomination and recommendation" means the decision point at which a site is nominated as suitable for characterization or recommended as a candidate site for characterization.

"Repository site selection" means the decision point at which a site is recommended for the development of a repository.

2. The findings resulting from the application of a disqualifying condition for any particular guideline at a given decision point are denoted in the table by the numeral 1 or 2. The numerals 1 and 2 signify the types of findings that are required and are defined as follows:

"1" means *either* of the following:

(a) The evidence does *not* support a finding that the site is disqualified.

or

(b) The evidence supports a finding that the site is disqualified.

"2" means *either* of the following:

(a) The evidence supports a finding that the site is *not* disqualified on the basis of that evidence and is *not* likely to be disqualified.

or

(b) The evidence supports a finding that the site is disqualified or is likely to be disqualified.

3. The findings resulting from the application of a qualifying condition for any particular guideline at a given decision point are denoted in the table by the numeral 3 or 4. The numerals 3 and 4 signify the types of findings that are required and are defined as follows:

"3" means *either* of the following:

(a) The evidence does *not* support a finding that the site is *not* likely to meet the qualifying condition.

or

(b) The evidence supports a finding that the site is *not* likely to meet the qualifying condition, and therefore the site is disqualified.

"4" means *either* of the following:

(a) The evidence supports a finding that the site meets the qualifying condition and is likely to continue to meet the qualifying condition.

or

(b) The evidence supports a finding that the site cannot meet the qualifying condition or is unlikely to be able to meet the qualifying condition, and therefore the site is disqualified.

4. If performance assessments are used to substantiate any of the above findings, those assessments shall include estimates of the effects of uncertainties in data and modeling.

5. For both the disqualifying and qualifying conditions of any guideline, a higher finding (e.g., a "2" finding rather than "1") shall be made if there is sufficient evidence to support such a finding.

FINDINGS RESULTING FROM THE APPLICATION OF THE QUALIFYING AND DISQUALIFYING CONDITIONS OF THE TECHNICAL GUIDELINES AT MAJOR SITING DECISIONS

Section 960	Guideline	Condition	Siting decision		
			Potentially acceptable	Nomination and recommendation	Repository site selection
4-1(a)	System	Qualifying		3	4
4-2-1(a)	Geohydrology	do		3	4
4-2-1(d)	do	Disqualifying		1	2
4-2-2(a)	Geochemistry	Qualifying		3	4
4-2-3(a)	Rock Characteristics	do		3	4
4-2-4(a)	Climatic Changes	do		3	4
4-2-5(a)	Erosion	do		3	4
4-2-5(d)	do	Disqualifying	1	1	2
4-2-6(a)	Dissolution	Qualifying		3	4
4-2-6(d)	do	Disqualifying	1	1	2
4-2-7(a)	Tectonics	Qualifying		3	4
4-2-7(d)	do	Disqualifying	1	1	2
4-2-8-1(a)	Natural Resources	Qualifying		3	4
4-2-8-1(d)(1)	do	Disqualifying	1	1	2
4-2-8-1(d)(2)	do	do		1	2
4-2-8-2(a)	Site Ownership and Control	Qualifying		3	4
5-1(a)(1)	System	do		3	4
5-1(a)(2)	do	do		3	4
5-1(a)(3)	do	do		3	4
5-2-1(a)	Population Density and Distribution	do		3	4
5-2-1(d)(1)	do	Disqualifying	1	1	2
5-2-1(d)(2)	do	do	1	1	2
5-2-1(d)(3)	do	do		1	2
5-2-2(a)	Site Ownership and Control	Qualifying		3	4
5-2-3(a)	Meteorology	do		3	4
5-2-4(a)	Offsite Installations and Operations	do		3	4
5-2-4(d)	do	Disqualifying	1	1	2
5-2-5(a)	Environmental Quality	Qualifying		3	4
5-2-5(d)(1)	do	Disqualifying		1	2
5-2-5(d)(2)	do	do	1	1	2
5-2-5(d)(3)	do	do	1	1	2
5-2-6(a)	Socioeconomic Impacts	Qualifying		3	4
5-2-6(d)	do	Disqualifying		1	2
5-2-7(a)	Transportation	Qualifying		3	4

Findings Resulting From the Application of the Qualifying and Disqualifying Conditions of the Technical Guidelines at Major Siting Decisions—Continued

Section 960	Guideline	Condition	Siting decision		
			Potentially acceptable	Nomination and recommendation	Repository site selection
5-2-8(a)	Surface Characteristics	do		3	4
5-2-9(a)	Rock Characteristics	do		3	4
5-2-9(d)	do	Disqualifying		1	2
5-2-10(a)	Hydrology	Qualifying		3	4
5-2-10(d)	do	Disqualifying		1	2
5-2-11(a)	Tectonics	Qualifying		3	4
5-2-11(d)	do	Disqualifying	1	1	2

Appendix IV—Types of Information for the Nomination of Sites as Suitable for Characterization

The types of information specified below are those that the DOE expects will be included in the evidence used for evaluations and applications of the guidelines of Subparts C and D at the time of nomination of a site as suitable for characterization. The types of information listed under each guideline are considered to be the most significant for the evaluation of that guideline. However, the types of information listed under any particular guideline will be used, as necessary, for the evaluation of any other guideline. As stated in § 960.3-1-4-2, the DOE will use technically conservative assumptions or extrapolations of regional data, where necessary, to supplement this information. The information specified below will be supplemented with conceptual models, as appropriate, and analyses of uncertainties in the data.

Before site-characterization studies and related nongeologic data gathering activities, the evidence is not expected to provide precise information, but, rather, to provide a reasonable basis for assessing the merits or shortcomings of the site against the guidelines of Subparts C and D. Consequently, the types of information described below should be interpreted so as to accommodate differences among sites and differences in the information acquired before detailed studies.

The specific information required for the guideline applications set forth in Appendix III of this Part is expected to differ from site to site because of site-specific factors, both with regard to favorable and potentially adverse conditions and with regard to the sources and reliability of the information. The types of information specified in this appendix will be used except where the findings set forth in Appendix III of this part can be arrived at by reasonable alternative means or the information is not required for the particular site.

Section 960.4-2-1 Geohydrology.

Description of the geohydrologic setting of the site, in context with its geologic setting, in order to estimate the pre-waste-emplacement ground-water flow conditions. The types of information to support this description should include—

- Location and estimated hydraulic properties of aquifers, confining units, and aquitards.
- Potential areas and modes of recharge and discharge for aquifers.
- Regional potentiometric surfaces of aquifers.
- Likely flow paths from the repository to locations in the expected accessible environment, as based on regional data.
- Preliminary estimates of ground-water travel times along the likely flow paths from the repository to locations in the expected accessible environment.
- Current use of principal aquifers and State or local management plans for such use.

Section 960.4-2-2 Geochemistry.

Description of the geochemical and hydrochemical conditions of the host rock, of the surrounding geohydrologic units, and along likely ground-water paths to locations in the expected accessible environment, in order to estimate the potential for the migration of radionuclides. The types of information to support this description should include—

- Petrology of the rocks.
- Mineralogy of the rocks and general characteristics of fracture fillings.
- Geochemical and mechanical stability of the minerals under expected repository conditions.
- General characteristics of the ground-water chemistry (e.g., reducing/oxidizing conditions and the principal ions that may affect the waste package or radionuclide behavior).

- Geochemical properties of minerals as related to radionuclide transport.

Section 960.4-2-3 Rock characteristics.

Description of the geologic and geomechanical characteristics of the site, in context with the geologic setting, in order to estimate the capability of the host rock and surrounding rock units to accommodate the thermal, mechanical, chemical, and radiation stresses expected to be induced by repository construction, operation, and closure and by expected interactions among the waste, host rock, ground-water, and engineered components of the repository system. The types of information to support this description should include—

- Approximate geology and stratigraphy of the site, including the depth, thickness, and lateral extent of the host rock and surrounding rock units.
- Approximate structural framework of the rock units and any major discontinuities identified from core samples.
- Approximate thermal, mechanical, and thermomechanical properties of the rocks, with consideration of the effects of time, stress, temperature, dimensional scale, and any major identified structural discontinuities.
- Estimates of the magnitude and direction of in situ stress and of temperature in the host rock and surrounding rock units.

Section 960.4-2-4 Climatic changes.

Description of the climatic conditions of the site region, in context with global and regional patterns of climatic changes during the Quaternary Period, in order to project likely future changes in climate such that potential impacts on the repository can be estimated. The types of information to support this description should include—

- Expected climatic conditions and cycles, based on extrapolation of climates during the Quaternary Period.
- Geomorphology of the site region and evidence of changes due to climatic changes.
- Estimated effects of expected climatic cycles on the surface-water and the groundwater systems.

Section 960.4-2-5 Erosion.

Description of the structure, stratigraphy, and geomorphology of the site, in context with the geologic setting, in order to estimate the depth of waste emplacement and the likelihood for erosional processes to uncover the waste in less than one million years. The types of information to support this description should include—

- Depth, thickness, and lateral extent of the host rock and the overlying rock units.
- Lithology of the stratigraphic units above the host rock.
- Nature and rates of geomorphic processes during the Quaternary Period.

Section 960.4-2-6 Dissolution.

Description of the stratigraphy, structure, hydrology, and geochemistry of the site, in context with the geologic setting, to delineate the approximate limits of subsurface rock dissolution, if any. This description should include such information as the following:

- The stratigraphy of the site, including rock units largely comprised of water-soluble minerals.
- The approximate extent and configuration of features indicative of dissolution within the geologic setting.

Section 960.4-2-7 Tectonics.

Description of the tectonic setting of the site, in context with its geologic setting, in order to project the tectonic stability of the site over the next 10,000 years and to identify tectonic features and processes that could be reasonably expected to have a potentially adverse effect on the performance of the repository. The types of information to support this description should include—

- The tectonic history and framework of the geologic setting and the site.
- Quaternary faults in the geologic setting, including their length, displacement, and any information regarding the age of latest movement.
- Active tectonic processes, such as uplift, diapirism, tilting, subsidence, faulting, and volcanism.
- Estimate of the geothermal gradient.
- Estimate of the regional in situ stress field.
- The historical seismicity of the geologic setting.

Section 960.4-2-8 Human interference.

Section 960.4-2-8-1 Natural resources.

Description of the mineral and energy resources of the site, in order to project whether past or future exploration and recovery could have a potentially adverse effect on the performance of the repository. The types of information to support this description should include—

- Known occurrences of energy and mineral resources, including ground water.
- Estimates of the present and projected value of these resources compared with resources contained in other areas of similar size in the geologic setting.
- Past and present drilling and mining operations in the vicinity of the site.

Section 960.4-2-8-2 Site ownership and control.

Description of the ownership of land for the geologic-repository operations area and the controlled area, in order to evaluate whether the DOE can obtain ownership of, and control access to, the site. The types of information to support this description should include—

- Present land ownership.

Section 960.5-2-1 Population density and distribution.

Description of the population density and distribution of the site region, in order to identify highly populated areas and the nearest 1 mile by 1 mile area having a population greater than 1,000 persons. The types of information to support this description should include—

- The most-recent U.S. census, including population composition, distribution, and density.

Section 960.5-2-2 Site ownership and control.

Description of current ownership of land, including surface and subsurface mineral and water rights, in order to evaluate whether the DOE can obtain control of land within the projected restricted area. The types of information to support this description should include—

- Present land ownership.

Section 960.5-2-3 Meteorology.

The meteorological setting, as determined from the closest recording station, in order to project meteorological conditions during repository operation and closure and their potential effects on the transport of airborne emissions. The types of information to support this description should include—

- Wind and atmospheric-dispersion characteristics.
- Precipitation characteristics.
- Extreme weather phenomena.

Section 960.5-2-4 Offsite installations and operations.

Description of offsite installations and operations in the vicinity of the site in order to estimate their projected effects on repository construction, operation, or closure. The types of information to support this description should include—

- Location and nature of nearby industrial, transportation, and military installations and operations, including atomic energy defense activities.

Section 960.5-2-5 Environmental quality.

Description of environmental conditions in order to estimate potential impacts on public health and welfare and on environmental quality. The types of information to support this description should include—

- Applicable Federal, State, and local procedural and substantive environmental requirements.
- Existing air quality and trends.
- Existing surface-water and ground-water quality and quantity.
- Existing land resources and uses.
- Existing terrestrial and aquatic vegetation and wildlife.
- Location of any identified critical habitats for threatened or endangered species.
- Existing aesthetic characteristics.
- Location of components of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Land.
- Location of significant State or regional protected resource areas, such as State parks, wildlife areas, or historical areas.
- Location of significant Native American resources such as major Indian religious sites, or other sites of unique cultural interest.

Section 960.5-2-6 Socioeconomic impacts.

Description of the socioeconomic conditions of the site, including population density and distribution, economics, community services and facilities, social conditions, and fiscal and government structure, in order to estimate the impacts that might result from site characterization and from the development of a repository at that site. The types of information to support this description should include—

- Population composition, density, and distribution.
- Economic base and economic activity, including major sectors of local economy.
- Employment distribution and trends by economic sector.
- Resource usage.
- Community services and infrastructure, including trends in use and current capacity utilization.
- Housing supply and demand.
- Life style and indicators of the quality of life.
- Existing social problems.
- Sources of, and trends in, local government expenditures and revenues.

Section 960.5-2-7 Transportation.

Description of the transportation facilities in the vicinity of the site in order to evaluate existing or required access routes or improvements. The types of information to support this description should include—

- Estimates of the overall cost and risk of transporting waste to the site.

- Description of the road and rail network between the site and the nearest Interstate highways and major rail lines; also, description of the waterway system, if any.
- Analyses of the adequacy of the existing regional transportation network to handle waste shipments; the movement of supplies for repository construction, operation, and closure; removal of nonradioactive waste from the site; and the transportation of the labor force.
- Improvements anticipated to be required in the transportation network and their feasibility, cost, and environmental impacts.
- Compatibility of the required transportation network improvements with the local and regional transportation and land-use plans.
- Analysis of weather impacts on transportation.
- Analysis of emergency response requirements and capabilities related to transportation.

Section 960.5-2-8 Surface characteristics.

Description of the surface characteristics of the site, in order to evaluate whether repository construction, operation, and closure are feasible on the basis of site characteristics that influence those activities. The types of information to support this description should include—

- Topography of the site.
- Existing and planned surface bodies of water.
- Definition of areas of landslides and other potentially unstable slopes, poorly drained material, or materials of low bearing strength or of high liquefaction potential.

Section 960.5-2-9 Rock characteristics.

Description of the geologic and geomechanical characteristics of the site, in context with the geologic setting, in order to project the capability of the host rock and the surrounding rock units to provide the space required for the underground facility and safe underground openings during repository construction, operation, and closure. The types of information to support this description should include—

- Depth, thickness, and lateral extent of the host rock.
- Stratigraphic and structural features within the host rock and adjacent rock units.
- Thermal, mechanical, and thermomechanical properties and constructibility characteristics of the rocks, with consideration of the effects of time, stress, temperature, dimensional scale, and any major identified structural discontinuities.
- Fluid inclusions and gas content in the host rock.
- Estimates of the magnitude and direction of in situ stress and of temperature in the host rock.

Section 960.5-2-10 Hydrology.

Description of the hydrology of the site, in context with its geologic setting, in order to project compatibility with repository construction, operation, and closure. The types of information to support this description should include—

- Surface-water systems, including recharge and runoff characteristics, and potential for flooding of the repository.
- Nature and location of aquifers, confining units, and aquitards.
- Potentiometric surfaces of aquifers.
- Hydraulic properties of geohydrologic units.

Section 960.5-2-11 Tectonics.

Description of the tectonic setting of the site, in context with the regional setting, in order to estimate any expected effects of tectonic activity on repository construction, operation, or closure. The types of information to support this description should include—

- Quaternary faults.
- Active tectonic processes.
- Preliminary estimates of expected ground motion caused by the maximum potential earthquake within the geologic setting.

PART 961—STANDARD CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

Subpart A—General

Sec.
961.1 Purpose.
961.2 Applicability.
961.3 Definitions.
961.4 Deviations.
961.5 Federal agencies.

Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

961.11 Text of the contract.

AUTHORITY: Sec. 644, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7254) and sec. 302, Pub. L. 97-425, 96 Stat. 2257 (42 U.S.C. 10222).

SOURCE: 48 FR 16599, Apr. 18, 1983, unless otherwise noted.

Subpart A—General

§ 961.1 Purpose.

This part establishes the contractual terms and conditions under which the Department of Energy (DOE) will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel (SNF) and high-level radioactive waste (HLW) as provided in section 302 of the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425). Under the contract set forth in § 961.11 of this part, DOE will take title to, transport, and dispose of spent nuclear fuel and/or high-level radioactive waste delivered to DOE by those owners or generators of such fuel or waste who execute the contract. In addition, the contract will specify the fees owners and generators of SNF and/or HLW will pay for these services. All receipts, proceeds, and revenues realized by DOE under the contract will be deposited in the Nuclear Waste Fund, an account established by the Act in the U.S. Treasury. This fund will pay for DOE's radioactive waste disposal activities, the full costs of which will be borne by the owners and generators under contract with DOE for disposal services.

§ 961.2 Applicability.

This part applies to the Secretary of Energy or his designee and any person who owns or generates spent nuclear fuel or high-level radioactive waste, of domestic origin, generated in a civilian nuclear power reactor. If executed in a timely manner, the contract contained in this part will commit DOE to accept title to, transport, and dispose of such spent fuel and waste. In exchange for these services, the owners or generators of such fuel or waste shall pay fees specified in the contract which are intended to recover fully the costs of the disposal services to be furnished by DOE. The contract must be signed by June 30, 1983, or by the date on which such owner or generator commences generation of, or takes title to, such spent fuel or waste, whichever occurs later.

§ 961.3 Definitions.

For purposes of this part—

"Act" means the Nuclear Waste Policy Act of 1982, Pub. L. 97-425, 96 Stat. 2201 *et seq.*, 42 U.S.C. 10101 *et seq.*

"Contract" means the agreement set forth in § 961.11 of this part and any duly executed amendment or modification thereto.

"Generator" means any person who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of section 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134).

"Owner" means any person who has title to spent nuclear fuel or high-level radioactive waste.

"Purchaser" means any person, other than a Federal agency, who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of sections 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) or who has title to spent nuclear fuel or high level radioactive waste and who has executed a contract with DOE.

"Secretary" means the Secretary of Energy of his designee.

Other definitions relating to the subject matter of this rule are set forth in Article II of the contract which is contained in § 961.11. Text of the contract, of this part.

§ 961.4 Deviations.

Requests for authority to deviate from this part shall be submitted in writing to the Contracting Officer, who shall forward the request for approval to the Senior Procurement Official, Headquarters. Each request for deviation shall contain the following information:

(a) A statement of the deviation desired, including identification of the specific paragraph number(s) of the contract;

(b) A description of the intended effect of the deviation;

(c) The reason why the deviation is considered necessary or would be in the best interests of the Government;

(d) The name of the owner or generator seeking the deviation and nuclear power reactor(s) affected;

(e) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(f) A statement of the period of time for which the deviation is needed; and

(g) Any pertinent background information will contribute to a full understanding of the desired deviation.

§ 961.5 Federal agencies.

Federal agencies or departments requiring DOE's disposal services for SNF and/or HLW will be accommodated by a suitable interagency agreement reflecting, as appropriate, the terms and conditions set forth in the contract in § 961.11; *Provided, however*, that the fees to be paid by Federal agencies will be equivalent to the fees that would be paid under the contract.

Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

§ 961.11 Text of the contract.

The text of the standard contract for disposal of spent nuclear fuel and/or high/level radioactive waste follows:

U.S. DEPARTMENT OF ENERGY CONTRACT NO.

Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

THIS CONTRACT, entered into this — day of —— 19—, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the "Government"), represented by the UNITED STATES DEPARTMENT OF ENERGY (hereafter referred to as "DOE") and ————, (hereinafter referred to as the "Purchaser"), a corporation organized and existing under the laws of the State of ———— [add as applicable: "acting on behalf of itself and ———."].

Witnesseth that:

Whereas, the DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors in order to protect the public health and safety, and the environment; and

Whereas, the DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel; and

Whereas, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste; and

Whereas, the DOE is required to collect a full cost recovery fee from owners and generators delivering to the DOE such spent nuclear fuel and/or high level radioactive waste; and

Whereas, the DOE is authorized to enter into contracts for the permanent disposal of spent nuclear fuel and/or high-level radioactive waste of domestic origin in DOE facilities; and

Whereas, the Purchaser desires to obtain disposal services from DOE; and

Whereas, DOE is obligated and willing to provide such disposal services, under the terms and conditions hereinafter set forth; and

Whereas, this contract is made and entered into under the authority of the DOE Organization Act (Pub. L. 95-91, 42 U.S.C. 7101 *et seq.*) and the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425, 42 U.S.C. 10101 *et seq.*)

Now, therefore, the parties hereto do hereby agree as follows:

ARTICLE I—DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

1. The term "assigned three-month period" means the period that each Purchaser will be assigned by DOE, giving due consideration to the Purchaser's assignment preference, for purposes of reporting kilowatt hours generated by the Purchaser's nuclear power reactor and for establishing fees due and payable to DOE.

2. The term "cask" means a container for shipping spent nuclear fuel and/or high-level radioactive waste which meets all applicable regulatory requirements.

3. The term "civilian nuclear power reactor" means a civilian nuclear powerplant required to be licensed under Sections 103 or 104(b) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2133, 2134(b)).

4. The term "Commission" means the United states Nuclear Regulatory Commission.

5. The term "contract" means this agreement and any duly executed amendment or modification thereto.

6. The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly disignated Contracting Officer of the DOE; and the term includes, except as otherwise provided

in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

7. The term "delivery" means the transfer of custody, f.o.b. carrier, of spent nuclear fuel or high-level radioactive waste from Purchaser to DOE at the Purchaser's civilian nuclear power reactor or such other domestic site as may be designated by the Purchaser and approved by DOE.

8. The term "disposal" means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive waste with no foreseeable intent of recovery, whether or not such emplacement permits recovery of such waste.

9. The term "DOE" means the United States Department of Energy or any duly authorized representative thereof, including the Contracting Officer.

10. The term "DOE facility" means a facility operated by or on behalf of DOE for the purpose of disposing of spent nuclear fuel and/or high-level radioactive waste, or such other facility(ies) to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility.

11. The term "full cost recovery," means the recoupment by DOE, through Purchaser fees and any interest earned, of all direct costs, indirect costs, and all allocable overhead, consistent with generally accepted accounting principles consistently applied, of providing disposal services and conducting activities authorized by the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425). As used herein, the term "cost" includes the application of Nuclear Waste Fund moneys for those uses expressly set forth in section 302 (d) and (e) of the said Act and all other uses specified in the Act.

12. The term "high-level radioactive waste" (HLW) means—

(a) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(b) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

13. The term "net kilowatt hours generated" means the gross electrical output produced by a civilian nuclear power reactor measured at the output terminals of the turbine generator minus the normal onsite nuclear station service loads during the time electricity is being generated. Instructions to Annex A to Appendix G provide further guidance on the calculation procedures for reporting purposes. The term "net kilowatt hours generated" is also referred to as "net electricity generated".

14. The term "metric tons uranium" means that measure of weight, equivalent to 2,204.6 pounds of uranium and other fissile and fertile material that are loaded into a reactor core as fresh fuel.

15. The term "Purchaser's site" means the location of Purchaser's civilian nuclear power reactor or such other location as the Purchaser may designate.

16. The term "quarterly Treasury rate" means the current value of funds rate as specified by the Treasury Fiscal Requirements Manual, Volume 1, Part 6, section 8020.20. This rate is published quarterly in the FEDERAL REGISTER prior to the beginning of the affected quarter.

17. The term "shipping lot" means a specified quantity of spent nuclear fuel or high-level radioactive waste designated by Purchaser for delivery to DOE beginning on a specified date.

18. The term "spent nuclear fuel" (SNF) means fuel that has been withdrawn from a nuclear reactor following irradiation, the consistituent elements of which have not been separated by reprocessing.

19. The term "spent nuclear fuel and high-level radioactive waste of domestic origin" means irradiated fuel material used, and radioactive wastes resulting from such use, in nuclear power reactors located only in the United States.

20. The term "year" means the period which begins on October 1 and ends on September 30.

ARTICLE II—SCOPE

This contract applies to the delivery by Purchaser to DOE of SNF and/or HLW of domestic origin from civilian nuclear power reactors, acceptance of title by DOE to such SNF and/or HLW, subsequent transportation, and disposal of such SNF and/or HLW and, with respect to such material, establishes the fees to be paid by the Purchaser for the services to be rendered hereunder by DOE. The SNF and/or HLW shall be specified in a delivery commitment schedule as provided in Article V below. The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF and/or HLW from the civilian nuclear power reactors specified in Appendix A, annexed hereto and made a part hereof, has been disposed of.

ARTICLE III—TERM

The term of this contract shall be from the date of execution until such time as DOE has accepted, transported from the Purchaser's site(s) and disposed of all SNF and/or HLW of domestic origin from the civilian nuclear power reactor(s) specified in Appendix A.

Article IV—Responsibilities of the Parties

A. Purchaser's Responsibilities

1. *Discharge Information.*

(a) On an annual basis, commencing October 1, 1983, the Purchaser shall provide DOE with information on actual discharges to date and projected discharges for the next ten (10) years in the form and content set forth in Appendix B, annexed hereto and made a part hereof. The information to be provided will include estimates and projections and will not be Purchaser's firm commitment with respect to discharges or deliveries.

(b) No later than October 1, 1983, the Purchaser shall provide DOE with specific information on:

(1) Total spent nuclear fuel inventory as of April 7, 1983;

(2) Total number of fuel assemblies removed from the particular reactor core prior to 12:00 a.m. April 7, 1983 for which there are plans for reinsertion in the core, indicating the current planned dates for reinsertion in the core. Estimates of the burned and unburned portion of each individual assembly are to be provided.

(c) In the event that the Purchaser fails to provide the annual forecast in the form and content required by DOE, DOE may, in its sole discretion, require a rescheduling of any delivery commitment schedule then in effect.

2. *Preparation for Transportation.*

(a) The Purchaser shall arrange for, and provide, all preparation, packaging, required inspections, and loading activities necessary for the transportation of SNF and/or HLW to the DOE facility. The Purchaser shall notify DOE of such activities sixty (60) days prior to the commencement of such activities. The preparatory activities by the Purchaser shall be made in accordance with all applicable laws and regulations relating to the Purchaser's responsibilities hereunder. DOE may designate a representative to observe the preparatory activities conducted by the Purchaser at the Purchaser's site, and the Purchaser shall afford access to such representative.

(b) Except as otherwise agreed to by DOE, the Purchaser shall advise DOE, in writing as specified in Appendix F, annexed hereto and made a part hereof, as to the description of the material in each shipping lot sixty (60) days prior to scheduled DOE transportation of that shipping lot.

(c) The Purchaser shall be responsible for incidental maintenance, protection and preservation of any and all shipping casks furnished to the Purchaser by DOE for the performance of this contract. The Purchaser shall be liable for any loss of or damage to such DOE-furnished property, and for expenses incidental to such loss or damage while such casks are in the possession and control of the Purchaser except as otherwise provided for hereunder. Routine cask maintenance, such as scheduled overhauls, shall not be the responsibility of the Purchaser.

B. DOE Responsibilities

1. DOE shall accept title to all SNF and/or HLW, of domestic origin, generated by the civilian nuclear power reactor(s) specified in Appendix A, provide subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract.

2. DOE shall arrange for, and provide, a cask(s) and all necessary transportation of the SNF and/or HLW from the Purchaser's site to the DOE facility. Such cask(s) shall be furnished sufficiently in advance to accommodate scheduled deliveries. Such cask(s) shall be suitable for use at the Purchaser's site, meet applicable regulatory requirements, and be accompanied by pertinent information including, but not limited to, the following:

(a) Written procedures for cask handling and loading, including specifications on Purchaser-furnished cannisters for containment of failed fuel;

(b) Training for Purchaser's personnel in cask handling and loading, as may be necessary;

(c) Technical information, special tools, equipment, lifting trunnions, spare parts and consumables needed to use and perform incidental maintenance on the cask(s); and

(d) Sufficient documentation on the equipment supplied by DOE.

3. DOE may fulfill any of its obligations, or take any action, under this contract either directly or through contractors.

4. DOE shall annually provide to the Purchaser pertinent information on the waste disposal program including information on cost projections, project plans and progress reports.

5. (a) Beginning on April 1, 1991, DOE shall issue an annual acceptance priority ranking for receipt of SNF and/or HLW at the DOE repository. This priority ranking shall be based on the age of SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. The oldest fuel or waste will have the highest priority for acceptance, except as provided in paragraphs B and D of Article V and paragraph B.3 of Article VI hereof.

(b) Beginning not later than July 1, 1987 DOE shall issue an annual capacity repor for planning purposes. This report shall se forth the projected annual receiving capacity for the DOE facility(ies) and the annual acceptance ranking relating to DOE contracts for the disposal of SNF and/or HLW including, to the extent available, capacity information for ten (10) years following the projected commencement of operation of the initial DOE facility.

ARTICLE V—DELIVERY OF SNF AND/OR HLW

A. Description of SNF and HLW

The Purchaser shall deliver to DOE and DOE shall, as provided in this contract, accept the SNF and/or HLW which is described in accordance with Article VI.A. of this contract, for disposal thereof.

B. Delivery Commitment Schedule

1. Delivery commitment schedule(s), in the form set forth in Appendix C annexed hereto and made a part hereof, for delivery of SNF and/or HLW shall be furnished to DOE by Purchaser. After DOE has issued its proposed acceptance priority ranking, as described in paragraph B.5 of Article IV hereof, beginning January 1, 1992 the Purchaser shall submit to DOE the delivery commitment schedule(s) which shall identify all SNF and/or HLW the Purchaser wishes to deliver to DOE beginning sixty-three (63) months thereafter. DOE shall approve or disapprove such schedules within three (3) months after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval.

2. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s). Purchaser shall have the right to adjust the quantities of SNF and/or HLW plus or minus (±) twenty percent (20%), and the delivery schedule up to two (2) months, until the submission of the final delivery schedule.

C. Final Delivery Schedule

Final delivery schedule(s), in the form set forth in Appendix D, annexed hereto and made a part hereof, for delivery of SNF and/or HLW covered by an approved delivery commitment schedule(s) shall be furnished to DOE by Purchaser. The Purchaser shall submit to DOE final delivery schedules not less than twelve (12) months prior to the delivery date specified therein. DOE shall approve or disapprove a final delivery schedule within forty-five (45) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s).

D. Emergency Deliveries

Emergency deliveries of SNF and/or HLW may be accepted by DOE before the date provided in the delivery commitment schedule upon prior written approval by DOE.

E. Exchanges

Purchaser shall have the right to determine which SNF and/or HLW is delivered to DOE; *provided, however,* that Purchaser shall comply with the requirements of this contract. Purchaser shall have the right to exchange approved delivery commitment schedules with parties to other contracts with DOE for disposal of SNF and/or HLW; *provided, however,* that DOE shall, in advance, have the right to approve or disapprove, in its sole discretion, any such exchanges. Not less than six (6) months prior to the delivery date specified in the Purchaser's approved delivery commitment schedule, the Purchaser shall submit to DOE an exchange request, which states the priority rankings of both the Purchaser hereunder and any other Purchaser with whom the exchange of approved delivery commitment schedules is proposed. DOE shall approve or disapprove the proposed exchange within thirty (30) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval.

ARTICLE VI—CRITERIA FOR DISPOSAL

A. General Requirements

1. *Criteria.*

(a) Except as otherwise provided in this contract, DOE shall accept hereunder only such SNF and/or HLW which meets the General Specifications for such fuel and waste as set forth in Appendix E, annexed hereto and made a part hereof.

(b) Purchaser shall accurately classify SNF and/or HLW prior to delivery in accordance with paragraphs B and D of Appendix E.

2. *Procedures.*

(a) Purchaser shall provide to DOE a detailed description of the SNF and/or HLW to be delivered hereunder in the form and content as set forth in Appendix F, annexed hereto and made a part hereof. Purchaser shall promptly advise DOE of nay changes in said SNF and/or HLW as soon as they become known to the purchaser.

(b) DOE's obligation for disposing of SNF under this contract also extends to other than standard fuel; however, for any SNF which has been designated by the Purchaser as other than standard fuel, as that term is defined in Appendix E, the Purchaser shall obtain delivery and procedure confirmation from DOE prior to delivery. DOE shall advise Purchaser within sixty (60) days after receipt of such confirmation request as to the technical feasibility of disposing of such fuel on the currently agreed to schedule and any schedule adjustment for such services.

B. Acceptance Procedures

1. *Acceptance Priority Ranking.*

Delivery commitment schedules for SNF and/or HLW may require the disposal or more material than the annual capacity of the DOE disposal facility (or facilities) can accommodate. The following acceptance priority ranking will be utilized:

(a) Except as may be provided for in subparagraph (b) below and Article V.D. of this contract, acceptance priority shall be based upon the age of the SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. DOE will first accept from Purchaser the oldest SNF and/or HLW for disposal in the DOE facility, except as otherwise provided for in paragraphs B and D of Article V.

(b) Notwithstanding the age of the SNF and/or HLW, priority may be accorded any SNF and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.

2. *Verification of SNF and/or HLW.*

During cask loading and prior to acceptance by DOE for transportation to the DOE facility, the SNF and/or HLW description of the shipping lot shall be subject to verification by DOE. To the extent the SNF and/or HLW is consistent with the description submitted and approved, in accordance with Appendices E and F, DOE agrees to accept such SNF and/or HLW for disposal when DOE has verified the SNF and/or HLW description, determined the material is properly loaded, packaged, marked, labeled and ready for transportation, and has taken custody, as evidenced in writing, of the material at the Purchaser's site, f.o.b. carrier. A properly executed off-site radioactive shipment record describing cask contents must be prepared by the Purchaser along with a signed certification which states: "This is to certify that the above-named materials are properly described, classified, packaged, marked and labeled and are in proper condition for transfer according to the applicable regulations of the U. S. Department of Transportation."

3. *Improperly described SNF and/or HLW.*

(a) *Prior to Acceptance*—If SNF and/or HLW is determined by DOE to be improperly described prior to acceptance by DOE at the Purchaser's site, DOE shall promptly notify the Purchaser in writing of such determination. DOE reserves the right, in its sole discretion, to refuse to accept such SNF and/or HLW until the SNF and/or HLW has been properly described. The Purchaser shall not transfer such SNF and/or HLW to DOE unless DOE agrees to accept such SNF and/or HLW under such other arrangements as may be agreed to, in writing, by the parties.

(b) *After Acceptance*—If subsequent to its acceptance DOE finds that such SNF and/or HLW is improperly described, DOE shall promptly notify the Purchaser, in writing, of such finding. In the event of such notification, Purchaser shall provide DOE with a proper designation within thirty (30) days. In the event of a failure by the Purchaser to provide such proper designation, DOE may hold in abeyance any and all deliveries scheduled hereunder.

Article VII—Title

Title to all SNF and/or HLW accepted by DOE for disposal shall pass to DOE at the Purchaser's site as provided for in Article VI hereof. DOE shall be solely repsonsible for control of all material upon passage of title. DOE shall have the right to dispose as it sees fit of any SNF and/or HLW to which it has taken title. The Purchaser shall have no claim against DOE or the Government with respect to such SNF or HLW nor shall DOE or the Government be obligated to compensate the Purchaser for such material.

Article VIII—Fees and Terms of Payment

A. Fees

1. Effective April 7, 1983, Purchaser shall be charged a fee in the amount of 1.0 mill per net kilowatt hour generated (1M/KWH) by Purchaser's nuclear power reactor(s). The said fee shall be paid as specified in paragraph B of this Article VIII.

2. For SNF, or solidified high-level radioactive waste derived from SNF, which fuel was used to generate electricity in a civilian nuclear power reactor prior to April 7, 1983, a one-time fee will be assessed by applying industry-wide average dollar per kilogram charges to four (4) distinct ranges of fuel burnup so that the integrated cost across all discharged (i.e. spent) fuel is equivalent to

an industry-wide average charge of 1.0 mill per kilowatt-hour. For purposes of this contract, discharged nuclear fuel is that fuel removed from the reactor core with no plans for reinsertion. In the event that any such fuel withdrawn with plans for reinsertion is not reinserted, then the applicable fee for such fuel shall be calculated as set forth in this paragraph 2. The categories of spent nuclear fuel burnup and the fee schedule are listed below:

[In 1982 dollars]

Nuclear spent fuel burnup range	Dollars per kilogram
0 to 5,000 MWDT/MTU	$80.00
5,000 to 10,000 MWDT/MTU	142.00
10,000 to 20,000 MWDT/MTU	162.00
Over 20,000 MWDT/MTU	184.00

This fee shall not be subject to adjustment, and the payment thereof by the Purchaser shall be made to DOE as specified in paragraph B of this Article VIII.

3. For in-core fuel as of April 7, 1983, that portion of the fuel burned through April 6, 1983 shall be subject to the one-time fee as calculated in accordance with the following methodology: [a] determine the total weight in kilograms of unranium loaded initially in the particular core; [b] determine the total megawatt-days (thermal) which have been generated by all of the fuel assemblies in the said core as of 12:00 A.M. April 7, 1983; [c] divide the megawatt-days (thermal) generated in the said core by the total metric tons of initially loaded uranium in that core and multiply the quotient by the conversion factor 0.0078 to obtain a value in dollars per kilogram; and [d] multiply the dollars per kilogram value by the kilograms determined in [a] above to derive the dollar charge for the one-time fee to be paid for the specified in-core fuel as of 12:00 A.M. April 7, 1983. For purposes of this contract, in-core fuel is that fuel in the reactor core as of the date specified, plus any fuel removed from the reactor with plans for reinsertion. That portion of such fuel unburned as of 12:00 A.M. April 7, 1983 shall be subject to the 1.0 mill per kilowatt-hour charge.

4. DOE will annually review the adequacy of the fees and adjust the 1M/KWH fee, if necessary, in order to assure full cost recovery by the Government. Any proposed adjustment to the said fee will be transmitted to Congress and shall be effective after a period of ninety (90) days of continuous session has elapsed following receipt of such transmittal unless either House of Congress adopts a resolution disapproving the proposed adjustment. Any adjustment to the 1M/KWH fee under paragraph A.1. of this Article VIII shall be prospective.

B. Payment

1. For net electricity generated by the Purchaser's civilian nuclear power reactor(s) on or after April 7, 1983, fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of business on the last business day of the month following the end of each assigned 3-month period. The first payment shall be due on July 31, 1983, for the period April 7, 1983, to June 30, 1983. [add as applicable: A one-time adjustment period payment shall be due on ____, for the period ____ to ____]. The assigned 3-month period, for purposes of payment and reporting of net kilowatt hours generated shall begin ____.

2. For SNF discharged prior to April 7, 1983, and for in-core burned fuel as of 12:00 A.M. April 7, 1983, the Purchaser shall, within two (2) years of contract execution, select one of the following fee payment options:

(a) *Option 1*—The Purchaser's financial obligation for said fuel shall be prorated evenly over forty (40) quarters and will consist of the fee plus interest on the outstanding fee balance. The interest from April 7, 1983, to date of the first payment is to be calculated based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period. Beginning with the first payment, interest is to be calculated on Purchaser's financial obligation plus accrued interest, at the ten-year Treasury note rate in effect on the date of the first payment. In no event shall the end of the forty (40) quarters extend beyond the first scheduled delivery date as reflected in the DOE-approved delivery commitment schedule. All payments shall be made concurrently with the assigned three month period payments. At any time prior to the end of the forty (40) quarters, Purchaser may, without penalty, make a full or partial lump sum payment at any of the assigned three month period payment dates. Subsequent quarterly payments will be appropriately reduced to reflect the reduction in the remaining balance in the fee due and payable. The remaining financial obligation, if any, will be subject to interest at the same ten-year Treasury note rate over the remainder of the ten year period.

(b) *Option 2*—The Purchaser's financial obligation shall be paid in the form of a single payment anytime prior to the first delivery, as reflected in the DOE approved delivery commitment schedule, and shall consist of the fee plus interest on the outstanding fee balance. Interest is to be calculated from April 7, 1983, to the date of the payment based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period until payment.

(c) *Option 3*—The Purchaser's financial obligation shall be paid prior to June 30, 1985, or prior to two (2) years after contract execution, whichever comes later, in the form of a single payment and shall consist of all outstanding fees for SNF and in-core fuel burned prior to April 7, 1983. Under this option, no interest shall be due to DOE from April 7, 1983, to the date of full payment on the outstanding fee balance.

3. *Method of Payment:*

(a) Payments shall be made by wire transfer, in accordance with instructions specified by DOE in Appendix G, annexed hereto and made a part hereof, and must be received within the time periods specified in paragraph B.1. of this Article VIII.

(b) The Purchaser will complete a Standard Remittance Advice, as set forth in Appendix G, for each assigned three month period payment, and mail it postmarked no later than the last business day of the month following each assigned three month period to Department of Energy, Office of Controller, Cash Management Division, Box 500, Room D-208, Germantown, Maryland 20874.

4. Any fees not paid on a timely basis or underpaid because of miscalculation will be subject to interest as specified in paragraph C of this Article VIII.

C. Interest on Late Fees

1. DOE will notify the Purchaser of amounts due only when unpaid or underpaid by the dates specified in paragraph B above. Interest will be levied according to the following formula:

Interest = Unpaid balance due to DOE for assigned three month period × Quarterly Treasury rate plus six percent (6%) × Number of months late including month of payment (fractions rounded up to whole months) ÷ 12

2. Interest is payable at any time prior to the due date for the subsequent assigned three month period fee payment. Nonpayment by the end of the subsequent assigned three month period will result in compounding of interest due. Purchaser shall complete a Standard Remittance Advice of interest payments.

3. Following the assessment of a late fee by DOE, payments will be applied against accrued interest first and the principal thereafter.

D. Effect of Payment

Upon payment of all applicable fees, interest and penalties on upaid or underpaid amounts, the Purchaser shall have no further financial obligation to DOE for the disposal of the accepted SNF and/or HLW.

E. Audit

1. The DOE or its representative shall have the right to perform any audits or inspections necessary to determine whether Purchaser is paying the correct amount under the fee schedule and interest provisions set forth in paragraphs A, B and C above.

2. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

3. The Purchaser shall furnish DOE with such records, reports and data as may be necessary for the determination of quantities delivered hereunder and for final settlement of amounts due under this contract and shall retain and make available to DOE and its authorized representative examination at all reasonable times such records, reports and data for a period of three (3) years from the completion of delivery of all material under this contract.

ARTICLE IX—DELAYS

A. Unavoidable Delays by Purchaser or DOE

Neither the Government nor the Purchaser shall be liable under this contract for damages caused by failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather—cause delay in scheduled delivery, acceptance or transport of SNF and/or HLW, the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.

B. Avoidable Delays by Purchaser or DOE

In the event of any delay in the delivery, acceptance or transport of SNF and/or HLW to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

ARTICLE X—SUSPENSION

A. In addition to any other rights DOE may have hereunder, DOE reserves the right, at no cost to the Government, to suspend this contract or any portion thereof upon written notice to the Purchaser within ninety (90) days of the Purchaser's failure to perform its obligations hereunder, and the Purchaser's failure to take corrective action within thirty (30) days after written notice of such failure to perform as provided above, unless such failure shall arise from causes beyond the control and without the fault or negligence of the Purchaser, its contractors or agents. However, the Purchaser's obligation to pay fees required hereunder shall continue unaffected by any suspension. Any such suspension shall be rescinded if and when DOE determines that Purchaser has completed corrective action.

B. The DOE reserves the right to suspend any scheduled deliveries in the event that a national emergency requires that priority be given to Government programs to the exclusion of the work under this contract. In the event of such a suspension by the Government, the DOE shall refund that portion of payments representing services not delivered as determined by the Contracting Officer to be an equitable adjustment. Any disagreement arising from the refund payment, if any, shall be resolved as provided in the clause of this contract, entitled "DISPUTES."

ARTICLE XI—REMEDIES

Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law.

ARTICLE XII—NOTICES

All notices and communications between the parties under this contract (except notices published in the FEDERAL REGISTER) shall be in writing and shall be sent to the following addressees:

To DOE: ______________________
____
____

To the Purchaser: ________________
____
____

However, the parties may change the addresses or addressees for such notices or communications without formal modification to this contract; *provided, however*, that notice of such changes shall be given by registered mail.

ARTICLE XIII—REPRESENTATION CONCERNING NUCLEAR HAZARDS INDEMNITY

A. DOE represents that it will include in its contract(s) for the operation of any DOE facility an indemnity agreement based upon Section 170(d) of the Atomic Energy Act of 1954, as amended, a copy of which agreement shall be furnished to the Purchaser; that under said agreement, DOE shall have agreed to indemnify the contractor and other persons indemnified against claims for public liability (as defined in said Act) arising out of or in connection with contractual activities; that the indemnity shall apply to covered nuclear incidents which (1) take place at a contract location; or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a contract location. The obligation of DOE to indemnify shall be subject to the conditions stated in the indemnity agreement.

B. The provisions of this Article XIII shall continue beyond the term of this contract.

ARTICLE XIV—ASSIGNMENT

The rights and duties of the Purchaser may be assignable with transfer of title to the SNF and/or HLW involved; *provided, however*, that notice of any such transfer shall be made to DOE within ninety (90) days of transfer.

ARTICLE XV—AMENDMENTS

The provisions of this contract has been developed in the light of uncertainties necessarily attendant upon long-term contracts. Accordingly, at the request of either DOE or Purchaser, the parties will negotiate and, to the extent mutually agreed, amend this contract as the parties may deem to be necessary or proper to reflect their respective interests; *provided, however*, that any such amendment shall be consistent with the DOE final rule published in the FEDERAL REGISTER on April 18, 1983 entitled, "Standard Contract for Disposal or SNF and/or HLW", as the same may be amended from time to time.

ARTICLE XVI—DISPUTES

A. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Purchaser. The decision of the Contracting Officer shall be final and conclusive unless within ninety (90) days from the date of receipt of such copy, the Purchaser mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the DOE Board of Contract Appeals (Board). The decision of the Board shall be final and conclusive unless determined by a court of competent jursidiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Purchaser shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

B. For Purchaser claims of more than $50,000, the Purchaser shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Purchaser's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable. The certification shall be executed by the Purchaser if an individual. When the Purchaser is not an individual, the certification shall be executed by a senior company official in charge at the Purchaser's plant or location involved, or by an officer or general partner of the Purchaser having overall responsibility for the conduct of the Purchaser's affairs.

C. For Purchaser claims of $50,000 or less, the Contracting Officer must render a decision within sixty (60) days. For Purchaser claims in excess of $50,000, the Contracting Officer must decide the claim within sixty (60) days or notify the Purchaser of the date when the decision will be made.

D. This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph A above; *provided, however,* that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

ARTICLE XVII—OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE XVIII—COVENANT AGAINST CONTINGENT FEES

The Purchaser warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Purchaser for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to increase the contract price or consideration, or otherwise recover, the full amount of such commission, brokerage, or contingent fee.

ARTICLE XIX—EXAMINATION OF RECORDS

The Purchaser agrees that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Purchaser involving transactions related to this contract until the expiration of three years after final payment under this contract.

ARTICLE XX—PERMITS

The Government and the Purchaser shall procure all necessary permits or licenses (including any special nuclear material licenses) and comply with all applicable laws and regulations of the United States, States and municipalities necessary to execute their respective responsibilities and obligations under this contract.

ARTICLE XXI—RIGHTS IN TECHNICAL DATA

A. Definitions.

1. "Technical data" means recorded information regardless of form or characteristic, of a specific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design-type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

2. "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(a) Are not generally known or available from other sources without obligation concerning their confidentiality;

(b) Have not been made available by the owner to others without obligation concerning its confidentiality; and

(c) Are not already available to the Government without obligation concerning their confidentiality.

3. "Contract data" means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, or technical data actually delivered in connection with the contract.

4. "Unlimited rights" means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

B. Allocation of Rights.

1. The Government shall have:

(a) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data properly marked as authorized by this clause;

(b) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE concerning the proprietary nature of the markings, the Purchaser fails to respond thereto within 60 days or fails to substantiate the proprietary nature of the markings. In either case, DOE will notify the Purchaser of the action taken;

(c) No rights under this contract in any technical data which are not contract data.

2. Subject to the foregoing provisions of this rights in technical data clause, the Purchaser shall have the right to mark proprietary data it furnishes under the contract with the following legend and no other, the terms of which shall be binding on the Government:

LIMITED RIGHTS LEGEND

This "proprietary data," furnished under "Contract No. ——" with the U.S. Department of Energy may be duplicated and used by the Government with the express limitations that the "proprietary data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Purchaser, except that further disclosure or use may be made solely for the following purposes:

(a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not be further disclosed;

(b) This "proprietary data" may be disclosed to contractors participating in the Government's program of which this contract is a part, for information or use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or

(c) This "proprietary data" may be used by the Government or others on its behalf for emergency work under the restriction that the "proprietary data" be retained in confidence and not be further disclosed. This legend shall be marked on any reproduction of this data in whole or in part.

3. In the event that proprietary data of a third party, with respect to which the Purchaser is subject to restrictions on use or disclosure, is furnished with the Limited Rights Legend above, Purchaser shall secure the agreement of such third party to the rights of the Government as set forth in the Limited Rights Legend. DOE shall upon request furnish the names of those contractors to which proprietary data has been disclosed.

ARTICLE XXII—ENTIRE CONTRACT

A. This contract, which consists of Articles I through XXII and Appendices A through G, annexed hereto and made a part hereof, contains the entire agreement between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party. No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract.

B. Nothing in this contract is intended to affect in any way the contractual obligation of any other persons with whom the Purchaser may have contracted with respect to assuming some or all disposal costs or to accept title to SNF and/or HLW.

C. Appendices

A. Nuclear Power Reactor(s) or Other Facilities Covered
B. Discharge Information (Ten Year; Annual)
C. Delivery Commitment Schedule
D. Final Delivery Schedule
E. General Specifications
F. Detailed Description of Purchaser's Fuel
G. Standard Remittance Advice For Payment of Fees

In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

United States of America
United States Department of Energy
By: ————————————
(Contracting Officer)

Witnesses as to Execution on Behalf of Purchaser

(Name)————————————
(Address) ————————————
(Name)————————————
(Address) ————————————
(Purchaser's Company Name)
By: ————————————
Title:————————————

I, (*Name*), certify that I am the (*Title*) of the corporation named as Purchaser herein; that (*Name*) who signed this document on behalf of the Purchaser was then (*Title*) of said corporation; that said document was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

In Witness Whereof, I have hereunto affixed my hand and the seal of said corporation this —— day of ——, 1983

(Corporate Seal)
(Signature) ————————————

APPENDIX A

Nuclear Power Reactor(s) or Other Facilities Covered

Purchaser ————————————
Contract Number/Date ——/—— ————
Reactor/Facility Name ————————
Location:
Street ————————————
City ————————————
County/State ———/ ————————
Zip Code ————————————
Capacity (MWE)—Gross ————————
Reactor Type:
BWR ☐
PWR ☐
Other (Identify)————————————
Facility Description ————————
Date of Commencement of Operation ——
(actual or estimated)
NRC License #: ————————————
By Purchaser:
Signatue ————————————
Title ————————————
Date ————————————

APPENDIX B

Ten Year Discharge Forecast

To be used for DOE planning purposes only and does not represent a firm commitment by Purchaser.

Purchaser ————————————
Contract Number/Date ———/ ————
Reactor/Facility Name ————————
Location:
Street ————————————
City ————————————
County/State ———/ ————————
Zip Code
Type: BWR ☐
PWR ☐
Other (Identify)————————————

	1	2	3	4	5	6	7	8	9	10	10 yr total
Discharge date—mo/yr (or refueling shut down date)											
Metric tons											
—initial											
—discharged											
Number of assemblies discharged (per cycle)											

By Purchaser:
Signature ————————————
Title ————————————
Date ————————————

APPENDIX B (Enclosure 1)

Actual Discharges

Purchaser ————————————
Contract Number/Date ————————
Reactor/Facility Name ————————
Location:
Street ————————————
City ————————————
County/State ————————————
Zip Code ————————————
Type:
BWR ☐
PWR ☐
Other (Identify)————————————
Refueling Shutdown Date ————————
Metric Tons Uranium (Initial/Discharged);
Initial ————————————
Discharged ————————————
Number of Assemblies Discharged: ———

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:
Signature ————————————
Title ————————————
Date ————————————

APPENDIX C

Delivery Commitment Schedule

This delivery commitment schedule shall be submitted by Purchaser to DOE as specified in Article V.B. of this contract.

Purchaser ————————————
Contract Number/Date ————————

Reactor/Facility Name ——————
Location:
Street ——————
City ——————
County/State ——————
Zip Code ——————
Type Cask Required: ——————
Shipping Lot Number ——————
(Assigned by DOE)
Proposed Shipping Mode:
Truck ☐
Rail ☐
Barge ☐
DOE Assigned Delivery Commitment Date
Range of Discharge Date(s) (Earliest to Latest)
Mo—— Day—— Yr—— to Mo—— Day—— Yr——
Metric Tons Uranium:
(Initial) ——————
(Discharged) ——————
Number of Assemblies:
BWR ——————
PWR ——————
Other ——————

Unless otherwise agreed to in writing by DOE, the Purchaser shall furnish herewith to DOE suitable proof of ownership of the SNF and/or HLW to be delivered hereunder. The Purchaser shall notify DOE in writing at the earliest practicable date of any change in said ownership.

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:
Signature ——————
Title ——————
Date ——————
Approved by DOE:
Technical Representative ——————
Title ——————
Date ——————
Contracting Officer ——————
Date ——————

APPENDIX D

Final Delivery Schedule

(To be submitted to DOE by Purchaser for each designated Purchaser Delivery site not later than twelve (12) months prior to estimated date of first delivery)

Purchaser: ——————
Contract Number/Date ——————
Reactor/Facility Name ——————
Location:
Street ——————
City ——————
County/State ——————
Zip Code ——————
Type(s) cask(s) required: ——————
No. Assemblies per cask ——————
Shipping Lot Number ——————
Shipping Mode:
(Assigned by DOE)
Truck ——————
Rail ——————
Barge ——————
Metric Tons Uranium:
(Initial) ——————
(Discharged) ——————
Range of Discharge Date(s) (Earliest to Latest)
(From approved commitment schedule)
Mo—— Day—— Yr—— to Mo—— Day—— Yr——
Number of Assemblies:
BWR ——————
PWR ——————
Other ——————
Purchaser's Delivery First Estimate
Mo—— Day—— Yr—— last Mo—— Day—— Mo——

Unless otherwise agreed to in writing by DOE, the Purchaser shall furnish herewith to DOE suitable proof of ownership of the SNF and/or HLW to be delivered hereunder. The Purchaser shall notify DOE in writing at the earliest practicable date of any change in said ownership.

To confirm acceptability of delivery date(s):
Purchaser Contact ——————
Phone ——————
Title ——————
DOE Contact ——————
Phone ——————
Title ——————

Any false, fictitious or fraudulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:
Signature ——————
Title ——————
Date ——————
Approved by DOE:
Technical Representative ——————
Title ——————
Date ——————
Contracting Officer ——————
Date ——————

APPENDIX E

General Specifications

A. Fuel Category Identification

1. Categories—Purchaser shall use reasonable efforts, utilizing technology equivalent to and consistent with the commercial practice, to properly classify Spent Nuclear Fuel (SNF) prior to delivery to DOE, as follows:

a. "Standard Fuel" means SNF that meets all the General Specifications therefor set forth in paragraph B below.

b. "Nonstandard Fuel" means SNF that does not meet one or more of the General Specifications set forth in subparagraphs 1 through 5 of paragraph B below, and which is classified as Nonstandard Fuel Classes NS-1 through NS-5, pursuant to paragraph B below.

c. "Failed Fuel" means SNF that meets the specifications set forth in subparagraphs 1 through 3 of paragraph B below, and which is classified as Failed Fuel Class F-1 through F-3 pursuant to subparagraph 6 of paragraph B below.

d. Fuel may have "Failed Fuel" and/or several "Nonstandard Fuel" classifications.

B. Fuel Description and Subclassification—General Specifications

1. *Maximum Nominal Physical Dimensions.*

	Boiling water reactor (BWR)	Pressurized water reactor (PWR)
Overall Length	14 feet, 11 inches	14 feet, 10 inches
Active Fuel Length	12 feet, 6 inches	12 feet, 0 inches
Cross Section [1]	6 inches × 6 inches	9 inches × 9 inches

[1] The cross section of the fuel assembly shall not include the channel.

NOTE: Fuel that does not meet these specifications shall be classified as Nonstandard Fuel—Class NS-1.

2. *Nonfuel Components.* Nonfuel components including, but not limited to, control spiders, burnable poison rod assemblies, control rod elements, thimble plugs, fission chambers, and primary and secondary neutron sources, that are contained within the fuel assembly, or BWR channels that are an integral part of the fuel assembly, which do not require special handling, may be included as part of the spent nuclear fuel delivered for disposal pursuant to this contract.

NOTE: Fuel that does not meet these specifications shall be classified as Nonstandard Fuel—Class NS-2.

3. *Cooling.* The minimum cooling time for fuel is five (5) years.

NOTE: Fuel that does not meet this specification shall be classified as Nonstandard Fuel—Class NS-3.

4. *Non-LWR Fuel.* Fuel from other than LWR power facilities shall be classified as Nonstandard Fuel—Class NS-4. Such fuel may be unique and require special handling, storage, and disposal facilities.

5. *Consolidated Fuel Rods.* Fuel which has been disassembled and stored with the fuel rods in a consolidated manner shall be classified as Nonstandard Fuel Class NS-5.

6. *Failed Fuel.*

a. Visual Inspection.

Assemblies shall be visually inspected for evidence of structural deformity or damage to cladding or spacers which may require special handling. Assemblies which (i) are structurally deformed or have damaged cladding to the extent that special handling may be required or (ii) for any reason cannot be handled with normal fuel handling equipment shall be classified as Failed Fuel—Class F-1.

b. Previously Encapsulated Assemblies.

Assemblies encapsulated by Purchaser prior to classification hereunder shall be classified as Failed Fuel—Class F-3. Purchaser shall advise DOE of the reason for the prior encapsulation of assemblies in sufficient detail so that DOE may plan for appropriate subsequent handling.

c. Regulatory Requirements.

Spent fuel assemblies shall be packaged and placed in casks so that all applicable regulatory requirements are met.

C. Summary of Fuel Classifications

1. *Standard Fuel:*
a. Class S-1: PWR
b. Class S-2: BWR
2. *Nonstandard Fuel:*
a. Class NS-1: Physical Dimensions
b. Class NS-2: Non Fuel Components
c. Class NS-3: Short Cooled
d. Class NS-4: Non-LWR
e. Class NS-5: Consolidated Fuel Rods
3. *Failed Fuel:*
a. Class F-1: Visual Failure or Damage
b. Class F-2: Radioactive "Leakage"
c. Class F-3: Encapsulated

D. High-Level Radioactive Waste

The DOE shall accept high-level radioactive waste. Detailed acceptance criteria and general specifications for such waste will be issued by the DOE no later than the date on which DOE submits its license application to the Nuclear Regulatory Commission for the first disposal facility.

APPENDIX F

Detailed Description of Purchaser's Fuel

This information shall be provided by Purchaser for each distinct fuel type within a Shipping Lot not later than sixty (60) days prior to the schedule transportation date.

Purchaser ——————————————
Contract Number/Date ——/————
Reactor/Facility Name— ——————————
——————————————————————
——————————————————————

I. Drawings included in generic dossier.
————

1. Fuel Assembly DWG# ——
2. Upper & Lower end fittings DWG# ——
Dossier Number: ——
DOE Shipping Lot #: ——
Assemblies Described:
———BWR
———PWR
———Other

II. *Design Material Descriptions.*

Fuel Element:

1. Element type —— (rod, plate, etc.)
2. Total length) ——/(in.)
3. Active length —— (in.)
4. Cladding material —— (Zr, s.s., etc.)

Assembly Description:

1. Number of Elements ——
2. Overall dimensions (length —— (cross section) —— (in.)
3. Overall weight ——

III. Describe any distortions, cladding damage or other damage to the spent fuel, or nonfuel components within this Shipping Lot which will require special handling procedures. (Attach additional pages if needed.)

IV. Assembly Number ——

Shipping Lot #——

	Irradiation history cycle No				
	1	2	3	4	5
1 Startup date (mo/day/yr)					
2 Shutdown date (mo/day/yr)					
3 Cumulative fuel exposure (mwd/mtu)					
4 Avg. reactor power (mwth)					

5 Total heat output/assembly in watts, using an approved calculational method ——— as of Date ———

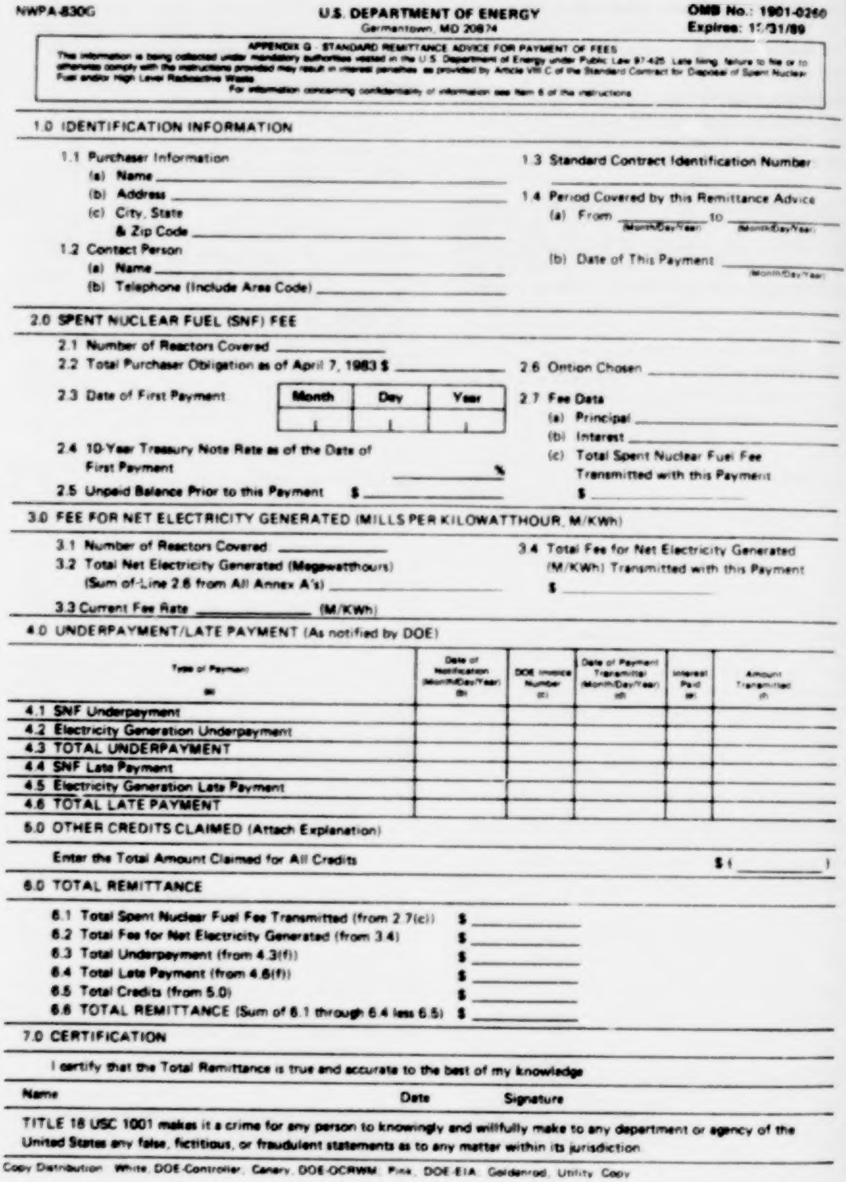
Any false, fictitious or fradulent statement may be punishable by fine or imprisonment (U.S. Code, Title 18, Section 1001).

By Purchaser:

Signature ——————————

Title ——————————

Date ——————————



NWPA-830G

U.S. DEPARTMENT OF ENERGY
Germantown, MD 20874

OMB No.: 1901-0260
Expires: 12/31/89

APPENDIX G - STANDARD REMITTANCE ADVICE FOR PAYMENT OF FEES

This information is being collected under mandatory authorities vested in the U.S. Department of Energy under Public Law 97-425. Late filing, failure to file or to otherwise comply with the instructions provided may result in interest penalties, as provided by Article VIII C of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste.

For information concerning confidentiality of information see Item 6 of the instructions.

1.0 IDENTIFICATION INFORMATION

1.1 Purchaser Information
(a) Name ____________
(b) Address ____________
(c) City, State & Zip Code ____________

1.2 Contact Person
(a) Name ____________
(b) Telephone (Include Area Code) ____________

1.3 Standard Contract Identification Number ____________

1.4 Period Covered by this Remittance Advice
(a) From ________ (Month/Day/Year) to ________ (Month/Day/Year)
(b) Date of This Payment ________ (Month/Day/Year)

2.0 SPENT NUCLEAR FUEL (SNF) FEE

2.1 Number of Reactors Covered ____________

2.2 Total Purchaser Obligation as of April 7, 1983 $ ____________

2.3 Date of First Payment

Month	Day	Year

2.4 10-Year Treasury Note Rate as of the Date of First Payment ________ %

2.5 Unpaid Balance Prior to this Payment $ ____________

2.6 Option Chosen ____________

2.7 Fee Data
(a) Principal ____________
(b) Interest ____________
(c) Total Spent Nuclear Fuel Fee Transmitted with this Payment $ ____________

3.0 FEE FOR NET ELECTRICITY GENERATED (MILLS PER KILOWATTHOUR, M/KWh)

3.1 Number of Reactors Covered ____________

3.2 Total Net Electricity Generated (Megawatthours) (Sum of Line 2.6 from All Annex A's) ____________

3.3 Current Fee Rate ____________ (M/KWh)

3.4 Total Fee for Net Electricity Generated (M/KWh) Transmitted with this Payment $ ____________

4.0 UNDERPAYMENT/LATE PAYMENT (As notified by DOE)

Type of Payment (a)	Date of Notification (Month/Day/Year) (b)	DOE Invoice Number (c)	Date of Payment Transmittal (Month/Day/Year) (d)	Interest Paid (e)	Amount Transmitted (f)
4.1 SNF Underpayment					
4.2 Electricity Generation Underpayment					
4.3 TOTAL UNDERPAYMENT					
4.4 SNF Late Payment					
4.5 Electricity Generation Late Payment					
4.6 TOTAL LATE PAYMENT					

5.0 OTHER CREDITS CLAIMED (Attach Explanation)

Enter the Total Amount Claimed for All Credits $ (____________)

6.0 TOTAL REMITTANCE

6.1 Total Spent Nuclear Fuel Fee Transmitted (from 2.7(c)) $ ____________
6.2 Total Fee for Net Electricity Generated (from 3.4) $ ____________
6.3 Total Underpayment (from 4.3(f)) $ ____________
6.4 Total Late Payment (from 4.6(f)) $ ____________
6.5 Total Credits (from 5.0) $ ____________
6.6 TOTAL REMITTANCE (Sum of 6.1 through 6.4 less 6.5) $ ____________

7.0 CERTIFICATION

I certify that the Total Remittance is true and accurate to the best of my knowledge.

Name Date Signature

TITLE 18 USC 1001 makes it a crime for any person to knowingly and willfully make to any department or agency of the United States any false, fictitious, or fraudulent statements as to any matter within its jurisdiction.

Copy Distribution: White, DOE-Controller; Canary, DOE-OCRWM; Pink, DOE-EIA; Goldenrod, Utility Copy

DEPARTMENT OF ENERGY
Germantown, MD 20874

APPENDIX G - STANDARD REMITTANCE ADVICE FOR PAYMENT OF FEES

General Information

1. Purpose
Standard Remittance Advice (RA) form is designed to serve as the source document for entries into the Department's accounting records to transmit data from Purchasers concerning payment of their contribution to the Nuclear Waste Fund.

2. Who Shall Submit
The RA must be submitted by Purchasers who signed the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste. Submit Copy 1, 2, and 3 to DOE, Office of the Controller, Special Accounts and Payroll Division and retain Copy 4.

3. Where to Submit
Purchasers shall forward completed RA to:

U.S. Department of Energy
Office of the Controller
Special Accounts and Payroll Division (C-216 GTN)
Box 500
Germantown, MD 20874-0500

Request for further information, additional forms, and instructions may be directed in writing to the address above or by telephone to (301) 353-4014.

4. When to Submit
For electricity generated on or after 4-7-83 fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of business on the last business day of the month following the end of each assigned three month period. Payment is by electronic wire transfer only.

5. Sanctions
The timely submission of RA by a Purchaser is mandatory. Failure to file may result in late penalty fees as provided by Article VIII.C of the Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste.

6. Provisions Regarding the Confidentiality of Information
The information contained in these forms may be (i) information which is exempt from disclosure to the public under the exemption for trade secrets confidential commercial information specified in the Freedom of Information Act of 5 USC 522(b) (4) (FOIA) or (ii) prohibited from public release by 18 USC 1905. However, before a determination can be made that particular information is within the coverage of either of these statutory provisions, the person submitting the information must make a showing satisfactory to the Department concerning its confidential nature.

Therefore, respondents should state briefly and specifically (on an element-by-element basis if possible), in a letter accompanying submission of the form why they consider the information concerned to be a trade secret or other proprietary information, whether such information is customarily treated as confidential information by their companies and the industry, and the type of competitive hardship that would result from disclosure of the information. In accordance with the provisions of 10 CFR 1004.11 of DOE's FOIA regulations, DOE will determine whether any information submitted should be withheld from public disclosure.

If DOE receives a response and does not receive a request, with substantive justification, that the information submitted should not be released to the public, DOE may assume that the respondent does not object to disclosure to the public of any information submitted on the form.

A new written justification need not be submitted each time the NWPA-830G is submitted if:

a. views concerning information items identified as privileged or confidential have not changed and

b. a written justification setting forth respondent's views in this regard was previously submitted.

In accordance with the cited statutes and other applicable authority, the information must be made available, upon request, to the Congress or any committee of Congress, the General Accounting Office, and other Federal agencies authorized by law to receive such information.

INSTRUCTIONS FOR COMPLETING STANDARD REMITTANCE ADVICE FOR PAYMENT OF FEES

Section 1.0 *Identification Information*

1.1 Name of Purchaser as it appears on the Standard Contract, the mailing address, state and zip code.

1.2 Name and telephone number of person responsible for the completion of this form.

1.3 Standard Contract identification number as assigned by DOE.

1.4 Period covered by this advice and date of this payment. Any period different from the assigned three month period should be explained on a separate attachment.

Section 2.0 *Spent Nuclear Fuel (SNF) Fee*

2.1 Enter the number of reactors for which the Purchaser had irradiated fuel as of midnight between 6/7 April 1983 (equal to the number of Annex B Forms attached).

2.2 Total amount owed to the Nuclear Waste Fund for spent fuel used to generate electricity prior to April 7, 1983. (See Annex B for calculation.)

2.3 Self explanatory.

2.4 Ten year Treasury Note rate on the date the payment is made, to be used if payments are being made using the 40 quarter option, or if lump sum payment is made after June 30, 1985.

2.5 Unpaid balance before this payment is made.

2.6 Enter the payment option (1, 2, or 3) chosen. The selection of payment option must be made within two years of Standard Contract execution.

2.7 Total payment of fee which this advice represents. Show principal, interest, and total.

Section 3.0 *Fee for Net Electricity Generated (M/KWh)*

3.1 Enter the number of reactors the Purchaser is reporting on during this reporting period.

3.2 Enter total net electricity generated during the reporting period from all reactors being reported. This is the sum of Station Total figures of line 2.6 from all Annex A forms attached, expressed in megawatthours.

3.3 Current Fee Rate as provided by DOE (initially 1.0 M/KWh which is equal to 1.0 $/MWh).

3.4 Total Fee for Net Electricity Generated (M/KWh) represented by this advice.

Section 4.0 *Underpayment/Late Payment (as notified by DOE)*

4.1-4.6 Self explanatory.

Section 5.0 *Other Credits Claimed*

Represents all items for which a Purchaser may receive credit, as specified in the Standard Contract.

Section 6.0 *Total Remittance*

6.1-6.6 This section is a summary of the payments made in the previously mentioned categories with this remittance.

Section 7.0 *Certification*

Enter the name and title of the individual your company has designated to certify the accuracy of the data. Sign the "Certification" block and enter the current date.

NWPA-830G

OMB No 1901-0260
Expires 12/31/89

ANNEX A
to
APPENDIX G
Standard Remittance Advice for Payment of Fees

- Please read all instructions before completing form.
- Complete a seperate Annex A for each station.
- Submit Annex A's quarterly with Appendix G—Standard Remittance Advice for Payment of Fees.

1.0 Identification Information

1.1 Purchaser Information
(a) Name ______________________
(b) Address ______________________
(c) City, State and Zip Code ______________________
(d) Utility ID number ☐☐

1.2 Contact Person
(a) Name ______________________
(b) Telephone (Include area code)
____ ______________________

1.3 Station Name
______________________ __________

1.4 Standard Contract Identification Number
____

1.5 Period Covered
(a) From __________ to __________
(Month/Day/Year) (Month/Day/Year)
(b) Date of this submission __________
(Month/Day/Year)

2.0 Fee Calculation for Net Electricity Generated

	Unit 1	Unit 2	Unit 3	Station Total
2.1 Unit ID Codes				▨
2.2 Gross Thermal Energy Generated (MWh)				▨
2.3 Gross Electricity Generated (MWh)				
2.4 Nuclear Station Use While At Least One Nuclear Unit Is In Service* (MWh)				
2.5 Nuclear Station Use While All Nuclear Units Are Out Of Service* (MWh)				
2.6 Net Electricity Generated (MWh) (Item 2.3 minus Item 2.4)				
2.7 Current Fee Rate (mills/KWh = $/MWh)				
2.8 Current Fee Due (Dollars) Enter on Line 3.4 of Appendix G				

*Utilities unable to meter individual unit use shall report estimated unit use and shall explain in a footnote how the unit data were estimated.

INSTRUCTIONS FOR COMPLETING ANNEX A TO APPENDIX G – STANDARD REMITTANCE ADVICE FOR PAYMENT OF FEES

Section 1.0 *Identification Information*

1.1 Utility name, address, and ID number. The ID number is assigned by DOE.

1.2 Contact person for additional information on data submitted in this annex.

1.3 Station name. Enter the name of the Station covered in this annex.

1.4 Self-explanatory.

1.5a The dates shown should be the beginning and ending days of the reporting period for which electrical output is reported.

1.5b Self-explanatory.

Section 2.0 *Fee Calculation for Net Electricity Generated*

2.1 Unit ID Code: Enter the reactor unit identification (ID) code as assigned by DOE, one per column, for each reactor associated with this station.

2.2 Gross Thermal Energy (Generated (MWh). The thermal output of the nuclear steam supply system during the gross hours of the reporting period, expressed in megawatthours.

2.3 Gross Electricity Generated (MWh).

Utilities shall report Gross Electricity Generated for each unit in the appropriate column and shall report the total in the column labeled "Station Total." The Gross Electricity Generated is measured at the output terminals of the turbine generator during the reporting period, expressed in megawatthours.

Note: Utilities that have small quantities of unmetered non-nuclear electrical generation included in Gross Electricity Generated should see Note D, Item 2.4.

2.4 Nuclear Station Use While At Least One Nuclear Unit Is In Service (MWh).

Utilities shall report Nuclear Station Use While At Least One Nuclear Unit Is In Service data for each unit in the appropriate column, and shall report the total in the column labeled "Station Total." In this row, utilities are to report the consumption of electricity by the nuclear portion of the station during days in which at least one of the nuclear units at the station was on-line and producing electricity, expressed in megawatthours. Utilities unable to meter inidividual unit use shall report estimated unit use and shall explain in a footnote how the unit data were estimated.

Note:

A. During days in which nuclear station use exceeds nuclear station generation, utilities shall treat all resulting negative values as zero for fee calculation purposes.

B. Utilities that have multiple nuclear units at one station:

- when at least one nuclear unit is operating and when generation from that one unit exceeds the nuclear station's use, the utility may assume that the operating unit is supplying electricity for nuclear station use, whether or not the electricity has been metered separately or the units terminate to a common electrical busbar, and
- shall report under Item 2.5 any electricity use by the nuclear portion of the station during days in which all nuclear units at the station were out of service simultaneously.

C. Utilities that have a metered transmission line connecting an off-station nuclear reactor with another nuclear station may treat the off-station plant as part of this station for fee calculation purposes and report accordingly.

D. Utilities may deduct small quantities of unmetered non-nuclear electricity generation included in Gross Electricity Generated, provided they identify and explain the generation estimates in a footnote.

2.5 Nuclear Station Use While All Nuclear Units Are Out Of Service (MWh).

Utilities shall report Nuclear Station Use While All Nuclear Units Are Out Of Service data for each unit in the appropriate column, and shall report the total in the column labeled "Station Total." In this row, utilities shall report the consumption of electricity by the nuclear portion of the station during days in which total nuclear unit use exceeds nuclear generation (e.g., a day in which all nuclear units at the station were out of service simultaneously), expressed in megawatthours. Utilities unable to meter individual unit use shall report estimated unit use and shall explain in a footnote how the unit data were estimated.

2.6 Net Electricity Generated (MWh).

Utilities shall report Net Electricity Generated data for each unit in the appropriate column, and shall report the total in the column labeled "Station Total." Utilities shall report the gross electrical output produced by a civilian nuclear power reactor measured at the output terminals of the turbine generator minus the normal onsite nuclear station service loads during the time electricity is being generated, expressed in megawatthours (Item 2.3 minus Item 2.4).

2.7 Current Fee Rate (mills/KWh = $/MWh). Initially 1.0 mills/KWh or 1.0 dollars/MWh. The units mills/KWh are exactly equivalent to dollars/MWh. Enter the rate here and on line 3.3 of the Remittance Advice.

2.8 Current Fee Due (dollars). The product of Items 2.6 and 2.7. The Current Fee Due for this station must be added to the Current Fee Due for all other reactors operated by the Purchaser and the sum entered on line 3.4 of the Remittance Advice.

ANNEX B TO APPENDIX G

Standard Remittance of Advice (RA) for Payment of Fees

This Annex should be completed only for SNF burned before midnight between April 6/7, 1983.

I. *Identification*

A. Purchaser:————

B. Unit identification (Only one unit may be covered in each report.)

1. Reactor/Facility Name: ————
2. Location: ————
3. Type: ————
4. Capacity: ————
5. Date of Commencement of Operations: —
6. NRC License No.: ————

II. *Fee Calculation*

A. *Discharged nuclear fuel*

1 Burnup[1] (MWDT/MTU)	0 5,000	5,000 10,000	10,000 20,000	20,000 up
2 Initial loading (KgU) (with indicated burnup)				
3 Fee rate ($/KgU)	80.00	142.00	162.00	184.00
4 Fee ($)				
5 Total fee (4)				

B. Nuclear fuel in the reactor core as of midnight of 6/7 April 1983.

Assembly identification	Initial loading (KgU)	Burnup[1] as of midnight 6/7 April 1983 (MWDT/MTU)	Fee
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

[1] Please provide (as an attachment) a clear reference to the methodology used to derive the burnup figures (computer codes, etc.) and a clear reference to all data used in the derivation of those figures.

C. Total fee.

(Approved by the Office of Management and Budget under control number 1091-0260)

[48 FR 16599, Apr. 18, 1983; 48 FR 23160, May 24, 1983, as amended at 52 FR 35359, Sept. 18, 1987]

PART 962—BYPRODUCT MATERIAL

Sec.
962.1 Scope.
962.2 Purpose.
962.3 Byproduct material.

AUTHORITY: The Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*); Energy Reorganization Act of 1974 (42 U.S.C. 5801 *et seq.*); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*); Nuclear Waste Policy Act (Pub. L. 97-425, 96 Stat. 2201).

SOURCE: 52 FR 15940, May 1, 1987, unless otherwise noted.

§ 962.1 Scope.

This part applies only to radioactive waste substances which are owned or produced by the Department of Energy at facilities owned or operated by or for the Department of Energy under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq*). This part does not apply to substances which are not owned or produced by the Department of Energy.

§ 962.2 Purpose.

The purpose of this part is to clarify the meaning of the term "byproduct material" under section 11e(1) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(1)) for use only in determining the Department of Energy's obligations under the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*) with regard to radioactive waste substances owned or produced by the Department of Energy pursuant to the exercise of its responsibilities under the Atomic Energy Act of

1954. This part does not affect materials defined as byproduct material under section 11e(2) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(2)).

§ 962.3 Byproduct material.

(a) For purposes of this part, the term "byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

(b) For purposes of determining the applicability of the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*) to any radioactive waste substance owned or produced by the Department of Energy pursuant to the exercise of its atomic energy research, development, testing and production responsibilities under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), the words "any radioactive material," as used in paragraph (a) of this section, refer only to the actual radionuclides dispersed or suspended in the waste substance. The nonradioactive hazardous component of the waste substance will be subject to regulation under the Resource Conservation and Recovery Act.

CHAPTER X—DEPARTMENT OF ENERGY (GENERAL PROVISIONS)

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PART 1000—TRANSFER OF PROCEEDINGS TO THE SECRETARY OF ENERGY AND THE FEDERAL ENERGY REGULATORY COMMISSION

§ 1000.1 Transfer of proceedings.

(a) *Scope.* This part establishes the transfer of proceedings pending with regard to those functions of various agencies which have been consolidated in the Department of Energy and identifies those proceedings which are transferred into the jurisdiction of the Secretary and those which are transferred into the jurisdiction of the Federal Energy Regulatory Commission.

(b) *Proceedings transferred to the Secretary.* The following proceedings are transferred to the Secretary:

(1) All Notices of Proposed Rulemaking, pending and outstanding, which have been proposed by the Department of Energy and the Department of Energy;

(2) All Notices of Inquiry which have been issued by the Department of Energy;

(3) All Requests for Interpretations which have been filed pursuant to 10 CFR Part 205, Subpart F, and on which no interpretation has been issued, with the Office of General Counsel of the Department of Energy;

(4) All Applications for Exception Relief which have been filed pursuant to 10 CFR Part 205, Subpart D, and on which no final decision and order has been issued, with the Office of Exceptions and Appeals of the Department of Energy;

(5) All petitions for special redress, relief or other extraordinary assistance which have been filed pursuant to 10 CFR Part 205, Subpart R, and on which no order has been issued, with the Office of Private Grievances and Redress of the Department of Energy;

(6) All appeals from Remedial Orders, Exception Decisions and Orders, Interpretations issued by the Office of General Counsel, and other agency orders which have been filed pursuant to 10 CFR Part 205, Subpart H, and on which no order has been issued prior to October 1, 1977, with the Office of Exceptions and Appeals of the Department of Energy;

(7) All applications for modification or rescission of any DOE order or interpretation which have been filed pursuant to 10 CFR Part 205, Subpart J, and on which no order has been issued prior to October 1, 1977, with the Office of Exceptions and Appeals of the Federal Energy Administation;

Note: For a document relating to procedures for natural gas import and export proceedings see 42 FR 61856, Dec. 7, 1977.

(8) All applications for temporary stays and stays which have been filed pursuant to 10 CFR Part 205, Subpart I, and on which no order has been issued, with the Office of Exceptions and Appeals of the Department of Energy;

(9) All applications which have been filed with the Office of Regulatory Programs of the Department of Energy and on which no final order has been issued;

(10) All investigations which have been instituted and have not been resolved by the Office of Compliance of the Department of Energy;

(11) All Notices of Probable Violation which have been issued prior to October 1, 1977, by the Office of Compliance of Department of Energy;

(12) All Notices of Proposed Disallowance which have been issued prior to October 1, 1977, by the Office of Compliance of Department of Energy;

(13) All Prohibition Orders which have been issued pursuant to 10 CFR Part 303 and as to which no Notice of Effectiveness has been issued;

(14) From the Department of the Interior:

(i) The tentative power rate adjustments for the Central Valley Project, California, proposed on September 12, 1977 (42 FR 46619, September 16, 1977).

(15) From the Interstate Commerce Commission:

(i) Ex Parte No. 308 (Sub-No. 1)—Investigation of Common Carrier Pipelines.

(16) From the Federal Power Commission:

(i) Cases:

(A) Northwest Pipeline Corporation, Docket No. CP75-340.

(B) Midwestern Gas Transmission Co., Docket No. CP77-458, *et al.*

(C) St. Lawrence Gas Company, Docket No. G-17500.

(D) U.S.D.I. Bonneville Power Administration, Docket No. E-9563.

(E) U.S.D.I. Southwestern Power Administration, Docket No. E-7201.

(F) U.S.D.I. Southeastern Power Administration, Docket No. E-6957.

(G) Tenneco InterAmerica, Inc., Docket No. CP77-561.

(ii) Applications:

(A) Maine Public Service Co., Docket No. E-6751. (ERA Docket No. IE-78-1).

(B) Northern States Power Co., Docket No. E-9589, (ERA Docket No. IE-78-2).

(C) Arizona Public Service Co., Docket No. IT-5331. (ERA Docket No. IE-78-3).

(D) Niagara Mohawk Power Corp., Docket No, E-7022. (ERA Docket No. IE-77-6).

(E) Maine Public Service Co., Docket No. IT-6027. (ERA Docket No. PP-12).

(F) Boise Cascade, Docket No. E-7765. (ERA Docket No. PP-52).

(G) Bonneville Power Administration, Docket No. IT-5959. (ERA Docket No. PP-10).

(H) EPR—Oregon (Geothermal Steam Leases).

(I) EPR—Utah (Geothermal Steam Leases).

(J) EPR—Idaho (Geothermal Steam Leases).

(K) EPR—Oregon (Geothermal Steam Leases).

(L) EPR—Idaho (Geothermal Steam Leases).

(iii) Rulemakings:

(A) Implementation of Sections 382(b) and 382(c) of the Energy Policy and Conservation Act of 1975. Docket No. RM77-3.

(B) New Form Nos:

151, Docket No. RM76-19.
153, Docket No. RM76-27.
154, Docket No. RM76-33.
156, Docket No. RM76-32.
157, Docket No. RM76-21.
158, Docket No. RM76-31.
159, Docket No. RM76-23.
160, Docket No. RM76-20.
161, Docket No. RM76-26.
162, Docket No. RM76-34.
155, Docket No. RM76-28.
163, Docket No. RM76-30.
164, Docket No. RM76-25.

(C) Procedures for the Filing of Federal Rate Schedules Docket No. RM77-9.

(iv) Project withdrawals and power site revocations:

(A) Project 1021, 1226, 1606, and 1772—(Wyoming)—U.S. Forest Service (Applicant).

(B) Project Nos. 1021, 1226, 1606, and 1772—(Wyoming)—U.S. Forest Service (Applicant).

(C) Project Nos. 220 and 691—(Wyoming)—Cliff Gold Mining Co. (Applicant for P-691) The Colowyo Gold Mining Co. (Applicant for P-220).

(D) Project No. 1203—(Wyoming)—F. D. Foster (Applicant).

(E) Project No. 1241—(Wyoming)—F. B. Hommel (Applicant).

(F) Project No. 847—(Oregon)—H. L. Vorse (Applicant).

(G) Project No. 907—(Colorado)—S. B. Collins (Applicant).

(H) Project No. 941—(Colorado)—Marian Mining Company (Applicant).

(I) Project Nos. 347 and 418—(Colorado)—Jones Brothers (Applicant for P-347) Frank Gay et al. (Applicant for P-418).

(J) Project Nos. 373, 521, 937, 1024, 1415, 1546, 1547, and 1025—( )—U.S. Forest (Applicant).

(K) Project No. 163—(Colorado)—James F. Meyser and Edward E. Drach (Applicants).

(L) Project Nos. 335, 445, 506, 519, 1220, 1296, 1418, 1519, 1576, 1615, 1616, 1618, 1678, 1682, and 1750—(Colorado)—U.S. Forest Service (Applicant).

(M) DA-117—(Alaska)—Bureau of Land Management (Applicant).

(N) Project No. 114—(Alaska)—Elizabeth H. Graff et al. (Applicant).

(O) DA-222—(Washington)—Bureau of Land Management (Applicant).

(P) DA-562—(Oregon)—U.S. Geological Survey (Applicant).

(Q) DA-601—(Idaho)—Bureau of Land Management (Applicant).

(R) DA-509—(Colorado)—Fed. Highway Admin. (Applicant).

(S) DA-616—(Idaho)—U.S. Forest Service (Applicant).

(T) DA-1—(South Carolina)—U.S. Forest Service (Applicant).

(U) DA-1116—(California)—U.S. Geological Survey (Applicant).

(V) DA-154—(Arizona)—U.S. Geological Survey (Applicant).

(W) DA-1098—(California)—Merced Irrigation District (Applicant).

(c) *Proceedings transferred to the Commission.* There are hereby transferred to the jurisdiction of the Federal Energy Regulatory Commission the following proceedings:

(1) From the Interstate Commerce Commission:

(i) Ex Parte No. 308—Valuation of Common Carrier Pipelines.

(ii) I&S 9164—Trans Alaska Pipeline System—Rate Filings (including I&S 9164 (Sub-No. 1), NOR 36611, NOR 36611 (Sub-No. 1), NOR 36611 (Sub-No. 2), NOR 36611 (Sub-No. 3), NOR 36611 (Sub-No. 4)).

(iii) I&S 9089—General Increase, December 1975, Williams Pipeline Company.

(iv) I&S 9128—Anhydrous Ammonia, Gulf Central Pipeline Company.

(v) NOR 35533 (Sub-No. 3)—Petroleum Products, Southwest & Midwest Williams Pipeline.

(vi) NOR 35794—Northville Dock Pipeline Corp. et al.

(vii) NOR 35895—Inexco Oil Company v. Belle Fourche Pipeline Co. et al.

(viii) NOR 36217—Department of Defense v. Interstate Storage & Pipeline Corp.

(ix) NOR 36423—Petroleum Products Southwest to Midwest Points.

(x) NOR 36520—Williams Pipeline Company—Petroleum Products Midwest.

(xi) NOR 36553—Kerr-McGee Refining Corporation v. Texoma Pipeline Co.

(xii) Suspension Docket 67124—Williams Pipe Line Co.—General Increase.

(xiii) Valuation Docket 1423—Williams Pipeline Company (1971-1974 inclusive).

(2) To remain with the Commission until forwarding to the Secretary:

The following proceedings will continue in effect under the jurisdiction of the Commission until the timely filing of all briefs on and opposing exceptions to the initial decision of the presiding Administration Law Judge, at which time the Commission shall forward the record of the proceeding to the Secretary for decision on those matters within his jurisdiction:

(i) *El Paso Eastern Co., et al.,* Docket No. CP 77-330, *et al.*

(ii) *Tenneco Atlantic Pipeline Co., et al.,* Docket No. CP 77-100, *et al.*

(iii) *Distrigas of Massachusetts Corp., et al.,* Docket No. CP 70-196, *et al.*

(iv) *Distrigas of Massachusetts Corp., et al.,* Docket No. CP 77-216, *et al.*

(v) *Eascogas LNG, Inc., et al.,* Docket No. CP 73-47, *et al.*

(vi) *Pacific Indonesia LNG Co., et al.,* Docket No. CP74-160, *et al.,* (except as provided in paragraph (c)(3) of this section).

(3) The Amendment to Application of Western LNG Terminal Associates, filed on November 11, 1977, in *Pacific Indonesia LNG Co., et al.,* FPC Docket No. CP74-160, et al., ERA Docket No. 77-001-LNG, is transferred to the jurisdiction of the Commission until timely filing of all briefs on and opposing exceptions to the Initial Decision of the presiding Administrative Law Judge on that Amendment, at which time the Commission shall forward a copy of the record of that proceeding to the Secretary of Energy for decision on those matters within his jurisdiction. (If the Commission waives the preparation of an initial decision, the Commission will forward a copy of the record after completion of the hearing, or after the timely filing of any briefs submitted to the Commission, whichever occurs later.)

(d) *Residual clause.* All proceedings (other than proceedings described in paragraphs (b) and (c) of this section) pending with regard to any function of the Department of Energy, the Department of Energy, Department of the Interior, the Department of Commerce, the Department of Housing and Urban Development, the Department of Navy, and the Naval Reactor and Military Applications Programs which is transferred to the Department of Energy (DOE) by the DOE Organization Act, will be conducted by the Secretary. All proceedings (other than proceedings described in paragraphs (b) and (c) of this section) before the Federal Power Commission or Interstate Commerce Commission will be conducted by the Federal Energy Regulatory Commission.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 567 (42 U.S.C. 7101 et seq.); E.O. 12009, 42 FR 46267)

[42 FR 55534, Oct. 17, 1977, as amended at 43 FR 21434, May 18, 1978; 43 FR 21658, May 19, 1978]

PART 1001—SEPARATION OF REGULATORY AND ENFORCEMENT FUNCTIONS WITHIN THE ECONOMIC REGULATORY ADMINISTRATION

§ 1001.1 Separation of regulatory and enforcement functions within the Economic Regulatory Administration.

In accordance with Section 206(a) of the Department of Energy Organization Act, Pub. L. 95-91, and the October 1, 1977 delegation of the Secretary of Energy to the Administrator of the Economic Regulatory Administration (ERA), the regulation preparation and enforcement functions delegated to the Administrator of ERA shall be performed by separate entities of the ERA. The office of the Assistant Administrator for Regulations and Emergency Planning shall be responsible for the preparation of regulations. The office of the Assistant Administrator for Enforcement, including the offices of Regional Directors of Enforcement, and the office of the Special Counsel for Compliance, shall be responsible for the bringing of individual enforcement actions. No officer or member of the office of the Assistant Administrator for Regulations and Emergency Planning shall have authority to make or concur in any decision by ERA to institute an individual enforcement investigation or adjudicate an individual enforcement proceeding.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 567 (42 U.S.C. 7101 et seq.); E.O. 12009, 42 FR 46267)

[42 FR 60726, Nov. 29, 1977]

APPENDIX—DEPARTMENT OF ENERGY DELEGATION ORDER NO. 0204-4

TO THE ADMINISTRATOR OF THE ECONOMIC REGULATORY ADMINISTRATION

Pursuant to the authority vested in me as Secretary of Energy ("Secretary") and by the Department of Energy Organization Act (Pub. L. 95-91) (the "DOE Act"), the Administrator of the Economic Regulatory Administration ("ERA") is hereby directed to provide by rule for a separation of the regulatory and enforcement functions of the Economic Regulatory Administration, in accordance with Section 206(a) of the DOE Act; and

There is hereby delegated to the Administrator of ERA the authority to adopt rules, issue orders, licenses and allocations, collect fees, and take such other action as may be necessary and appropriate to administer the following functions:

1. The allocation and pricing of crude oil, residual fuel oil, and refined petroleum products, pursuant to the provisions of the Emergency Petroleum Allocation Act of 1973 (Pub. L. 93-159), as amended;

2. The importation of crude oil, unfinished oils and finished products, pursuant to the provisions of the Trade Expansion Act of 1962 (Pub. L. 87-794) and Proclamation No. 3279, as amended;

3. The prohibition of powerplants and major fuel burning installations from the use, as a primary energy source, of natural gas or petroleum products; requiring that powerplants and major fuel burning installations in the early planning process be designed and constructed so as to be capable of using coal as a primary energy source; and the allocation of coal, pursuant to the provisions of Section 2 of the Energy Supply and Environmental Coordination Act of 1974 (Pub. L. 93-319), as amended;

4. The prescription of energy conservation and rationing contingency plans, pursuant to the provisions of Sections 202 and 203 of the Energy Policy and Conservation Act (Pub. L. 94-163), as amended;

5. The development of proposals for improvement of electric utility rate design and advising the Secretary of such proposals for the transmittal thereof to Congress; funding of electric utility rate demonstration projects; and providing financial assistance to State offices of consumer services to facilitate presentation of consumer interests before such commissions, pursuant to the provisions of Title II of the Energy Conservation and Production Act (Pub. L. 94-385), as amended;

6. The exportation and importation of natural gas, pursuant to the provisions of Section 3 of the Natural Gas Act (Pub. L.

688, 75th Cong. 2d Sess.), as amended, and Executive Order No. 10485, except with respect to those pending cases assigned by rule to FERC;

7. The exportation and importation of electric energy, pursuant to the provisions of Section 202(e) of the Federal Power Act (Pub. L. 280, 66th Cong., 2d Sess.), as amended, and Executive Order No. 10485;

8. The establishment and review of priorities for the curtailment of deliveries of natural gas, under the authority of the provisions of Sections 1(b), 4, 5, 7 and 16 of the Natural Gas Act and pursuant to the provisions of Section 402(a)(1)(E) of the DOE Act;

9. The assembly of information with regard to State compacts, proposed and approved, dealing with the conservation, production, transportation or distribution of natural gas; and advising the Secretary with respect to legislation recommended to carry out the purposes of such State compacts and to aid in the conservation, and orderly, equitable and economic production, transportation and distribution of natural gas, pursuant to the provisions of Section 11 of the Natural Gas Act;

10. The establishment and modification of regional districts in the country for the voluntary interconnection and coordination of facilities for the generation, transmission and sale of electric energy, and the promotion and encouragement of such interconnection and coordination within each such district and between such districts, pursuant to the provisions of Section 202(a) of the Federal Power Act;

11. To order the temporary connections of facilities, during times of war or national emergency, for the generation or transmission of electric energy and such generation, delivery, interchange, or transmission of electric energy as in the Administrator's judgment will best meet the emergency and serve the public interest, pursuant to the provisions of Section 202(c) of the Federal Power Act;

12. To approve or deny applications to make permanent connections for emergency use only by persons engaged in the transmission or sale of electric energy where the applicant is not otherwise subject to the jurisdiction defined by Section 201 of the Federal Power Act, with any public utility that is subject to such jurisdiction, pursuant to the provisions of Section 202(d) of the Federal Power Act;

13. The investigation and determination, upon the Administrator's own motion or the request of any State commission, of the cost of production or transmission of electric energy by means of facilities that are subject to the jurisdiction defined by Section 201 of the Federal Power Act, as the Administrator determines is necessary and appropriate to perform his functions, pursuant to the provisions of Section 206(b) of the Federal Power Act;

14. The conduct of investigations regarding the generation, transmission, distribution and sale of electric energy, however produced, throughout the United States and its possessions, including the generation, transmission, distribution and sale of electric energy by any agency, authority or instrumentality of the United States, or of any State or municipality or other political subdivision of a State, and advising the Secretary of the results of such investigations for his report thereof to Congress, as the Administrator determines is necessary and appropriate to perform his functions, pursuant to Section 311 of the Federal Power Act;

15. Exercise of the authority under the acts listed below to confirm and approve power or transmission rates of federal power marketing agencies, and exercise of the cost-allocation authority contained in Section 7 of the Bonneville Project Act cited below: Section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s), the Bonneville Project Act of 1937 (Pub. L. 329, 75th Cong., 1st Sess.), as amended; the Federal Columbia River Transmission System Act of 1974 (Pub. L. 93-454), the Eklutna Project Act of 1950, as amended, (64 Stat. 382); the Act of June 18, 1954 (68 Stat. 255), as amended by the Act of December 23, 1963 (77 Stat. 475) (Falcon and Amistad Dams);

16. The final decision as to rate adjustments pursuant to Section 10 of the rules entitled "Procedures for Public Participation in General Adjustmeents in Power Rates", set forth at 40 FR 34431-32 (August 15, 1975), which were promulgated pursuant to the Reclamation Act of 1902, as amended and supplemented by subsequent enactments, particularly Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), and the acts specifically applicable to the project in question;

17. Exercise of the authority under Section 11 of the Clayton Act (15 U.S.C. 21) as related to the transportation of oil by pipeline, pursuant to the provisions of Section 306 of the DOE Act;

18. To propose rules, regulations and statements of policy of general applicability to the Federal Energy Regulatory Commission ("FERC") with respect to any function within the jurisdiction of FERC under Section 402 of the DOE Act and set reasonable time limits for the completion of action by FERC on any such proposal, pursuant to the provisions of Section 403(a) of the DOE Act;

19. To intervene or otherwise participate in any proceeding before FERC, pursuant to the provisions of Section 405 of the DOE Act;

20. To intervene or otherwise participate on behalf of the Secretary in any proceed-

ing before any federal or state agency or commission whenever it is determined that the interests of the Secretary should be represented in such proceeding;

21. To issue Notices of Probable Violation (NOPV) when there is reason to believe that a violation of any regulation or order having the effect of a rule promulgated pursuant to the Emergency Petroleum Allocation Act of 1973 has occurred, is continuing or is about to occur and conduct proceedings incidental thereto;

22. To issue proposed remedial orders and remedial orders (including matters involving remedial orders for immediate compliance and orders of disallowance) for the violation of any regulation or order having the effect of a rule promulgated pursuant to the Emergency Petroleum Allocation Act of 1973, advise FERC as to any such remedial order that is contested, and set reasonable time limits for FERC to complete action on any such proceeding referred to it, pursuant to the provisions of Section 503 of the DOE Act;

23. To issue appeal decisions with respect to remedial orders (including remedial orders for immediate compliance and orders of disallowance) relating to NOPV's that were issued by the Department of Energy prior to October 1, 1977;

24. To suspend or revoke allocations and licenses, and conduct proceedings incidental thereto, issued pursuant to the functions described in paragraph 2;

25. To provide for the making of adjustments to any rule, regulation or order having the effect of a rule, issued under the statutory authorities vested in and transferred to the Secretary pursuant to the DOE Act and which are not delegated by the Secretary to the Federal Energy Regulatory Commission, consistent with the other purposes of the relevant statutory authority, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens, and to provide by rule for procedures for any person to seek an interpretation, modification or recission of, exception to, or exemption from any rule, regulation or order having the effect of a rule issued under such statutory authorities, pursuant to the provisions of Section 504(a) of the DOE Act;

26. To initiate and conduct investigations, when necessary and incidental to the exercise of any authority delegated herein, in response to complaints or other information; conduct conferences, hearings or public hearings with respect to the functions delegated hereby; administer oaths and affirmations to any person, and suspend or disqualify any person appearing at such conference or hearing; issue subpoenas; make payment, if appropriate, of witness fees and mileage to any witness appearing in response to such subpoenas; and take such other action as may be necessary and appropriate to assure and determine the extent of compliance with DOE rules and regulations described herein and any order having the effect of a rule issued thereunder;

27. To take such other action as the Secretary or his authorized delegates may, from time to time, direct or authorize.

The authority delegated to the Administrator of ERA may be further delegated, in whole or in part, as may be appropriate, *Provided*, That the Administrator shall not further delegate, in whole or in part, the authority delegated to him to propose or adopt rules.

The Administrator of ERA shall consult with the Administrator of the Energy Information Administration ("EIA") with respect to the exercise of functions under paragraphs 13 and 14, as EIA considers appropriate.

In exercising the authority delegated by this Order or as redelegated pursuant thereto, the delegate(s) shall be governed by the rules and regulations of DOE and the policies and procedures prescribed by the Secretary or his delegate.

All actions pursuant to any authority delegated prior to this Order or pursuant to any authority delegated by this Order taken prior to and in effect on the date of this Order are hereby confirmed and ratified, and shall remain in full force and effect as if taken under this Order, unless or until rescinded, amended or superseded.

(Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 567 (42 U.S.C. 7101 et seq.); E.O. 12009, 42 FR 46267)

[42 FR 60726, Nov. 29, 1977]

PART 1002—OFFICIAL SEAL AND DISTINGUISHING FLAG

Subpart A—General

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1002.1 Purpose.
1002.2 Definitions.
1002.3 Custody of official seal and distinguishing flag.

Subpart B—Official Seal

1002.11 Description of official seal.
1002.12 Use of replicas, reproductions, and embossing seals.

Subpart C—Distinguishing Flag

1002.21 Description of distinguishing flag.
1002.22 Use of distinguishing flag.

Subpart D—Unauthorized Uses

1002.31 Unauthorized uses of the seal and flag.

AUTHORITY: 42 U.S.C. 7264.

SOURCE: 43 FR 20782, May 15, 1978, unless otherwise noted.

Subpart A—General

§ 1002.1 Purpose.

The purpose of this part is to describe the official seal and distinguishing flag of the Department of Energy, and to prescribe rules for their custody and use.

§ 1002.2 Definitions.

For purposes of this part—

(a) "DOE" means all organizational units of the Department of Energy.

(b) "Embossing seal" means a display of the form and content of the official seal made on a die so that the seal can be embossed on paper or other medium.

(c) "Official seal" means the original(s) of the seal showing the exact form, content, and colors therof.

(d) "Replica" means a copy of the official seal displaying the identical form, content, and colors thereof.

(e) "Reproduction" means a copy of the official seal displaying the form and content thereof, reproduced in only one color.

(f) "Secretary" means the Secretary of DOE.

§ 1002.3 Custody of official seal and distinguishing flags.

The Secretary or his designee shall:

(a) Have custody of:

(1) The official seal and prototypes thereof, and masters, molds, dies, and all other means of producing replicas, reproductions, and embossing seals; and

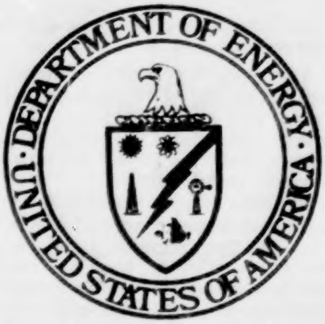
(2) Production, inventory and loan records relating to items specified in paragraph (a)(1) of this section; and

(b) Have custody of distinguishing flags, and be responsible for production, inventory, and loan records thereof.

Subpart B—Official Seal

§ 1002.11 Description of official seal.

The Department of Energy hereby prescribes as its official seal, of which judicial notice shall be taken pursuant to section 654 of the Department of Energy Organization Act of 1977, 42 U.S.C. 7264, the imprint illustrated below and described as follows:



(a)(1) The official seal includes a green shield bisected by a gold-colored lightning bolt, on which is emblazoned a gold-colored symbolic sun, atom, oil derrick, windmill, and dynamo. It is crested by the white head of an eagle, atop a white rope. Both appear on a blue field surrounded by concentric circles in which the name of the agency, in gold, appears on a green background. Detailing is in black.

(2) The colors used in the configuration are dark green, dark blue, gold, black, and white.

(3) The eagle represents the care in planning and the purposefulness of efforts required to respond to the Nation's increasing demands for energy. The sun, atom, oil derrick, windmill, and dynamo serve as representative technologies whose enhanced development can help meet these demands. The rope represents the cohesiveness in the development of the technologies and their link to our future capabilities. The lightning bolt represents the power of the natural forces from which energy is derived and the Nation's challenge in harnessing the forces.

(4) The color scheme is derived from nature, symbolizing both the source of

energy and the support of man's existence. The blue field represents air and water, green represents mineral resources and the earth itself, and gold represents the creation of energy in the release of natural forces. By invoking this symbolism, the color scheme represents the Nation's commitment to meet its energy needs in a manner consistent with the preservation of the natural environment.

§ 1002.12 Use of replicas, reproductions, and embossing seals.

(a) The Secretary and his designees are authorized to affix replicas, reproductions, and embossing seals to appropriate documents, certifications, and other material for all purposes as authorized by this section.

(b) Replicas may be used only for:

(1) Display in or adjacent to DOE facilities, in Department auditoriums, presentation rooms, hearing rooms, lobbies, and public document rooms.

(2) Offices of senior officials.

(3) Official DOE distinguishing flags, adopted and utilized pursuant to Subpart C.

(4) Official awards, certificates, medals, and plaques.

(5) Motion picture film, video tape and other audiovisual media prepared by or for DOE and attributed thereto.

(6) Official prestige publications which represent the achievements or mission of DOE.

(7) Non-DOE facilities in connection with events and displays sponsored by DOE, and public appearances of the Secretary or other designated senior DOE Officials.

(8) For other such purposes as determined by the Director of the Office of Administrative Services.

(c) Reproductions may be used only on:

(1) DOE letterhead stationery.

(2) Official DOE identification cards and security credentials.

(3) Business cards for DOE employees.

(4) Official DOE signs.

(5) Official publications or graphics issued by and attributed to DOE, or joint statements of DOE with one or more Federal agencies, State or local governments, or foreign governments.

(6) Official awards, certificates, and medals.

(7) Motion picture film, video tape, and other audiovisual media prepared by or for DOE and attributed thereto.

(8) For other such purposes as determined by the Director of the Office of Administrative Services.

(d) Embossing seals may be used only on:

(1) DOE legal documents, including interagency or intergovernmental agreements, agreements with States, foreign patent applications, and similar documents.

(2) For other such purposes as determined by the General Counsel or the Director of Administration.

(e) Any person who uses the official seal, replicas, reproductions, or embossing seals in a manner inconsistent with this part shall be subject to the provisions of 18 U.S.C. 1017, providing penalties for the wrongful use of an official seal, and to other provisions of law as applicable.

(f) The official seal is being registered with the World Intellectual Property Organization through the U.S. Patent and Trademark Office.

Subpart C—Distinguishing Flag

§ 1002.21 Description of distinguishing flag.

(a) The base or field of the flag shall be white, and a replica of the official seal shall appear on both sides thereof.

(b)(1) The indoor flag shall be of rayon banner, measure 4′4″ on hoist by 5′6″ on the fly, exclusive of heading and hems, and be fringed on three edges with yellow rayon fringe, 2½″ wide.

(2) The outdoor flag shall be of heavy weight nylon, and measure either 3′ on the hoist by 5′ on the fly or 5′ on the hoist by 8′ on the fly, exclusive of heading and hems.

(c) Each flag shall be manufactured in accordance with U.S. Department of Defense Military Specification Mil-F-2692. The official seal shall be screen printed on both sides, and on each side, the lettering shall read from left to right. Headings shall be Type II in accordance with the Institute of Heraldry Drawing No. 5-1-45E.

§ 1002.22 Use of distinguishing flag.

(a) DOE distinguishing flags may be used only:

(1) In the offices of the Secretarial officers, Chairman of the Federal Energy Regulatory Commission, and heads of field locations designated below:

Power Administrations.
Regional Offices.
Operations Offices.
Certain Field Offices and other locations as designated by the Director of Administration.

(2) At official DOE ceremonies.

(3) In Department auditoriums, official presentation rooms, hearing rooms, lobbies, public document rooms, and in non-DOE facilities in connection with events or displays sponsored by DOE, and public appearances of DOE officials.

(4) On or in front of DOE installation buildings.

(5) Other such purposes as determined by the Director of Administration.

Subpart D—Unauthorized Uses

§ 1002.31 Unauthorized uses of the seal and flag.

The official seal and distinguishing flag shall not be used except as authorized by the Director of Administration in connection with:

(a) Contractor-operated facilities.

(b) Souvenir or novelty items.

(c) Toys or commercial gifts or premiums.

(d) Letterhead design, except on official Departmental stationery.

(e) Matchbook covers, calendars, and similar items.

(f) Civilian clothing or equipment.

(g) Any article which may disparage the seal or flag or reflect unfavorably upon DOE.

(h) Any manner which implies Departmental endorsement of commercial products or services, or of the user's policies or activities.

PART 1004—FREEDOM OF INFORMATION

Sec.

1004.1 Purpose and scope.
1004.2 Definitions.
1004.3 Public reading facilities.
1004.4 Elements of a request.
1004.5 Processing requests for records.
1004.6 Requests for classified records.
1004.7 Responses by authorizing officials: Form and content.
1004.8 Appeals of initial denials.
1004.9 Fees for providing records.
1004.10 Exemptions.
1004.11 Handling information of a private business, foreign government, or an international organization.
1004.12 Computation of time.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 53 FR 15661, May 3, 1988, unless otherwise noted.

§ 1004.1 Purpose and scope.

This part contains the regulations of the Department of Energy (DOE) that implement 5 U.S.C. 552, Pub. L. 89-487, as amended by Pub. L. 93-502, 88 Stat. 1561, by Pub. L. 94-409, 90 Stat. 1241, and by Pub. L. 99-570, 100 Stat. 3207-49. The regulations of this part provide information concerning the procedures by which records may be requested from all DOE offices, excluding the Federal Energy Regulatory Commission (FERC). Records of the DOE made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public as prescribed by this part. Persons seeking information or records of the DOE may find it helpful to consult with a DOE Freedom of Information Officer before invoking the formal procedures set out below. To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

§ 1004.2 Definitions.

As used in this part:

(a) "Appeal Authority" means the Office of Hearings and Appeals.

(b) "Authorizing or Denying Official" means that DOE officer as identified by the Directorate of Administration by separate directive, having custody of or responsibility for records requested under 5 U.S.C. 552. In DOE Headquarters, the term refers to The Freedom of Information Officer as defined below and officials who report directly to either the Office of the Secretary or a Secretarial Officer as also defined below. In the Field Offices, the term refers to the head of a field location identified in § 1004.2(h) and the heads of field offices to which they provide administrative support and have delegated this authority.

(c) "'Commercial use' request" refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, agencies must determine how the requester will use the documents requested. Moreover, where DOE has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not evident from the request itself, the DOE will seek additional clarification before assigning the request to a specific category.

(d) "Department" or "Department of Energy (DOE)" means all organizational entities which are a part of the executive department created by Title II of the DOE Organization Act, Pub L. 95-91. This specifically excludes the FERC.

(e) "Direct costs" means those expenditures which the DOE actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(f) "Duplication" refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of, but are not limited to, paper copy, microform, audiovisual materials, or machine readable documentation (e.g., magnetic tape or disk). The copy provided must be in a form that can be reasonably used by requesters.

(g) "Educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(h) "Freedom of Information Officer" means the person designated to administer the Freedom of Information Act at the following DOE offices:

(1) Alaska Power Administration, P.O. Box 020050, Juneau, AK 99802-0050.

(2) Albuquerque Operations Office, P.O. Box 5400, Albuquerque, NM 87115.

(3) Bartlesville Project Office, P.O. Box 1398, Bartlesville, OK 74005.

(4) Bonneville Power Administration, P.O. Box 3621-AL, Portland, OR 97208-3621.

(5) Chicago Operations Office, 9800 South Cass Avenue, Argonne, IL 60439.

(6) Headquarters, Department of Energy, Washington, DC 20585.

(7) Idaho Operations Office, 785 DOE Place, Idaho Falls, ID 83402.

(8) Morgantown Energy Technology Center, P.O. Box 880, Morgantown, WV 26507.

(9) Nevada Operations Office, P.O. Box 98518, Las Vegas, NV 89193-8518.

(10) Oak Ridge Operations Office, P.O. Box E, Oak Ridge, TN 37831.

(11) Pittsburgh Energy Technology Center, P.O. Box 10940, Pittsburgh, PA 15236-0940.

(12) Richland Operations Office, P.O. Box 550, Richland, WA 99352.

(13) San Francisco Operations Office, 1333 Broadway, Oakland, CA 94612.

(14) Savannah River Operations Office, P.O. Box A, Aiken, SC 29802.

(15) Southeastern Power Administration, Samuel Elbert Building, Elberton, GA 30635.

(16) Southwestern Power Administration, ATTN: SWPA-120, P.O. Box 1619, Tulsa, OK 74101.

(17) Strategic Petroleum Reserve Project Management Office, 900 Commerce Road East, New Orleans, LA 70123.

(18) Western Area Power Administration, P.O. Box 3402, Golden, CO 80401.

(i) "General Counsel" means the General Counsel provided for in section 202(b) of the DOE Organization Act, or any DOE attorney designated by the General Counsel as having responsibility for counseling the Department on Freedom of Information Act matters.

(j) "Headquarters" means all DOE facilities functioning within the Washington metropolitan area.

(k) "Non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis as that term is referenced in § 1004.2(c), and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(l) "Office" means any administrative or operating unit of the DOE, including those in field offices.

(m) "Representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive.

Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but agencies may also look to the past publication record of a requester in making this determination.

(n) "Review" refers to the process of examining documents located in response to a commercial use request (see § 1004.2(c)) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise pepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(o) "Search" includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. The DOE will search for material in the most efficient and least expensive manner in order to minimize cost for both DOE and the requester. For example, DOE will not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. "Search" will be distinguished, moreover, from "review" of material in order to determine whether the material is exempt from disclosure. Searches may be done manually or by computer using existing programming.

(p) "Secretarial Officer" means the General Counsel; Assistant Secretary, Management and Administration; Assistant Secretary for Congressional, Intergovernmental, and Public Affairs; Assistant Secretary for International Affairs and Energy Emergencies; Assistant Secretary for Nuclear Energy; Assistant Secretary for Fossil Energy; Assistant Secretary, Conservation and Renewable Energy; Assistant Secretary for Defense Programs; Assistant Secretary for Environment, Safety, and Health; Administrator, Economic Regulatory Administration; Administrator, Energy Information Administration; Director of Energy Research; Director of Civilian Radioactive Waste

Management; Director of Minority Economic Impact, and the Inspector General.

(q) "Statute specifically providing for setting the level of fees for particular types of records," at 5 U.S.C. 552(a)(4)(A)(vi), means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records, in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

§ 1004.3 Public reading facilities.

(a) The DOE Headquarters will maintain, in the public reading facilities, the materials which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying. The principal public reading facility will be located at the Freedom of Information Office, 1000 Independence Avenue, SW, Washington, DC. A complete listing of other facilities is available from the Freedom of Information Officer at DOE Headquarters.

(b) Each of the designated field offices will maintain in public reading facilities certain materials maintained in the Headquarters facility and other materials associated with the particular field offices.

(c) Each of these public reading facilities will maintain and make available for public inspection and copying current indices of the materials at that facility which are required to be indexed by 5 U.S.C. 552(a)(2) or other applicable statutes.

§ 1004.4 Elements of a request.

(a) *Addressed to the Freedom of Information Officer.* A request for a record of the DOE which is not available in a public reading facility, as described in § 1004.3, shall be addressed to the appropriate Headquarters or field Freedom of Information Officer, Department of Energy, at a location listed in § 1004.2(h) of this part, and both the envelope and the letter shall be clearly marked "Freedom of Information Request." Except as provided in § 1004.4(e), a request will be considered to be received by the DOE for purposes of 5 U.S.C. 552(a)(6) upon actual receipt by the Freedom of Information Officer. Requests delivered after regular business hours of the Freedom of Information Office are considered received on the next regular business day.

(b) *Request must be in writing and for reasonably described records.* A request for access to records must be submitted in writing and must reasonably describe the records requested to enable DOE personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester, including the names and titles of any DOE officers or employees who have been contacted regarding the request prior to the submission of a written request. If the request relates to a matter in pending litigation, the court and its location should be identified to aid in locating the documents. If the records are known to be in a particular office of the DOE, the request should identify that office.

(c) *Categorical requests.* (1) Must meet reasonably described records requirement. A request for all records falling within a reasonably specific and well-defined category shall be regarded as conforming to the statutory requirement that records be reasonably described if DOE personnel can reasonably determine which particular records are sought in the request. The request must enable the DOE to identify an locate the records sought by a process that is not unreasonably burdensome or disruptive of DOE operations. The Freedom of Information Officer may take into consideration problems of search which are associated with the files of an individual office within the Department and determine that a request is not one for reasonably described documents as it pertains to that office.

(2) Assistance in reformulating a non-conforming request. If a request does not reasonably describe the records sought, as specified in paragraph (c)(1) of this section, the DOE response will specify the reasons why the request failed to meet the requiremnts of paragraph (c)(1) of this section and will invite the requester to confer with knowledgeable DOE personnel in an attempt to restate the request or reduce the request to managable proportions by reformulation or by agreeing on an orderly procedure for the production of the records. If DOE responds that additional information is needed from the requester to render records reasonably described, any reformulated request submitted by the requester will be treated as an initial request for purposes of calculating the time for DOE response.

(d) *Nonexistent records.* (1) 5 U.S.C. 552 does not require the compilation or creation of a record for the purpose of satisfying a request for records.

(2) 5 U.S.C. 552 does not require the DOE to honor a request for a record not yet in existence, even where such a document may be expected to come into existence at a later time.

(3) If a requested record is known to have been destroyed or otherwise disposed of, or if no such record is known to exist, the requester will be so notified.

(e) *Assurance of willingness to pay fees.* A request shall include (1) an assurance to pay whatever fees will be assessed in accordance with § 1004.9, (2) an assurance to pay those fees not exceeding some specified dollar amount, or (3) a request for a waiver or reduction of fees. No request will be deemed to have been received until the DOE has received some valid assurance of willingness to bear fees anticipated to be associated with the processing of the request or a specific request of a waiver or reduction of fees.

(f) *Requests for records or information of other agencies.* Some of the records in the files of the DOE have been obtained from other Federal agencies or contain information obtained from other Federal agencies.

(1) Where a document originated in another Federal agency, the Authorizing Official will refer the request to the originating agency and so inform the requester, unless the originator agrees to direct release by DOE.

(2) Requests for DOE records containing information received from another agency, or records prepared jointly by DOE and other agencies, will be treated as requests for DOE records except that the Authorizing Official will coordinate with the appropriate official of the other agency. The notice of determinaton to the requester, in the event part or all of the record is recommended for denial by the other agency, will cite the other agency Denying Official as well as the appropriate DOE Denying Official if a denial by DOE is also involved.

§ 1004.5 Processing requests for records.

(a) Freedom of Information Officers will be responsible for processing requests for records submitted pursuant to this part. Upon receiving such a request, the Freedom of Information Officer will, except as provided in paragraph (c) of this section, ascertain which Authorizing Official has responsibility for, custody of, or concern with the records requested. The Freedom of Information Officer will review the request, consulting with the Authorizing Official where appropriate, to determine its compliance with § 1004.4. Where a request complies with § 1004.4, the Freedom of Information Officer will acknowledge receipt of the request to the requester and forward the request to the Authorizing Official for action.

(b) The Authorizing Official will promptly identify and review the records encompassed by the request. The Authorizing Official will prepare a written response (1) granting the request, (2) denying the request, (3) granting/denying it in part, (4) reply-ing with a response stating that the request has been referred to another agency under § 1004.4(f) or § 1004.6(e), (5) informing the requester that responsive records cannot be located or do not exist.

(c) Where a request involves records which are in the custody of or are the concern of more than one Authorizing Official, the Freedom of Information Officer will identify all concerned Authorizing Officials, send copies of the request to them and forward the request for action to the Authorizing Official that can reasonably be expected to have custody of most of the requested records. This Authorizing Official will prepare a DOE response to the requester consistent with paragraph (b) of this section, which will identify any other Authorizing Official, having responsibility for the denial of records.

(d) Time for processing requests. (1) Action pursuant to paragraph (b) of this section will be taken within 10 working days of receipt of a request for DOE records ("receipt" is defined in § 1004.4(a)), except that, if unusual circumstances require an extension of time before a decision on a request can be reached and the person requesting records is promptly informed in writing by the Authorizing Official of the reasons for such extension and the date on which a determination is expected to be dispatched, then the Authorizing Official may take an extension not to exceed 10 working days.

(2) For purposes of this section and § 1004.8(d), the term "unusual circumstances" may include but is not limited to the following:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the offices processing the request;

(ii) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are responsive to a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the Department having substantial subject matter interest therein.

(3) The requester must be promptly notified in writing of the extension, the reasons for the extension, and the date on which a determination is expected to be made.

(4) If no determination has been made at the end of the 10-day period, or the last extension thereof, the requester may deem his adminstrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be made within the applicable time limit, the responsible Authorizing Official will nevertheless continue to process the request. If the DOE is unable to provide a response within the statutory period, the Authorizing Official will inform the requester of the reason for the delay; the date on which a determination may be expected to be made; that the requester can seek remedy through the courts, but ask the requester to forego such action until a determination is made.

(5) Nothing in this part shall preclude the Authorizing Official and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement will be confirmed in writing and will clearly specify the total time agreed upon.

§ 1004.6 Requests for classified records.

(a) All requests for classified records and Unclassified Controlled Nuclear Information will be subject to the provisions of this part with the special qualifications noted below.

(b) All requests for records made in accordance with this part, except those requests for access to classified records which are made specifically pursuant to the mandatory review provisions of Executive Order 12356 or any successor thereto, may be automatically considered a Freedom of Information Act request.

(c) Concurrence of the Director of Classification is required on all responses involving requests for classified records. The Director of Classification will be informed of the request by either the Freedom of Information Officer or the Authorizing Official to whom the action is assigned, and will advise the office originating the records, or having responsibility for the records, and consult with such office or offices prior to making a determination under this section.

(d) The written notice of a determination to deny records, or portions of records, which contain both classified material and other exempt material, will be concurred in by the Director of Classification who will be the Denying Official for the classified portion of such records in accordance with §§ 1004.5(c) and 1004.7(b)(2). If other DOE officials or appropriate officials of other agencies are responsible for denying any portion of the record, their names and titles or positions will be listed in the notice of denial in accordance with §§ 1004.5(c) and 1004.7(b)(2) and it will be clearly indicated what portion or portions they were responsible for denying.

(e) Requests for DOE records containing classified information received from another agency, and requests for classified documents originating in another agency, will be coordinated with or referred to the other agency consistent with the provisions of § 1004.4(f). Coordination or referral of information or documents subject to this section will be effected by the Director of Classification (in consultation with the Authorizing Official) with the appropriate official of the other agency.

§ 1004.7 Responses by authorizing officials: Form and content.

(a) *Form of grant.* Records requested pursuant to § 1004.4 will be made available promptly, when they are identified and determined to be nonexempt under this Regulation, the Freedom of Information Act, and where the applicable fees are $15 or less or where it has been determined that the payment of applicable fees should be waived. Where the applicable fees exceed $15, the records may be made available before all charges are paid.

(b) *Form of denial.* A reply denying a request for a record will be in writing. It will be signed by the Denying Official pursuant to § 1004.5 (b) or (c) and will include:

(1) *Reason for denial.* A statement of the reason for denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate.

(2) *Persons responsible for denial.* A statement setting forth the name and the title or position of each Denying Official and identifying the portion of the denial for which each Denying Official is responsible.

(3) *Segregation of nonexempt material.* A statement or notation addressing the issue of whether there is any segregable nonexempt material in the documents or portions thereof identified as being denied.

(4) *Adequacy of search.* Although a determination that no such record is known to exist is not a denial, the requester will be informed that a challenge may be made to the adequacy of the search by appealing within 30 calendar days to the Office of Hearings and Appeals.

(5) *Administrative appeal.* A statement that the determination to deny documents made within the statutory time period, may be appealed within 30 calendar days to the Office of Hearings and Appeals.

§ 1004.8 Appeal of initial denials.

(a) *Appeal to Office of Hearings and Appeals.* When the Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with § 1004.4(d), or when the Freedom of Information Officer has denied a request for waiver of fees consistent with § 1004.9, the requester may, within 30 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals.

(b) *Elements of appeal.* The appeal must be in writing, addressed to the Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585 and both the envelope and letter must be clearly marked "Freedom of Information Appeal." The appeal must contain a concise statement of grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities, including, but not limited to, DOE (and predecessor agencies) rulings, regulations, interpretations and decisions on appeals and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination which is being appealed, must be submitted with the appeal.

(c) *Receipt of appeal.* An appeal will be considered to be received for purposes of 5 U.S.C. 552(a)(6) upon receipt by the appeal authority. Documents delivered after regular business hours of the Office of Hearings and Appeals are considerd received on the next regular business day.

(d) *Action within 20 working days.* (1) The appeal authority will act upon the appeal within 20 working days of its receipt, except that if unusual circumstances (as defined in § 1004.5(d)(2)) require an extension of time before a decision on a request can be reached, the appeal authority may extend the time for final action for an additional 10 working days less the number of days of any statutory extension which may have been taken by the Authorizing Official during the period of initial determination.

(2) The requester must be promptly notified in writing of the extension, setting forth the reasons for the extension, and the date on which a determination is expected to be issued.

(3) If no determination on the appeal has been issued at the end of the 20-day period or the last extension thereof, the requester may consider his administrative remedies to be exhausted and seek a review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be issued within the applicable time limit, the appeal will nevertheless continue to be processed; on expiration of the time limit the requester will be informed of the reason for the delay, of the date on which a determination may be expected to be issued, and of his right to seek judicial review in the United States district court in the district in which he resides or has his principal place of business, the district in which the records are situated, or the District of Columbia. The requester may be asked to forego judicial review until determination of the appeal.

(4) Nothing in this part will preclude the appeal authority and a requester from agreeing to an extension of time for the decision on an appeal. Any such agreement will be confirmed in writing by the appeal authority and will clearly specify the total time agreed upon for the appeal decision.

(e) *Form of action on appeal.* The appeal authority's action on an appeal will be in writing and will set forth the reason for the decision. It will also contain a statement that it constitutes final agency action on the request and that judicial review will be available either in the district in which the requester resides or has a principal place of business, the district in which the records are situated, or in the District of Columbia. Documents determined by the appeal authority to be documents subject to release will be made promptly available to the requester upon payment of any applicable fees.

(f) *Classified records and records covered by section 148 of the Atomic Energy Act.* The Secretary of Energy or his designee will make the final determination concerning appeals involving the denial of requests for classified information or the denial of requests for information falling within the scope of section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

§ 1004.9 Fees for providing records.

(a) *Fees to be charged.* The DOE will charge fees that recoup the full allowable direct costs incurred. The DOE will use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The DOE may contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When doing so, however, the

DOE will ensure that the ultimate cost to the requester is no greater than it would be if the DOE itself had performed these tasks. In no case will the DOE contract out responsibilities which the FOIA provides that only the agency may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees. Where the DOE can identify documents that are responsive to a request and are maintained for public distribution by other agencies such as the National Technical Information Service and the Government Printing Office, the Freedom of Information Officer will inform requesters of the procedures to obtain records from those sources.

(1) *Manual searches for records.* Whenever feasible, the DOE will charge for manual searches for records at the salary rate(s) (i.e. basic pay plus 16 percent) of the employee(s) making the search.

(2) *Computer searches for records.* The DOE will charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary.

(3) *Review of records.* The DOE will charge requesters who are seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges will be assessed only for the initial review (i.e., the review undertaken the first time the DOE analyzes the applicability of a specific exemption to a particular record or portion of a record. The DOE will not charge for review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(4) *Duplication of records.* The DOE will make a per-page charge for paper copy reproduction of documents. At present, the charge for paper to paper copies will be five cents per page and the charge for microform to paper copies will be ten cents per page. For computer generated copies, such as tapes or printouts, the DOE will charge the actual cost, including operator time, for production of the tape or printout. For other methods of reproduction or duplication, we will charge the actual direct costs of producing the document(s).

(5) *Other charges.* It shall be noted that complying with requests for special services such as those listed below is entirely at the discretion of this agency. Neither the FOIA nor its fee structure cover these kinds of services. The DOE will recover the full direct costs of providing services such as those enumerated below to the extent that we elect to provide them:

(i) Certifying that records are true copies;

(ii) Sending records by special methods such as express mail, etc.

(6) *Restrictions on assessing fees.* With the exception of requesters seeking documents for a commercial use, section (a)(4)(A)(iv) of the Freedom of Information Act, as amended, DOE will provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, DOE will not charge fees to any requester, including commercial use requesters, if the cost of collecting the fee would be equal to or greater than the fee itself. These provisions work together, so that except for commercial use requesters, DOE will not begin to assess fees until after the Department has provided the free search and reproduction. For example, if a request involves two hours and ten minutes of search time and results in 105 pages of documents, DOE will charge for only 10 minutes of search time and only five pages of reproduction. If this cost is equal to or less than $15.00, the amount DOE incurs to process a fee collection, no charges would be assessed. For purposes of these restrictions on assessment of fees, the word "pages" refers to paper copies of a standard agency size which will be normally be "8½×11" or "11×14." Thus, requesters would not be entitled to 100 microfiche or 100 computer

disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction. Similarly, the term "search time" is based on a *manual search*. To apply this term to searches made by computer, the DOE will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the computer operator conducting the search, DOE will begin assessing charges for computer search.

(7) *Notification of charges.* If the DOE determines or estimates that the fees to be assessed under this section may amount to more than $25.00, the requester will be informed of the estimated amount of fees, unless the requester has previously indicated a willingness to pay the amount estimated by the agency. In cases where a requester has been notified that actual or estimated fees may amount to more than $25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to a requester pursuant to this paragraph will offer him the opportunity to confer with DOE personnel in order to reformulate his request to meet his needs at a lower cost.

(8) *Waiving or reducing fees.* The DOE will furnish documents without charge or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and disclosure is not primarily in the commercial interest of the requester. This fee waiver standard thus sets forth two basic requirements, both of which must be satisfied before fees will be waived or reduced. First it must be established that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. Second, it must be established that disclosure of the information is not primarily in the commercial interest of the requester. When these requirements are satisfied, based upon information supplied by a requester or otherwise made known to the DOE, the waiver or reduction of a FOIA fee will be granted. In determining when fees should be waived or reduced the Freedom of Information Officer should address the following two criteria:

(i) That disclosure of the Information "is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government." Factors to be considered in applying this criteria include but are not limited to:

(A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government";

(B) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

(ii) If Disclosure of the Information "is Not Primarily in the Commercial Interest of the Requester." Factors to be considered in applying this criteria include but are not limited to:

(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

(b) *Fees to be charged—categories of requesters.* There are four categories of FOIA requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The Freedom of Information Officer will make determinations regarding categories of requesters as defined at § 1004.2. The Headquarters Freedom of Information Officer will assist field Freedom of Information Officers in categorizing requesters, and will resolve conflicting categorizations. The FOIA prescribes specific levels of fees for each of these categories:

(1) *Commercial use requesters.* When the DOE receives a request for documents which appears to be for commercial use, charges will be assessed to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercical use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. The DOE will recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records.

(2) *Educational and non-commercial scientific institution requesters.* The DOE will provide documents to requesters in this category for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(3) *Requesters who are representatives of the news media.* The DOE will provide documents to requesters in this category for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 1004.2(m), and his or her request must not be made for a commercial use. With respect to this class of requesters, a request for records supporting the news dissemination function of the requester will not be considered to be a request for a commercial use.

(4) *All other requesters.* The DOE will charge requesters who do not fall into any of the above categories fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge. Moreover, requests from individuals for records about themselves filed in DOE systems of records will continue to be processed under the fee provisions of the Privacy Act of 1974.

(5) *Charging interest—notice and rate.* Interest will be charged those requesters who fail to pay fees. The DOE will begin to assess interest charges on the amount billed on the 31st day following the day on which the billing was sent to the requester. Interest will be at the rate prescribed in section 3717 of Title 31 U.S.C. and will accrue from the date of the billing.

(6) *Charges for unsuccessful search.* The DOE will assess charges for time spent searching even if the search fails to identify responsive records or if records located are determined to be exempt from disclosure. If the DOE estimates that search charges are likely to exceed $25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice will offer the requester the opportunity to confer with agency personnel in order to reformulate the request to reduce the cost of the request.

(7) *Aggregating requests.* A requester may not file multiple requests each seeking portions of a document or documents, solely to avoid payment of fees. When the DOE reasonably believes that a requester or, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the DOE will aggregate any such requests and charge the appropriate fees. The DOE may consider the time period in which the requests have been made in

its determination to aggregate the related requests. In no case will DOE aggregate multiple requests on unrelated subjects from one requester.

(8) *Advance payments.* Requesters are not required to make an advance payment (i.e., payment before action is commenced or continued on a request) unless:

(i) The DOE estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00. In such cases, the DOE will notify the requester of the likely cost and obtain a satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(ii) A requester has previously failed to pay a fee in a timely fashion (i.e., within 30 days of the date of the billing). The DOE will require the requester to pay the full amount delinquent plus any applicable interest as provided in paragraph (b)(5) of this section, or demonstrate that he has, in fact, paid the delinquent fee; and to make an advance payment of the full amount of the estimated current fee before we begin to process a new request or a pending request from that requester.

When the DOE acts under paragraphs (b)(8) (i) or (ii) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denials, plus permissible extensions of these time limits) will begin only after the DOE has received fee payments described above.

(c) *Effect of the Debt Collection Act of 1982 (Pub. L. 97-365).* The DOE will use the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and the use of collection agencies, where appropriate, to encourage payment of fees.

§ 1004.10 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in paragraph (b) of that section. These categories include such matters as national defense and foreign policy information; investigatory records; internal procedures and communications; materials exempted from disclosure by other statutes; confidential, commercial, and financial information; and matters involving personal privacy.

(b) Specifically, the exemptions in 5 U.S.C. 552(b) will be applied consistent with § 1004.1 of these regulations to matters that are:

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; for example Restricted Data and Formerly Restricted Data under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*) are covered by this exemption;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (i) could reasonably be expected to interfere with enforcement proceedings, (ii) would deprive a person of a right to a fair trial or an impartial adjudication, (iii) could reasonably be expected to constitute an unwarranted invasion of personal pri-

vacy, (iv) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (v) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (vi) could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(c) Any reasonably segregated nonexempt portion of a record will be provided to a requester. The DOE will delete portions which are withholdable under the exemptions listed above.

§ 1004.11 Handling information of a private business, foreign government, or an international organization.

(a) Whenever a document submitted to the DOE contains information which may be exempt from public disclosure, it will be handled in accordance with the procedures in this section. While the DOE is responsible for making the final determination with regard to the disclosure or nondisclosure of information contained in requested documents, the DOE will consider the submitter's views (as that term is defined in this section) in making its determination. Nothing in this section will preclude the submission of a submitter's views at the time of the submission of the document to which the views relate, or at any other time.

(b) When the DOE may determine, in the course of responding to a Freedom of Information request, not to release information submitted to the DOE (as described in paragraph (a) of this section, and contained in a requested document) without seeking any or further submitter's views, no notice will be given the submitter.

(c) When the DOE, in the course of responding to a Freedom of Information request, cannot make the determination described in paragraph (b) of this section without having for consideration the submitter's views, the submitter shall be promptly notified and provided an opportunity to submit his views on whether information contained in the requested document (1) is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, (2) contains information referred to in 18 U.S.C. 1905, or (3) is otherwise exempt by law from public disclosure. The DOE will make its own determinations as to whether any information is exempt from disclosure. Notice of a determination by the DOE that a claim of exemption made pursuant to this paragraph is being denied will be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

(d) When the DOE, in the course of responding to a Freedom of Information request, cannot make the determination described in paragraph (b) of this section and, without recourse to paragraph (c) of this section, previously has received the submitter's views, the DOE will consider such submitter's views and will not be required to obtain additional submitter's views under the procedure described in paragraph (c) of this section. The DOE will make its own determination with regard to any claim that information be exempted from disclosure. Notice of the DOE's determination to deny a claim of exemption made pursuant to this paragraph will be given to a person making such a claim no less than seven (7) calendar days prior to its intended public disclosure.

(e) Notwithstanding any other provision of this section, DOE offices may require a person submitting documents containing information that may be exempt by law from mandatory disclosure to (1) submit copies of each document from which information claimed to be confidential has been deleted or (2) require that the submitter's views be otherwise made known at the time of the submission. Notice of a determination by the DOE that a claim of exemption is being denied will be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

(f) *Criteria for determining the applicability of 5 U.S.C. 552(b)(4).* Subject to subsequent decisions of the Appeal Authority, criteria to be applied in determining whether information is exempt from mandatory disclosure pursuant to Exemption 4 of the Freedom of Information Act include:

(1) Whether the information has been held in confidence by the person to whom it pertains;

(2) Whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefore;

(3) Whether the information was transmitted to and received by the Department in confidence;

(4) Whether the information is available in public sources;

(5) Whether disclosure of the information is likely to impair the Government's ability to obtain similar information in the future; and

(6) Whether disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

(g) When the DOE, in the course of responding to a Freedom of Information request, determines that information exempt from the mandatory public disclosure requirements of the Freedom of Information Act is to be released in accordance with § 1004.1, the DOE will notify the submitter of the intended discretionary release no less than seven (7) days prior to intended public disclosure of the information in question.

(h) As used in this section, the term "submitter's views" means, with regard to a document submitted to the DOE, an item-by-item indication, with accompanying explanation, addressing whether the submitter considers the information contained in the document to be exempt from the mandatory public disclosure requirements of the Freedom of Information Act, to be information referred to in 18 U.S.C. 1905, or to be otherwise exempt by law from mandatory public disclosure. The accompanying explanation shall specify the justification for nondisclosure of any information under consideration. If the submitter states that the information comes within the exemption in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, the submitter shall include a statement specifying why such information is privileged or confidential and, where appropriate, shall address the criteria in paragraph (f) of this section. In all cases, the submitter shall address the question of whether or not discretionary disclosure would be in the public interest.

§ 1004.12 Computation of time.

Except as otherwise noted, in computing any period of time prescribed or allowed by this part, the day of the event from which the designated period of time begins to run is not to be included; the last day of the period so computed is to be included; and Saturdays, Sundays, and legal holidays are excepted.

PART 1005—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF ENERGY PROGRAMS AND ACTIVITIES

Sec.
1005.1 What is the purpose of these regulations?
1005.2 What definitions apply to these regulations?
1005.3 What programs and activities of the Department are subject to these regulations?

Sec.
1005.4 What are the Secretary's general responsibilities under the Order?
1005.5 What is the Secretary's obligation with respect to federal interagency coordination?
1005.6 What procedures apply to the selection of programs and activities under these regulations?
1005.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?
1005.8 How does the Secretary provide states an opportunity to comment on proposed federal financial assistance and direct federal development?
1005.9 How does the Secretary receive and respond to comments?
1005.10 How does the Secretary make efforts to accommodate intergovernmental concerns?
1005.11 What are the Secretary's obligations in interstate situations?
1005.12 How may a state simplify, consolidate, or substitute federally required state plans?
1005.13 May the Secretary waive any provision of these regulations?

AUTHORITY: E. O. 12372, July 14, 1982, 47 FR 30959, as amended April 8, 1983, 48 FR 15887; sec. 401 of the Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506).

SOURCE: 48 FR 29182, June 24, 1983, unless otherwise noted.

EDITORIAL NOTE: For additional information, see related documents published at 47 FR 57369, December 23, 1982, 48 FR 17101, April 21, 1983, and 48 FR 29096, June 24, 1983.

§ 1005.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, "Intergovernmental Review of Federal Programs," issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968.

(b) These regulations are intended to foster an intergovernmental partership and a strengthened Federalism by relying on state processes and on state, areawide, regional and local coordination for review of proposed federal financial assistance and direct federal development.

(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

§ 1005.2 What definitions apply to these regulations?

"Department" means the U.S. Department of Energy.

"Order" means Executive Order 12372, issued July 14, 1982, and amended April 8, 1983 and titled "Intergovernmental Review of Federal Programs."

"Secretary" means the Secretary of the U.S. Department of Energy or an official or employee of the Department acting for the Secretary under a delegation of authority.

"State" means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§ 1005.3 What programs and activities of the Department are subject to these regulations?

(a) The Secretary publishes in the FEDERAL REGISTER a list of the Department's program and activities that are subject to the order and these regulations.

(b) Unless otherwise stated in the FEDERAL REGISTER listing identified in paragraph (a) of this section, these regulations do not apply to the Department's financial assistance transactions with other than governmental entities.

(c) The Bonneville Power Administration shall satisfy the requirements of these regulations by compliance with the consultation requirements of the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501.

§ 1005.4 What are the Secretary's general responsibilities under the Order?

(a) The Secretary provides opportunities for consultation by elected officials of those state and local governments that would provide the nonfederal funds, for, or that would be directly affected by, proposed federal financial assistance from, or direct federal development by, the Department.

(b) If a state adopts a process under the Order to review and coordinate proposed federal financial assistance and direct federal development, the Secretary, to the extent permitted by law:

(1) Uses the state process to determine official views of state and local elected officials;

(2) Communicates with state and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Make efforts to accommodate state and local elected official's concerns with proposed federal financial assistance and direct federal development that are communicated through the state process;

(4) Allows the states to simplify and consolidate existing federally required state plan submissions;

(5) Where state planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of State plans for federally required state plans;

(6) Seeks the coordination of views of affected state and local elected officials in one state with those of another state when proposed federal financial assistance or direct federal development has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports state and local governments by discouraging the reauthorization or creation of any planning organization which is federally-funded, which has a limited purpose, and which is not adequately representative of, or accountable to, state or local elected officials.

§ 1005.5 What is the Secretary's obligation with respect to Federal interagency coordination?

The Secretary, to the extent practicable, consults with and seeks advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

§ 1005.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A state may select any program or activity published in the Federal Register in accordance with § 1005.3 of this part for intergovernmental review under these regulations. Each state, before selecting programs and activities, shall consult with local elected officials.

(b) Each state that adopts a process shall notify the Secretary of the Department's programs and activities selected for that process.

(c) A state may notify the Administrator of changes in its selections at any time. For each change, the state shall submit to the Secretary an assurance that the state has consulted with local elected officials regarding the change. The Department may establish deadlines by which states are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a state's process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

§ 1005.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?

(a) [Reserved]

(b) The Secretary provides notice to directly affected state, areawide, regional, and local entities in a state of proposed Federal financial assistance or direct Federal development if:

(1) The state has not adopted a process under the Order; or

(2) The assistance or development involves a program or activity not selected for the state process. This notice may be made by publication in the Federal Register or other appropriate means, which the Department in its discretion deems appropriate.

§ 1005.8 How does the Secretary provide states an opportunity to comment on proposed Federal financial assistance and direct Federal development?

(a) Except in unusual circumstances, the Secretary gives state processes or directly affected State, areawide, regional and local officials and entities—

(1) At least 30 days from the date established by the Secretary to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days from the date established by the Secretary to comment on proposed direct Federal development or Federal financial assistance other than noncompeting continuation awards.

(b) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

§ 1005.9 How does the Secretary receive and respond to comments?

(a) The Secretary follows the procedures in § 1005.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a state process recommendation for a program selected under § 1005.6.

(b)(1) The single point of contact is not obligated to transmit comments from state, areawide, regional or local officials and entities where there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from, state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional and local officials and entities may submit comments either to the applicant or to the Department.

(d) If a program or activity is not selected for a state process, state, areawide, regional and local officials and entities may submit comments either to the applicant or to the Department. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the Department by the single point of contact, the Secretary follows the procedures of § 1005.10 of this part.

(e) The Secretary considers comments which do not constitute a state process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of § 1005.10 of this part, when such comments are provided by a single point of contact, by the applicant, or directly to the Department by a commenting party.

§ 1005.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

(a) If a state process provides a state process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with such written explanation of the decision, as the Secretary in his or her discretion deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of such notification.

§ 1005.11 What are the Secretary's obligations in interstate situations?

(a) The Secretary is responsible for:

(1) Identifying proposed federal financial assistance and direct federal development that have an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Department's program or activity;

(3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Department's program or activity;

(4) Responding pursuant to § 1005.10 of this part if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.

(b) The Secretary uses the procedures in § 1005.10 if a state process provides a state process recommendation to the Department through a single point of contact.

§ 1005.12 How may a state simplify, consolidate, or substitute Federally required state plans?

(a) As used in this section:

(1) "Simplify" means that a state may develop its own format, choose its own submission date, and select the planning period for a state plan.

(2) "Consolidate" means that a state may meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan.

(3) "Substitute" means that a state may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a state may decide to try to simplify consolidate, or substitute federally required state plans without prior approval by the Secretary.

(c) The Secretary reviews each state plan that a state has simplified, consolidated, or substituted and accepts the plan only if its contents meet federal requirements.

§ 1005.13 May the Secretary waive any provision of these regulations?

In an emergency, the Secretary may waive any provision of these regulations.

PART 1008—RECORDS MAINTAINED ON INDIVIDUALS (PRIVACY ACT)

Subpart A—General Provisions

Sec.
1008.1 Purpose and scope.
1008.2 Definitions.
1008.3 Employee standards of conduct with regard to privacy.
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1008.6 Procedures for Privacy Act requests.
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1008.20 Content of systems of records.
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1008.22 Use and collection of social security numbers.
1008.23 Public notice of systems of records.
1008.24 Criminal penalties—failure to publish a system notice.

AUTHORITY: Dept. of Energy Organization Act, Pub. L. 95-91, Executive Order 12091, 42 FR 46267, Privacy Act of 1974, Pub. L. 93-579 (5 U.S.C. 552a).

SOURCE: 45 FR 61577, Sept. 16, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 1008.1 Purpose and scope.

(a) This part establishes the procedures to implement the Privacy Act of 1974 (Pub. L. 93-579, 5 U.S.C. 552a) within the Department of Energy.

(b) This part applies to all systems of records, as defined in § 1008.2(m), maintained by DOE.

(c) This part applies to all divisions within the DOE, and to the personnel records of the Federal Energy Regulatory Commission (FERC), which are maintained by DOE on behalf of FERC. These regulations do not apply to other systems of records maintained by FERC. These regulations also apply to DOE contractors and their employees to the extent required by 5 U.S.C. 552a(m).

§ 1008.2 Definitions.

(a) "Department" or "Department of Energy (DOE)" means all organizational entities which are a part of the executive department created by Title II of the Department of Energy Organization Act, Pub. L. 95-91, except the Federal Energy Regulatory Commission (FERC).

(b) "Director, Office of Hearings and Appeals" means the Director or his delegate.

(c) "DOE locations" means each of the following DOE components:

(1) Alaska Power Administration, P.O. Box 50, Juneau, AK 88801.

(2) Albuquerque Operations Office, P.O. Box 5400, Albuquerque, NM 87115.

NOTE: This office has cognizance over the following area offices: Amarillo, Dayton, Kansas City, Los Alamos, Pinellas, Rocky Flats and Sanria.

(3) Bartlesville Energy Technology Center, P.O. Box 1398, Bartlesville, OK 74003.

(4) Bonneville Power Administration, P.O. Box 3621, Portland, OR 97268.

(5) Chicago Operations Office, 9800 South Cass Avenue, Argonne, IL 60439.

NOTE: This office has cognizance over the Batvia and Brookhaven area offices and the New Brunswick laboratory.

(6) Grand Forks Energy Technology Center, P.O. Box 8213, University Station, Grand Forks, ND 58201.

(7) Grand Junction Office, P.O. Box 2567, Grand Junction, CO 81502.

(8) Headquarters, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

(9) Idaho Operations Office, 550 Second Street, Idaho Falls, ID 83401.

(10) Laramie Energy Technology Center, P.O. Box 3395, University Station, Laramie, WY 82070.

(11) Morgantown Energy Technology Center, P.O. Box 880, Morgantown, WV 26505.

(12) Nevada Operations Office, P.O. Box 14100, Las Vegas, NV 89114.

(13) Oak Ridge Operations Office, P.O. Box E, Oak Ridge, TN 37830.

(14) Oak Ridge Technical Information Center, P.O. Box 62, Oak Ridge, TN 37830.

(15) Pittsburgh Energy Technology Center, 4800 Forbes Avenue, Pittsburgh, PA 15213.

(16) Region I, Analex Building, Room 700, 150 Causeway Street, Boston, MA 02114.

(17) Region II, 26 Federal Plaza, Room 3206, New York, NY 10007.

(18) Region III, 1421 Cherry Street, 10th Floor, Philadelphia, PA 19102.

(19) Region IV, 1655 Peachtree Street, NE., 8th Floor, Atlanta, GA 30309.

(20) Region V, 175 West Jackson Boulevard, Room A-333, Chicago, IL 60604.

(21) Region VI, P.O. Box 35228, 2626 West Mockingbird Lane, Dallas, TX 75235.

(22) Region VII, Twelve Grand Building, 1150 Grand Avenue, Kansas City, MO 64106.

(23) Region VIII, P.O. Box 26247—Belmar Branch, 1075 South Yukon Street, Lakewood, CO 80226.

(24) Region IX, 111 Pine Street, Third Floor, San Francisco, CA 94111.

(25) Region X, 1992 Federal Building, 915 Second Avenue, Seattle, WA 98174.

(26) Richland Operations Office, P.O. Box 550, Richland, WA 99352.

(27) San Francisco Operations Office, 1333 Broadway, Wells Fargo Building, Oakland, CA 94612.

(28) Savannah River Operations Office, P.O. Box "A," Aiken, SC 29801.

(29) Southeastern Power Administration, Elberton, GA 30635.

(30) Southwestern Power Administration, P.O. Drawer 619, Tulsa, OK 74101.

(31) Western Area Power Administration, P.O. Box 3402, Golden, CO 80401.

(d) "General Counsel" means the General Counsel provided for in section 202(b) of the Department of Energy Organization Act, or any DOE attorney designated by the General Counsel.

(e) "Headquarters" means all DOE facilities functioning within the Washington, D.C. metropolitan area.

(f) "Individual" means a citizen of the United States or an alien lawfully admitted for permanent residence, but does not include proprietorships, businesses, or corporations. Where appropriate, the term "individual" also includes a duly authorized representative of an individual.

(g) "Maintain" means maintain, collect, use, or disseminate.

(h) "Privacy Act Officer" means the person designated by the Director, Office of Administration, as responsible for administering the DOE's program for implementing the requirements of the Privacy Act of 1974 at the DOE locations listed at § 1008.2(c).

(i) "Record" means any item, collection, or grouping of information about an individual that is maintained by or for the DOE including, but not limited, to education, financial transactions, medical history, and criminal or employment history, and that contains that individual's name, or other identifying number, symbol, or other identifying particulars assigned to the individual, such as a finger or voice print or photograph. See subsection (a)(4) of the Act.

(j) "Routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected. See subsection (a)(7) of the Act.

(k) "Statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by 13 U.S.C. 8. See subsection (a)(6) of the Act.

(l) "System Manager" means the DOE official who is responsible for a system of records as designated in the system notice of that system of records published by DOE.

(m) "System of records" means a group of any records under DOE control from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual. See subsection (a)(5) of the Act.

(n) "Act" means the Privacy Act of 1974, Pub. L. 93-579; references to subsections of the Act mean subsections of section 3 of the Act.

§ 1008.3 Employee standards of conduct with regard to privacy.

(a) The Headquarters DOE Privacy Act Officer shall assure that DOE personnel are advised of the provisions of the Privacy Act, including the criminal penalties and civil liabilities provided therein, (subsections (g) and (i) of the Act), and that DOE personnel are made aware of their responsibilities: to protect the security of personal information to assure its accuracy, relevance, timeliness and completeness; to avoid unauthorized disclosure; and to insure that no system of records concerning individuals, no matter how insignificant or specialized, is maintained without public notice.

(b) DOE personnel shall:

(1) Collect or maintain no information of a personal nature about individuals unless relevant and necessary to achieve a purpose or carry out a responsibility of the DOE as required by statute or by Executive Order. See subsection (e)(1) of the Act and § 1008.18(a).

(2) Collect information, wherever possible, directly from the individual to whom it pertains. See subsection (e)(2) of the Act and § 1009.19(a).

(3) Inform individuals from whom information is collected of the authority for collection, the principal purposes for which the information will be used, the routine uses that will be made of the information, and the effects of not furnishing the information. See subsection (e)(3) of the Act and § 1008.19(b).

(4) Collect, maintain, use or disseminate no information concerning an individual's rights guaranteed by the First Amendment, unless:

(i) The individual has volunteered such; or

(ii) The information is expressly authorized by statute to be collected, maintained, used or disseminated; or

(iii) The activities involved are pertinent to and within the scope of an authorized law enforcement activity. See subsection (e)(7) of the Act and § 1008.18(b).

(5) Advise their supervisors of the existence or proposal of any system of records which retrieves information about individuals by the individual's name or other identifying number, symbol, or identifying particulars assigned to the individual.

(6) Maintain an accounting, in the prescribed form, of all disclosures of information other than those to officers or employees who have a need for the record in the performance of their duties and those required under the Freedom of Information Act. See subsection (c) of the Act.

(7) Disclose no records other than to DOE personnel without the advance written consent of the individual, except as authorized by 5 U.S.C. 552a(b) including routine uses published in the FEDERAL REGISTER.

(8) Maintain and process information concerning individuals with care to insure that no inadvertent disclosure of the information is made. See subsection (e)(10) of the Act.

(9) Inform the proper DOE authorities of any information maintained in a DOE system of records which is not authorized by the Privacy Act of 1974.

(c) Heads of Headquarters Divisions and Offices and heads of the other DOE locations shall review annually the systems of records subject to their responsibility to insure compliance with the requirements of the Privacy Act of 1974.

§ 1008.4 Procedures for identifying the individual making a request for access to or amendment of records.

(a) When a request for information about or for access to or correction of a record pertaining to an individual and contained in a system of records has been made pursuant to § 1008.6, valid identification of the individual making the request shall be required before information will be given, access granted or a correction considered, to insure that information is given, corrected, or records disclosed or corrected only at the request of the proper person.

(b) Subject to paragraphs (c) and (d) of this section, an individual making a request may establish his identity by:

(1) Including with his request, if submitted by mail, a photocopy of two identifying documents bearing his name and signature, one of which shall bear his current home or business address and date of birth; or

(2) Appearing at the appropriate DOE location during the regular business hours and presenting either of the following:

(i) One identifying document bearing the individual's photograph and signature, such as a driver's license or passport; or

(ii) Two identifying documents bearing the individual's name and signature, one of which shall bear the individual's current home or business address and date of birth; or

(3) Providing such other proof of identity as the Privacy Act Officer deems satisfactory in the circumstances of a particular request.

(c) If the Privacy Act Officer or the appropriate System Manager determines that the information in a record is so sensitive that unauthorized access could cause harm or embarrassment to the individual whose record in involved, or if the individual making the request is unable to produce satisfactory evidence of identity under paragraph (b) or (d) of this section, the individual making the request may be required to submit a notarized statement attesting to his identity and his understanding of the criminal penalties provided under section 1001 of Title 18 of the United States Code for making false statements to a Government agency and under subsection (i)(3) of the Act for obtaining records under false pretenses. Copies of these statutory provisions and forms of such notarized statements may be obtained upon request from the Privacy Act Officer, Headquarters, Department of Energy, Washington, D.C.

(d) When an individual acting as the parent of a minor or the legal guardian of the person to whom a record pertains makes a request pursuant to § 1008.6 of this part:

(1) Such an individual shall establish his personal identity in the same

manner required in either paragraph (b) or (c) of this section.

(2) In addition, such an individual shall establish his identity in the representative capacity of parent or legal guardian. In the case of the parent of a minor, the proof of identity shall be a certified or authenticated copy of the minor's birth certificate. In the case of the legal guardian of a person who has been declared incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, the proof of identity shall be a certified or authenticated copy of the order from a court of competent jurisdiction.

(3) A parent or legal guardian may act only for a living individual, not for a decedent. Requests for the records of decedents will be handled under the Freedom of Information Act (5 U.S.C. 552).

§ 1008.5 Effect of the Freedom of Information Act (FOIA).

(a) DOE shall not rely on any exemption contained in the Freedom of Information Act (5 U.S.C. 552) to withhold from the individual to whom it pertains, any record which is otherwise accessible to such individual under this part.

(b) DOE shall rely on subsection (b) of the Privacy Act to withhold information from a person other than the person to whom the record pertains only when the information is also exempt from disclosure under the FOIA.

(c) Where a request for access to records is submitted pursuant to both the FOIA and the Privacy Act, the DOE shall, to the maximum extent possible, process the request under the provisions of this part, including the time limits of this part.

Subpart B—Requests for Access or Amendment

§ 1008.6 Procedures for Privacy Act requests.

(a) Any individual may—

(1) Ask the DOE whether a system of records maintained by the DOE contains records about him or her;

(2) Request access to information pertaining to him or her that is maintained in a DOE system of records;

(3) Request that information about him or her in a DOE system of records be amended or corrected. Requests for correction or amendment may include inquiries concerning:

(i) Whether such information is relevant or necessary to accomplish a purpose that DOE is required to accomplish by statute or Executive Order; or

(ii) If the information is to be used by the DOE in making a determination about the individual, whether the information is as accurate, relevant, timely, or complete as is reasonably necessary to assure fairness in the determination.

(b) Requests submitted pursuant to this section shall:

(1) Be in writing and signed by the individual making the request;

(2) State that the request is a "Privacy Act Access" or "Privacy Act Amendment" request;

(3) Include the identification information required by § 1008.4;

(4) Specify, if possible, the title and identifying number of the system of records as listed in DOE's published notices of system of records;

(5) Provide if possible any additional information to aid DOE in responding to the request, for example, a description of the records sought;

(6) Indicate, as appropriate, the time, place, and form of access sought.

(c) Any request not addressed and marked as specified in paragraph (a) of this section shall be forwarded immediately to the appropriate Privacy Act Officer. An improperly addressed request will not be deemed to have been received for purposes of measuring time periods pursuant to §§ 1008.7 and 1008.10 until actual receipt by the appropriate Privacy Act Officer. The individual making the request shall be notified that the request was improperly addressed and the date when the request was received by the Privacy Act Officer.

(d) Assistance in preparing an access request pursuant to this section may be obtained from any DOE Privacy Act Officer at the locations listed at § 1008.2(e).

(e) An individual shall not be required to state a reason or otherwise justify his request for information or access to a record pertaining to him/her that is contained in a system of records.

§ 1008.7 Processing of requests.

(a) Receipt of a request made in accordance with § 1008.6 shall be promptly acknowledged by the Privacy Act Officer.

(b) Each request shall be acted upon promptly. Every effort will be made to respond within ten working days of the date of receipt by the System Manager or designee. If a response cannot be made within ten working days, the appropriate Privacy Act Officer shall send an interim response providing information on the status of the request, including an estimate of the time within which action is expected to be taken on the request and asking for any further information as may be necessary to respond to the request. Action will be completed as soon as possible, but not later than 20 working days after receipt of the original specific inquiry. In unusual circumstances and for good cause, the appropriate Privacy Act Officer may decide that action cannot be completed within the initial 20 working days. In such case, the appropriate Privacy Act Officer will advise the individual of the reason for the delay and the date (not to exceed an additional 20 working days) by which action can be expected to be completed.

(c) The term "unusual circumstances" as used in this section includes situations where a search for requested records from inactive storage is necessary; cases where a voluminous amount of data is involved; instances where information on other individuals must be separated or expunged from the particular record; and cases where consultation with other agencies which have substantial interest in the response to the request is necessary.

(d) Upon receiving a request, the Privacy Act Officer shall ascertain which System Manager or Managers of the DOE have primary responsibility for, custody of, or concern with the system or systems of records subject to the request and shall forward the request to such System Manager or Managers. The System Manager or Managers shall promptly identify and, in consultation with the General Counsel, review the records encompassed by the request.

(e) Where the request is for access to or information about records, after reviewing the material the System Manager or Managers concerned shall transmit to the Privacy Act Officer the requested material. The transmission to the Privacy Act Officer shall include any recommendation that the request be granted or wholly or partially denied and shall set forth any exemption categories supporting denials. Any denial recommendation must be concurred in by the appropriate General Counsel.

(f) Where the request is for correction or amendment of records, after reviewing the material the System Manager or Managers shall transmit a recommended decision to the Privacy Act Officer. Any recommendation that the request be granted or wholly or partially denied shall cite the exemption relied on and set forth the policy considerations supporting a denial. Any recommendation of denial must be concurred in by General Counsel.

§ 1008.8 Action in response to a request for access: disclosure of requested information to subject individuals.

(a) Consistent with the recommendation of the System Manager and the concurrence of the appropriate General Counsel, the Privacy Act Officer shall provide to the requesting individual the information about or access to a record or information pertaining to the individual contained in a system of records, unless the request is being denied in accordance with § 1008.9 of this part. The Privacy Act Officer shall notify the individual of such determination and provide the following information:

(1) Whether there is information or a record pertaining to him that is contained in a system of records;

(2) The methods of access as set forth in paragraph (b) of this section;

(3) The place at which the record or information may be inspected;

(4) The earliest date on which the record or information may be inspected and the period of time that the record or information will remain available for inspection. In no event shall the earliest date be later than thirty calendar days from the date of notification.

(5) An indication that copies of the records are enclosed, or the estimated date by which a copy of the record could be mailed and the estimate of fees that would be charged to provide other than the first copy of the record, pursuant to § 1008.13.

(6) The fact that the individual, if he wishes, may be accompanied by another person during the in-person review of the record or information, provided that the individual shall first furnish to the Privacy Act Officer a written statement authorizing disclosure of that individual's record in the accompanying person's presence; and

(7) Any additional requirements that must be satisfied in order to provide information about or to grant access to the requested record or information.

(b) The following methods of access to records or information pertaining to an individual and contained in a system of records may be available to that individual depending on the circumstances of a particular request:

(1) A copy of the record may be enclosed with the initial response in accordance with paragraph (a) of this section;

(2) Inspection in person may be arranged during the regular business hours of the DOE in the office specified by the Privacy Act Officer;

(3) Transfer of records to a Federal facility more convenient to the individual may be arranged, but only if the Privacy Act Officer determines that a suitable facility is available, that the individual's access can be properly supervised at that facility, and that transmittal of the records or information to that facility will not unduly interfere with operations of the DOE or involve unreasonable costs, in terms of money or manpower; and

(4) The requested number of copies in addition to the initial copy may be mailed at the request of the individual, subject to payment of the fees prescribed in § 1008.13.

(c) If the Privacy Act Officer believes, based upon a recommendation of the System Manager and the agency's medical officer, that disclosure of medical and/or psychological information directly to an individual could have an adverse effect upon that individual, the individual may be asked:

(1) To designate in writing a physician or mental health professional to whom he would like the records to be disclosed; or

(2) To submit a signed statement by his physician or a mental health professional indicating that, in his view, disclosure of the requested records or information directly to the individual will not have an adverse effect upon the individual. If the individual refuses to designate a physician or mental health professional, or to submit a signed statement from his physician or mental health professional as provided in paragraphs (c) (1) and (2) of this section, the request will be considered denied, and the appeal rights provided in § 1008.11 will be available to the individual.

(d) The Privacy Act Officer shall supply such other information and assistance at the time of an individual's review of his record as is necessary to make the record intelligible to the individual.

(e) The DOE will, as required by subsection (d)(1), assure an individual's right "to review his or her record and have a copy made of all or any portion thereof in a form comprehensible to him." However, original records will be made available to individuals only under the supervision of the Privacy Act Officer or his designee. Individuals will be provided at their request with a copy, but not the original, of records pertaining to them.

§ 1008.9 Action in response to a request for access: initial denial of access.

(a) A request by an individual for information about or access to a record or information pertaining to that individual that is contained in a system of records may be denied only upon a determination by the appropriate System Manager, with the concurrence of the appropriate General Counsel, that:

(1) The record is subject to an exemption under § 1008.12;

(2) The record is information compiled in reasonable anticipation of a civil action or proceeding; or

(3) The individual has unreasonably failed to comply with the procedural requirements of this part.

(b) The Privacy Act Officer shall give written notice of the denial of a request of information about or access to records or information pertaining to the individual and contained in a system of records. Such written notice shall be sent by certified or registered mail, return receipt requested and shall include the following information:

(1) The System Manager's name and title;

(2) The reasons for the denial, including citation to the appropriate sections of the Privacy Act and this part; and

(3) Notification of the individual's right to appeal the denial pursuant to § 1008.11 and to administrative and judicial review under 5 U.S.C. 552a(g)(1)(B), as limited by 552a(g)(5).

(c) Nothing in this section shall:

(1) Require the furnishing of information or records that are not retrieved by the name or by some other identifying number, symbol or identifying particular of the individual making the request;

(2) Prevent a System Manager from waiving any exemption authorizing the denial of records, in accordance with § 1008.12.

§ 1008.10 Action in response to a request for correction or amendment of records.

(a) The Privacy Act Officer must respond in writing to the requester for amendment of a record within 10 working days of receipt. This response shall inform the requester of the decision whenever possible.

(b) If the decision cannot be reached within 10 working days, the requester shall be informed of the reason for delay and the date (within 20 working days) it is expected that the decision will be made.

(c) The Privacy Act Officer, consistent with the recommendation of the System Manager or Managers, as concurred in by the appropriate General Counsel, if appropriate, shall do one of the following:

(1) Instruct the System Manager to make the requested correction or amendment; and advise the individual in writing of such action, providing either a copy of the corrected or amended record, or a statement as to the means whereby the correction or amendment was accomplished in cases where a copy cannot be provided (for example, erasure of information from a record maintained only in an electronic data bank); or

(2) Inform the individual in writing that his request is denied in whole or in part. Such denial shall be sent by certified or registered mail, return receipt requested, and shall provide the following information:

(i) The System Manager's name and title;

(ii) The reasons for the denial; including citation to the appropriate sections of the Act and this part; and

(iii) Notification of the individual's right to appeal the denial pursuant to § 1008.11 and to administrative and judicial review under 5 U.S.C. 552a(g)(1)(B), as limited by 5 U.S.C. 552a(g)(5).

(iv) Notification of the right of the individual to submit a statement of disagreement consistent with § 1008.11(g).

(d) Whenever an individual's record is amended pursuant to a request by that individual, the Privacy Act Officer or the System Manager, as appropriate, shall notify all persons and agencies to which the amended portion of the record had been disclosed prior to its amendment, if an accounting of such disclosure was required by the Act. The notification shall request a recipient agency maintaining the record to acknowledge receipt of the notification, to correct or amend the record and to apprise an agency or person to which it had disclosed the record of the substance of the amendment.

(e) The following criteria will be taken into account by the DOE in reviewing a request for amendment:

(1) The sufficiency of the evidence submitted by the individual;

(2) The factual accuracy of the information;

(3) The relevance and necessity of the information in relation to the purpose for which it was collected;

(4) If such information is used in making any determination about the individual, whether the information is as accurate, relevant, timely, and complete as is reasonably necessary to assure fairness to the individual in such determination;

(5) The degree of possibility that denial of the request could unfairly result in a determination adverse to the individual;

(6) The nature of the record sought to be corrected or amended; and

(7) The propriety and feasibility of complying with the specific means of amendment requested by the individual.

(f) The DOE will not undertake to gather evidence for the individual, but does reserve the right to verify the evidence that the individual submits.

(g) Amendment of a record requested by an individual may be denied upon a determination that:

(1) The individual has failed to establish, by a preponderance of the evidence, the propriety of the amendment in relation to the criteria stated in paragraph (c) of this section;

(2) The record sought to be amended was compiled in a terminated judicial, quasi-judicial or quasi-legislative proceeding to which the individual was a party or participant;

(3) The record sought to be amended is the subject of a pending judicial, quasi-judicial or quasi-legislative proceeding to which the individual is a party or participant;

(4) The amendment would violate a duly enacted statute or promulgated regulation;

(5) The individual has unreasonably failed to comply with the procedural requirements of this part; or

(6) The record has been properly exempted from the provisions of subsection (d) of the Act.

(h) Nothing in this section shall restrict the DOE from granting in part or denying in part a request for amendment of records.

[45 FR 61577, Sept. 16, 1980; 46 FR 31637, June 17, 1981]

§ 1008.11 Appeals of denials of requests pursuant to § 1008.6.

(a) Any individual may appeal the denial of a request made by him for information about or for access to or correction or amendment of records. An appeal shall be filed within 30 calendar days after receipt of the denial. When an appeal is filed by mail, the postmark is conclusive as to timeliness. The appeal shall be in writing and must be signed by the individual. The words "PRIVACY ACT APPEAL" should appear in capital letters on the envelope and the letter. Appeals of denials relating to records maintained in government-wide systems of records reported by the OPM, shall be filed, as appropriate, with the Assistant Director for Agency Compliance and Evaluation, Office of Personnel Management (OPM), 1900 E Street, NW., Washington, DC 20415. All other appeals relating to DOE records shall be directed to the Director, Office of Hearings and Appeals (OHA), Department of Energy, Headquarters, Washington, DC.

(b) An appeal not addressed and marked as specified in paragraph (a) of this section shall be forwarded immediately to the Assistant Director for Agency Compliance and Evaluation, OPM, or the Director, OHA, as appropriate. An appeal that is not properly addressed by an individual shall not be deemed to have been received for purposes of time periods in this section until actual receipt of the appeal by the Assistant Director, OPM, or the Director, OHA. In each instance when an appeal so forwarded is received, the individual filing the appeal shall be notified that the appeal was improperly addressed and the date when the appeal was received by the Assistant Director, OPM, or the Director, OHA

(c) The appeal shall include the following:

(1) A copy of the original request for access or for amendment;

(2) A copy of the initial denial; and

(3) A statement of the reasons why the initial denial is believed to be in error.

(d) The records or record to which the individual was denied access, or which was requested to be corrected or amended, will be supplied to the appropriate appeal authority by the Privacy Act Officer who issued the initial denial. While such records normally will comprise the entire record on appeal, the appeal authority may seek such additional information as is necessary to assure that the final determination is fair and equitable.

(e) No personal appearance or hearing on appeal will be allowed.

(f) The appropriate appeal authority for DOE records shall act upon the appeal and issue a final determination in writing no later than 20 working days from the date on which the appeal is received. However, the appeal authority may extend the ten-day period upon a determination that a fair and equitable review cannot be made within that period. In such cases the individual shall be advised in writing of the reason for the extension and of the estimated date by which a final determination will be issued. The final determination shall be issued not later than the 30th working day after receipt of the appeal unless unusual circumstances, as defined in § 1008.7, are present, whereupon an additional 30 days may be extended.

(g) If an appeal of a denial of access is granted, a copy of the determination shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager. Upon receipt of the determination, the Privacy Act Officer promptly shall take action consistent with § 1008.8.

(h) If an appeal of a denial of correction or amendment is granted, the final determination shall identify the specific corrections or amendments to be made. A copy of the determination shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager. Upon receipt of the determination, the Privacy Act Officer promptly shall take steps to insure that the actions set forth in § 1008.10 (a) and (b) are taken.

(i) If the appeal of a denial of access is denied, the final determination shall state the reasons for the denial and shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager. The determination shall also include a statement identifying the right of the individual to administrative and judicial review pursuant to 5 U.S.C. 552a(g)(1)(B) as limited by 5 U.S.C. 552a(g)(5).

(j) If the appeal of a denial of correction or amendment is denied, the final determination shall state the reasons for the denial and shall be transmitted promptly to the individual, the Privacy Act Officer and the appropriate System Manager.

(1) The determination also shall include the following:

(i) Notice of the right of the individual to file with the Privacy Act Officer a concise, signed statement of reasons for disagreeing with the final determination, receipt of which statement will be acknowledged by the Privacy Act Officer.

(ii) An indication that any disagreement statement filed by the individual will be noted and appended to the disputed record and that a copy of the statement will be provided by the Privacy Act Officer or the System Manager, as appropriate, to persons and agencies to which the record is disclosed subsequent to the date of receipt of such statement;

(iii) An indication that the DOE shall append to any disagreement statement filed by the individual a copy of the final determination or a summary thereof, which determination or summary also will be provided to persons and agencies to which the disagreement statement is disclosed; and,

(iv) A statement of the right of the individual to administrative and judicial review under 5 U.S.C. 552a(g)(1)(B), as limited by 5 U.S.C. 552a(g)(5).

(2) Although a copy of the final determination or a summary thereof will be treated as part of the individual's record for purposes of disclosure in instances where the individual has filed a disagreement statement, it will not be subject to correction or amendment by the individual.

(3) Where an individual files a statement of disagreement consistent with paragraph (j)(1) of this section, the

Privacy Act Officer shall take steps to insure that the actions provided in paragraphs (j)(1) (i), (ii) and (iii) of this section are taken.

§ 1008.12 Exemptions.

(a) *General exemptions*—(1) *Generally*. 5 U.S.C. 552a(j)(2) allows the exemption of any system of records within the DOE from any part of section 552a except subsections (b), (c)(1) and (2) (e)(4)(A) through (F) (e)(6), (7), (9), (10), and (11), and (i) of the Act if the system of records is maintained by a DOE component which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and which consists of:

(i) Information compiled for the purpose of identifying individual criminal offenders and alleged offenders;

(ii) Information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(iii) Reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

(2) *Applicability of general exemptions to DOE systems of records*—(i) *Investigative Files of the Inspector General (DOE-54)*. This system of records is being exempted pursuant to subsection (j)(2) of the Act in order to aid the Office of the Inspector General in the performance of its law enforcement function. The system is exempted from subsections (c)(3) and (4); (d)(1)-(4); (e)(1)-(3); (4)(G), (H), and (I); (5) and (8); and (g) of the Act. The system is exempt from these provisions for the following reasons: notifying an individual at the individual's request of the existence of records in an investigative file pertaining to such individual, or granting access to an investigative file could (A) interfere with investigative and enforcement proceedings and with co-defendants' right to a fair trial; (B) disclose the identity of confidential sources and reveal confidential information supplied by these sources; and (C) disclose investigative techniques and procedures.

(b) *Specific exemptions*. Subsection (k) of the Privacy Act establishes seven categories of systems of records which may be exempted from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (7) of the Act. The Department has exempted systems of records under four of these provisions, as follows:

(1) *Classified material*. (i) Subsection (k)(1) permits exemption of systems of records that are specifically authorized under criteria established under statute or Executive Order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such statute or Executive Order. Restricted Data and Formerly Restricted Data under the Atomic Energy Act of 1954, as amended, are included in this exemption.

(ii) The DOE systems of records listed below have been exempted under subsection (k)(1) to the extent they contain classified information, in order to prevent serious damage to the national defense or foreign policy that could arise from providing individuals access to classified information. Systems exempted under subsection (k)(1) are:

(A) Alien Visits and Participation (DOE-52).

(B) Clearance Board Cases (DOE-46).

(C) Security Correspondence Files (DOE-49).

(D) Foreign Travel Records (DOE-27)

(E) Legal Files (Claims, Litigations, Criminal Violation, Patents, and other Legal Files) (DOE-41).

(F) Personnel Security Clearance Files (DOE-43).

(G) Personnel Security Clearance Index (Automated) (DOE-42).

(H) Special Access Authorization for Categories of Classified Information (DOE-44).

(2) *Investigatory material compiled for law enforcement purposes*. (i) Subsection (k)(2) permits the exemption of investigatory material compiled for law enforcement purposes: *Provided, however*, That if any individual is denied any right, privilege, or benefit to which he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result

of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

(ii) The DOE systems of records listed below have been exempted under subsection (k)(2) in order to prevent subjects of investigation from frustrating the investigatory process through access to records about themselves or as a result of learning the identities of confidential informants; to prevent disclosure of investigative techniques; to maintain the ability to obtain necessary information; and thereby to insure the proper functioning and integrity of law enforcement activities. Systems of records exempted under subsection (k)(2) are:

(A) Alien Visits and Participation (DOE-52).

(B) Clearance Board Cases (DOE-46).

(C) Security Correspondence Files (DOE-49).

(D) Foreign Travel Records (DOE-27).

(E) Legal Files (Claims, Litigation, Criminal Violations, Patents, and other Legal Files) (DOE-41).

(F) Personnel Security Clearance Files (DOE-43).

(G) Personnel Security Clearance Index (Automated) (DOE-42).

(H) Special Access Authorization for Categories of Classified Information (DOE-44).

(I) DOE Personnel and General Employment Records (DOE-1) (only personnel investigative records concerning current and former DOE employees and applicants for employment by DOE).

(J) Investigative Files of the Inspector General (DOE-54) (only investigative records concerning past and present DOE employees).

(3) *Investigatory material compiled for determining suitability for Federal employment.* (i) Subsection (k)(5) permits exemption of systems of records that contain investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualification for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

(ii) The DOE systems of records listed below have been exempted under subsection (k)(5) to the extent they contain the kinds of records described in subsection (k)(5) in order to maintain DOE's ability to obtain candid information on candidates for employment, contracts, or access to classified information and to fulfill commitments made to sources to protect the confidentiality of information, and thereby to facilitate proper selection or continuation of the best applicants or persons for a given position or contract. Systems exempted under subsection (k)(5) are:

(A) DOE Personnel and General Employment Records (DOE-1);

(B) Personnel Security Clearance Files (DOE-43);

(C) Investigative Files of the Inspector General (DOE-54);

(D) Alien Visits and Participation (DOE-52);

(E) Clearance Board Cases (DOE-46);

(F) Security Correspondence Files (DOE-49);

(G) Foreign Travel Records (DOE-27);

(H) Legal Files (Claims, Litigation, Criminal Violations, Patents, and other Legal Files) (DOE-41);

(I) Personnel Security Clearance Index (Automated) (DOE-42);

(J) Special Access Authorization for Categories of Classified Information (DOE-44);

(K) DOE Personnel: Supervisor-Maintained Personnel Records (DOE-2);

(L) Applications for DOE Employment (DOE-4).

(4) *Testing or examination material.* (i) Subsection (k)(6) permits exemption of systems of records that include testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing of examination process.

(ii) The DOE systems of records listed below have been exempted to the extent they contain testing or examination material in order to protect the integrity of the personnel testing and evaluation process and to avoid providing individuals with unfair advantage, by premature or unfair disclosure of testing or rating information. Systems exempted under Subsection (k)(6) are:

(A) (DOE-2) DOE Personnel: Supervisor-Maintained Personnel Records.

(B) (DOE-4) Applications for DOE Employment.

(C) (DOE-1) DOE Personnel and General Employment Records.

(c) *Application of exemptions to particular requests.* (1) The Privacy Act Officer, consistent with the recommendation of the System Manager and with concurrence of the appropriate General Counsel, may make available records which the DOE is authorized to withhold under this section.

(2) With respect to records containing material or information that would reveal the identity of a source who was given an assurance of confidentiality, a determination to make records available pursuant to paragraph (c)(1) of this section shall be made only if the source consents to the release of such information to the individual, or if it is determined that the material or information is not adverse or detrimental to the individual, or for good cause shown. The exercise of discretion with respect to waiver of the exemption shall be final.

(3) Prior to making a determination to deny access to a record in a system of records covered by exemption (k)(1) for classified material (see paragaph (b)(1) of this section), the System Manager shall consult with the Director, Division of Classification, to verify the current classification status of the information in the requested record.

§ 1008.13 Fees.

(a) The only fees to be charged to or collected from an individual under the provisions of this part are for copying records at the request of the individual. The fee charged shall be consistent with the fee schedule set forth in paragraph (b) of this section.

(1) No fees shall be charged or collected for the following: Search for and retrieval of records; review of records; copying by the DOE incident to granting access; copying at the initiative of the DOE without a request from the individual; copying when the aggregate of fees for copying is $25 or less; time spent providing copies; transportation of records and personnel; and first class postage.

(2) It is the policy of the DOE to provide an individual with one copy of each record corrected or amended pursuant to request without charge.

(3) As required by the Office of Personnel Management in its published regulations implementing the Act, the DOE will charge no fee for a single copy of a personnel record covered by that Commission's Government-wide published notice of systems of records.

(b) The schedule of fees is as follows:

(1) $.10 per copy of each page.

(2) For other forms of copying and other forms of materials (e.g., cassettes, computer materials), the direct cost of the materials, personnel, and equipment shall be charged, but only with prior specific approval of the person making the request, when such charges would be in excess of $25.

(c) The Privacy Act Officer may, upon application by an individual, furnish any records without charge or at a reduced rate, if the Privacy Act Officer determines that such waiver or reduction of fees is in the public interest.

(d) Payment shall be made by chec or money order payable to the Unite States Department of Energy.

(e) Advance payment of all or par of the fees may be required at the discretion of the Privacy Act Officer Unless the individual requesting th copies specifically states that he i willing to pay whatever fees are assessed for meeting the request or, alternatively, specifies an amount i excess of $25 that he is willing to pa and which in fact covers the anticipated fees for meeting the request, a request that is expected to involve assessed fees in excess of $25 shall no be deemed to have been received, fo purposes of the time periods specifie in §§ 1008.7 and 1008.10 until the ind vidual making the request is notifie of the anticipated cost, agrees to bear it, and makes any advance deposit required. Such notification shall be made by the Privacy Act Officer as promptly as possible after receipt of the request.

§ 1008.14 Requests under false pretenses.

Subsection (i)(3) of the Act provides that any person who knowingly and willingly requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdeamenaor and fined not more than $5,000.

§ 1008.15 Civil remedies.

Subsection (g) of the Act provides that an individual may bring suit against the DOE for a violation of the Privacy Act, as follows:

(a) If the DOE refuses to grant a request for access to an individual's records, the court may order the DOE to provide the individual with access to his or her records and award reasonable litigation costs and attorney's fees.

(b) If the DOE refuses to amend a record or fails to review an amendment request as required by subsection (d)(3) of the Act, the court may order the DOE to make the amendment and award reasonable litigation costs and attorney's fees.

(c) If the DOE makes an adverse determination based on a record which is not maintained in an accurate, timely, relevant, and complete manner, the individual may be awarded actual damages of at least $1,000. In order to prevail, the individual must show that:

(1) The DOE's action was willful and intentional; and

(2) The adverse determination was based on the faulty record.

(d) If the DOE fails to comply with any other provision of the Privacy Act or agency rule promulgated under the Act, in such a way as to have an adverse effect on the individual, the court may award actual damages of at least $1,000. In order to prevail, the individual must show that:

(1) The DOE's action was willful and intentional; and

(2) The agency's action had an adverse effort on the individual; and

(3) The adverse effect was causally related to the DOE's action.

Subpart C—Disclosure to Third Parties

§ 1008.16 Prohibition against disclosure.

Except as provided in § 1008.17, the DOE shall not disclose any record which is contained in a system of records, by any means of communication, to any agency or to any person other than the individual who is the subject of the record.

§ 1008.17 Conditions of disclosure.

(a) Notwithstanding the prohibition contained in § 1008.16, the DOE may disclose records covered by this part (1) to the individual to whom the record pertains or to an agency or (2) to a person other than the individual where he has given his prior written consent to the disclosure or has made a written request for such disclosure.

(b) Notwithstanding the prohibition contained in § 1008.16 the DOE may also disclose records covered by this part whenever the disclosure is:

(1) To officers and employees of the DOE who have a need for the record in the performance of their duties;

(2) Required under the Freedom of Information Act (5 U.S.C. 552);

(3) For a routine use (as defined in § 1008.2) which is described in the FEDERAL REGISTER notice for the system of records which the disclosure is to be made;

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of Title 13 of the United States Code;

(5) To a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental ju-

risdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law and if the head of the agency or instrumentality has made a written request to the DOE specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) To either House of Congress, or to any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee, to the extent of matter within its jurisdiction;

(10) To the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) Pursuant to the order of a court of competent jurisdiction.

(c) Notwithstanding the prohibition contained in § 1008.16 of this part, the DOE may also disclose records covered by this part when disseminating a corrected or amended record or notation of a disagreement statement as required by subsection (c)(4) of the Act.

§ 1008.18 Accounting for disclosures.

(a) For each disclosure of information contained in a system of records under his control, except disclosures to authorized officers and employees of DOE and disclosures required by the Freedom of Information Act, the appropriate System Manager shall keep an accurate accounting of:

(1) The date, nature, and purposes of each disclosure of a record made to any person or to another agency; and

(2) The name and address of the person or agency to which the disclosure was made.

(b) The accounting shall be retained for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made.

(c) The accounting described in paragraph (a) of this section shall be made available to the individual named in the record upon written request to the Privacy Act Officer at the appropriate DOE location listed at § 1008.2(c) of this part. However, the accounting shall not be revealed with respect to disclosures made under § 1008.17(b)(7) of this part, pertaining to law enforcement activity; or with respect to disclosures involving system of records for which DOE had claimed an exemption from certain requirements of the Act, as provided in § 1008.12 of this part.

(d) Whenever an amendment or correction of a record or a notation of dispute concerning the accuracy of records is made by the DOE in accordance with §§ 1008.10(a)(2)(iv) and 1008.11(g) of this part, DOE shall inform any person or other agency to whom the record was previously disclosed if an accounting of the disclosure was made pursuant to the requirements of paragraph (a) of this section, unless the disclosure was made pursuant to § 1008.17(b)(7) of this part; or the disclosure involved a system of records of which DOE has claimed an exemption from certain requirements of the Act, as provided in § 1008.12 of this part.

(e) The System Manager shall make reasonable efforts to serve notice on an individual when any record containing information about such individual in a DOE system of records is disclosed to any person under compulsory legal process when such process becomes a matter of public record.

(f) Prior to disclosing any record about an individual to any person other than an agency, unless the disclosure is pursuant to the Freeedom of Information Act, the System Manager shall make reasonable efforts to assure that each record is accurate, complete, timely, and relevant for DOE's purposes.

§ 1008.19 Criminal penalties—improper disclosure.

Subsection (i)(1) of the Act provides that a Federal employee who willfully discloses information subject to the Privacy Act in violation of the Act or rules promulgated under it shall be guilty of a misdemeanor and fined up to $5,000.

Subpart D—Maintenance and Establishment of Systems of Records

§ 1008.20 Content of systems of records.

(a) The DOE will maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose DOE is required to accomplish by statute or by Executive Order of the President, unless an exemption ot this requirement has been claimed by DOE, as provided in § 1008.12 of this part.

(b) The DOE will maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless it is pertinent to and within the scope of an authorized law enforcement activity.

(c) The DOE will maintain all records that are used by it to make any determination about any individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual in such determination.

§ 1008.21 Collection of information by DOE about an individual for a system of records.

(a) The DOE will collect information, to the greatest extent practicable, directly from the subject individual when the use of the information may result in adverse determinations about an individual's rights, benefits and privileges under Federal programs, unless an exemption from the Act to this requirement has been claimed by DOE as provided in § 1008.12

(b) Unless an exemption from the Act has been claimed by DOE under subsection (j)(2), as provided in § 1008.12, DOE shall inform each individual whom it asks to supply information, on the form or other means by which it uses to collect the information, or on a separate form that can be retained by the individual, of the following:

(1) The authority (whether granted by statute or by Executive Order of the President) that authorizes the solicitation of the information and whether the provision of such information is mandatory or voluntary;

(2) The principal purpose or purposes for which the information is intended to be used;

(3) The routine uses that may be made of the information, as published in the FEDERAL REGISTER pursuant to the requirements of the Act; and

(4) The effect on the individual, if any, of not providing all or any part of the requested information.

§ 1008.22 Use and collection of social security numbers.

(a) The System Manager of each system of records which utilizes social security numbers as a method of identification without statutory authorization or authorization by regulation adopted prior to January 1, 1975, shall revise the system to avoid future collection and use of the social security numbers.

(b) Heads of Headquarters Divisions and Offices and heads of the other DOE locations shall insure that employees authorized to collect information from individuals are advised that individuals may not be required to furnish social security numbers without statutory authorization, and that individuals who are requested to provide social security numbers voluntarily must be advised that furnishing the number is not required and that no penalty or denial of benefits will flow from the refusal to provide it.

§ 1008.23 Public notice of systems of records.

(a) The DOE shall publish in the FEDERAL REGISTER at least annually a notice of the existence and character of each of its systems of records, which notice shall include:

(1) The name and location of the system;

(2) The categories of individuals on whom records are maintained in the system;

(3) The categories of records maintained in the system;

(4) Each routine use of the records contained in the system, including the categories of users and the purpose of such use, subject to paragraph (d) of this section;

(5) The policies and practices of the DOE regarding storage, retrievability, access controls, retention, and disposal of the records;

(6) The title and business address of the DOE official who is responsible for the system of records;

(7) The DOE procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(8) The DOE procedures whereby an individual can be notified at his request about how he can gain access to any record pertaining to him contained in the system or records, and how he can contest its content; and

(9) The categories of source of records in the systems.

(b) Notwithstanding the requirements of paragraph (a) of this section, the notice of systems of records shall not necessarily include the information in paragraphs (a) (7) through (9) of this section if DOE has claimed a general or specific exemption from the requirements of the Act, as provided in § 1008.12.

(c) Copies of the notices as printed in the FEDERAL REGISTER shall be available at the DOE locations listed at § 1008.2(c). Requests by mail for copies of such notices should be sent to Privacy Act Officer, Headquarters, U.S. Department of Energy, Washington, DC. 20585. The first copy will be furnished free of charge. For each additional copy, the costs of printing and handling may be charged.

(d) DOE shall publish in the FEDERAL REGISTER notice of any new routine use or intended routine use of a record in the system of records, at least 30 calendar days prior to the implementation of any new routine use of a record in a system of records, or at least 30 calendar days prior to publication of the annual notice of such routine uses, as provided in paragraph (a) of this section, an opportunity for interested persons to submit written comments consisting of data, views, or arguments regarding such use to DOE, shall be provided.

§ 1008.24 Criminal penalties—failure to publish a system notice.

Subsection (i)(2) of the Act provides that an agency officer or employee who willfully maintains a system of records without publishing a system notice as required by subsection (e)(4) of the Act shall be guilty of a misdemeanor and fined up to $5,000.

PART 1009—GENERAL POLICY FOR PRICING AND CHARGING FOR MATERIALS AND SERVICES SOLD BY DOE

Sec.
1009.1 Purpose and scope.
1009.2 Definitions.
1009.3 Policy.
1009.4 Exclusions.
1009.5 Supersessions.
1009.6 Dissemination of prices and charges.

AUTHORITY: Sec. 644 of the Dept. of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7254); Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.) "User Fee Statue", 31 U.S.C. 483a, 42 U.S.C. 2111, 2112 and 2201.

SOURCE: 45 FR 70430, Oct. 24, 1980, unless otherwise noted.

§ 1009.1 Purpose and scope.

(a) This part establishes Department of Energy policy for establishing prices and charges for Department materials and services sold to organizations and persons outside the Federal Government.

(b) This part applies to all elements of the Department except the Federal Energy Regulatory Commission.

§ 1009.2 Definitions.

For the purposes of this regulation:

(a) "Allocable cost" means a cost allocable to a particular cost objective (i.e., a specific function, project, process, or organization) if the costs incurred are chargeable or assignable to such cost objectives in accordance with the relative benefits received or other equitable relationships. Subject to the foregoing, a cost is allocable if:

(1) It is incurred solely for materials or services sold;

(2) It benefits both the customer and the Department in proportions that can be approximated through use of reasonable methods, or

(3) It is necessary to the overall operation of the Department and is

deemed to be assignable in part to materials or services sold.

(b) "Byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

(c) "Charges" means an accumulation of job related costs for materials and services sold by the Department.

(d) "Commerical price" means the price that a willing buyer is currently paying or would pay a willing seller for materials and services in the market.

(e) "Direct cost" is any cost which can be identified specifically with a particular final cost objective.

(f) "Full cost" includes all direct costs and all allocable costs of producing the material or providing the service consistent with generally accepted accounting principles. Direct costs and allocable costs may include, but are not limited to, the following cost elements:

(1) Direct labor.

(2) Personnel fringe benefits.

(3) Direct materials.

(4) Other direct costs.

(5) Processing materials and chemicals.

(6) Power and other utilities.

(7) Maintenance.

(8) Indirect cost, i.e., common costs which cannot be directly assigned to specific cost objectives and are therefore allocated to cost objectives in a systematic cost allocation process.

(9) Depreciation which includes depreciation costs that are directly associated with facilities and equipment utilized, and allocated depreciation costs for support and general facilities and equipment.

(10) Added factor includes general and administrative costs and other support costs that are incurred for the benefit of the Department, an organizational unit or a material or service as a whole.

(g) "Prices" means the monetary amounts generally established and published for recurring sales of the same materials and services.

(h) "Source material" means uranium or thorium.

(i) "Special nuclear material" means plutonium, uranium enriched in the isotope 233 or in the isotope 235, or any materials artificially enriched by any of the foregoing. Special Nuclear Material does not include source material.

§ 1009.3 Policy.

(a) The Department's price or charge for materials and services sold to persons and organizations outside the Federal Government shall be the Government's full cost for those materials and services, unless otherwise provided in this part.

(b) Exceptions from the Department pricing and charging policy may be authorized in accordance with the following provisions:

(1) Prices and charges for byproduct material sold pursuant to 42 U.S.C. 2111 and 2112 et seq. shall be either the full cost recovery price or the commercial price, whichever is higher, except that lower prices and charges may be established by the Department if it is determined that such lower prices and charges (i) will provide reasonable compensation to the Government for such material, (ii) will not discourage the use of or the development of sources of supply independent of the DOE of such material, and (iii) will encourage research and development. In individual cases, if (ii) and (iii) cannot be equally accommodated, greater weight will be given to encouragement of research and development.

(2) Prices and charges for materials and services sold pursuant to 42 U.S.C. 2201 shall be either the full cost recovery price or the commercial price, whichever is higher, except that lower prices and charges may be established by the Department if it is determined that such lower prices and charges will provide reasonable compensation to the Government and will not discourage the development of sources of supply independent of the DOE of such material.

§ 1009.4 Exclusions.

This part shall not apply when the amount to be priced or charged is otherwise provided for by statute, Executive Order, or regulations. This part does not apply to:

(a) Fees, penalties and fines established by the Economic Regulatory Administration of DOE.

(b) Power marketing and related activities of the Alaska Power Administration, the Bonneville Power Administration, the Southeastern Power Administration, the Southwestern Power Administration, and the Western Power Administration.

(c) Crude oil, natural gas and other petroleum products and services by or from the Naval Petroleum and Oil Shale Reserves.

(d) Uranium enriching services, source material, and special nuclear material.

(e) Requests for information under the Freedom of Information Act and the Privacy Act.

(f) Energy data and information provided by the Energy Information Administration.

(g) Crude oil and related materials and services from the Strategic Petroleum Reserve.

(h) The disposal of excess and surplus property.

(i) Access permits for uranium enrichment technology issued in accordance with 10 CFR Part 725.

(j) Materials and services provided pursuant to a cooperative agreement, research assistance contract or grant, or made available to a DOE contractor in connection with a contract, the primary purpose of which is to procure materials or services for DOE.

§ 1009.5 Supersessions.

Prices which appear in FEDERAL REGISTER Notices previously published by the Department, or its predecessor agencies, for materials and services covered by this rule are hereby superseded.

§ 1009.6 Dissemination of prices and charges.

Current prices and charges for specific materials and services are available from the DOE laboratory or office providing the material or service, or from the responsible program office. If this office cannot be determined, inquiries regarding the appropriate contact office should be addressed to the Office, of Finance and Accounting, Product Accounting and Pricing Branch, Mail Station 4A-139, 1000 Independence Avenue, SW., Washington, D.C. 20585.

PART 1010—CONDUCT OF EMPLOYEES

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Appendix I—List of Classes of Positions Exempt from the Disclosure Requirements of Section 603 of the DOE Organization Act
Appendices II-IV—[Note]

Authority: Sec. 208, 601-608, 644, Pub. L. 95-91, 91 Stat. 575-577, 591-596, 599 (42 U.S.C. 7138, 7211-7218, 7254); Sec. 522, Pub. L. 94-163, 89 Stat. 961 (42 U.S.C. 6392); Sec. 308, Pub. L. 95-39, 91 Stat. 189 (42 U.S.C. 5816a); 5 U.S.C. 301 and 303(a); 5 U.S.C. app. 207(a); 18 U.S.C. 201-209; E.O. 11222, as amended by E.O. 12565.

Source: 44 FR 24697, Apr. 26, 1979, unless otherwise noted.

Subpart A—General

§ 1010.101 Purpose and scope.

(a) The following regulations are designed to assure that the business of the Department of Energy (DOE) is conducted effectively, objectively and without improper influence or the appearance thereof. Further, DOE expects that its employees will observe courtesy, consideration, and promptness in dealings with the public and other governmental agencies, and will avoid any action, whether or not specifically prohibited by the regulations, which might result in, or create the appearance of:

(1) Using public office for private gain;

(2) Giving preferential treatment to any person;

(3) Impeding Government efficiency or economy;

(4) Losing complete independence or impartiality;

(5) Making a Government decision outside official channels; or

(6) Affecting adversely the confidence of the public in the integrity of the Government.

(b) The following regulations are issued in compliance with Executive Order 11222, 5 CFR Part 735, and:

(1) 18 U.S.C. 201-209.

(2) Pub. L. 95-91, sections 601-608 (42 U.S.C. 7211-7218).

(3) Pub. L. 94-163, section 522 (42 U.S.C. 6392).

(4) Pub. L. 95-39, section 308 (42 U.S.C. 5816a).

(5) Pub. L. 95-87, section 201(f) (30 U.S.C. 1211(f)).

(6) 30 U.S.C. 6.

In addition to the foregoing, the regulations implement other statutes cited elsewhere herein.

(c) The following regulations, among other things, reflect prohibitions and requirements imposed by the criminal and civil laws of the United States. The regulations do not purport to reflect or enumerate all restrictions or requirements imposed by statutes, Executive Orders, regulations or otherwise upon Federal employees and former Federal employees. The omission of a restatement of or a reference to any such restriction or requirement in no way alters the legal effect of that restriction or requirement and any such restriction or requirement, as the case may be, continues to be applicable to employees in accordance with its own terms.

(d) It is expected that the provisions of the following regulations will be observed and administered in a manner which is consistent with both their spirit and their letter.

§ 1010.102 Applicability.

(a) Except where specifically provided otherwise, these regulations apply to all officers, employees, and special Government employees of DOE, excluding officers, employees, or special Government employees of the Federal

Energy Regulatory Commission (FERC).

(b) Those provisions hereinafter that are applicable to officers, employees, and special Government employees of FERC in addition to DOE employees are designated by "(APPLICABLE TO FERC)" and include: §§ 1010.103, 1010.104(g), 1010.302(b), 1010.303(b), 1010.303(c), 1010.304(b), 1010.304(c), 1010.305(a), 1010.306(d), 1010.401, 1010.402, 1010.403(a), 1010.403(b), 1010.403(c), 1010.403(d), 1010.405, 1010.406, 1010.407, 1010.501(a)(1), 1010.501(a)(2), 1010.501(a)(4), 1010.501(c), 1010.501(d), 1010.501(e), 1010.502(b), 1010.502(c), 1010.502(d), 1010.502(e), 1010.503, 1010.605(b), Appendix II, Appendix IIIA, Appendix IIIB, and Appendix IIIC.

(c) Special Government employees should also see Subpart F of these regulations.

§ 1010.103 Definitions (applicable to FERC).

(a) "Secretary" means the Secretary of Energy as provided by the Department of Energy Organization Act, section 201, Pub. L. 95-91 (42 U.S.C. 7131), or his delegate.

(b) "Administrator" means any of the heads of the Energy Information Administration, Economic Regulatory Administration, Bonneville Power Administration, Southeastern Power Administration, Southwestern Power Administration, Alaska Power Administration, or Western Area Power Administration.

(c) "Appearance or attendance" means, for the purposes of section 605 of Pub. L. 95-91 (42 U.S.C. 7215), a former employee's personal presence before a DOE employee conducting official DOE business involving direct or indirect contact between the former employee and the DOE employee relating to such official business. In person, or other responses to requests from DOE officials for information relating to the former employee's duties in the Department are not encompassed by this definition.

(d) "Chairman" means the Chairman of the Federal Energy Regulatory Commission established by Title IV of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7171-7177), or his delegate.

(e) "Commission" or "FERC" means the Federal Energy Regulatory Commission, or its delegate.

(f) "Counselor" means the General Counsel of the Department or the General Counsel of the Commission or their delegates, as appropriate.

(g) "DOE" or "Department" means the Department of Energy established by the Department of Energy Organization Act, section 201, Pub. L. 95-91 (42 U.S.C. 7131).

(h) "Department proceeding" means, for the purposes of section 606 of Pub. L. 95-91 (42 U.S.C. 7216), any judicial proceeding, Department hearing, application, rulemaking, order, license, contract, grant, award, fund transfer, claim, controversy, charge, accusation, or arrest, in which the Department is directly involved.

(i) "Dependent" means dependent as defined in section 152 of the Internal Revenue Code of 1954, as amended.

(j) "Employee" means a DOE officer or employee (including, except where otherwise indicated, a special Government employee), or a member of the Uniformed Services (other than enlisted members), or an employee of another Government agency assigned or detailed to DOE, or an individual assigned or detailed to DOE pursuant to the Intergovernmental Personnel Act or the President's Executive Interchange Program.

(k) "Energy concern" means:

(1) Any person listed on the Energy Concern List published by DOE; or

(2) Any other person:

(i) Holding an interest in property from which coal, natural gas, crude oil, nuclear material or a renewable resource is commercially produced or obtained;

(ii) Significantly engaged in the business of:

(A) Developing, extracting, producing, refining, transporting by pipeline, converting into synthetic fuel, distributing, or selling minerals for use as an energy source, or in the generation or transmission of energy from such minerals or from wastes or renewable resources;

(B) Producing, generating, transmitting, distributing, or selling electric power;

(C) Development, production, processing, sale, or distribution of nuclear materials, facilities, or technology; or

(D) Conducting research, development, or demonstration related to an activity described in paragraphs (k)(2)(i), (2)(ii)(A), (2)(ii)(B) or (2)(ii)(C) of this section; or

(iii) Significantly engaged, whether or not for profit, in conducting research, development, or demonstration related to an activity described in paragraph (k)(2)(i) or (2)(ii)(A), (2)(ii)(B) or (2)(ii)(C) of this section, with financial assistance under any Act the functions of which are vested in or delegated or transferred to the Secretary or the Department.

(3) For the purposes of reports required by Pub. L. 94-163 and Pub. L. 95-39, "energy concern" includes "energy businesses" and "energy properties" as those terms are used in those Acts.

(4) "Energy concern" does not include religious organizations; mutual funds or regulated investment companies the portfolios of which are widely diversified, or similarly constituted, commercially fungible entities. Membership or ownership in utility cooperatives required to obtain services is not considered an interest in an energy concern.

(l) "Interested party" means any person, firm, corporation, or other entity, or representative thereof, which:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with DOE;

(2) Conducts operations or activities that are regulated by DOE; or

(3) Has interests that may be substantially affected by the performance or nonperformance of the official duty of the DOE employee concerned.

(m) "Known financial interest" means any pecuniary interest of an employee, or which such employee has or should have knowledge.

(n) "Organization" means a university; foundation; nonprofit research entity or similar nonprofit organization; or State, county or municipality or subdivision thereof; as well as a business organization.

(o) "Participate" means, for the purposes of section 606 of Pub. L. 95-91 (42 U.S.C. 7216), involvement by an employee in a Department proceeding through decision, approval, disapproval, recommendation, the rendering of advice, or investigation.

(p) "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

(q) "Represent" means, but is not limited to, acting as an agent or attorney.

(r) "Reviewing official" means, for each employee, the individual to whom reports are submitted as set forth in § 1010.407(h) or (i). The functions of a reviewing official may not be delegated.

(s) "Special Government employee" means an officer or employee retained, designated, appointed, or employed with or without compensation for 130 days or fewer during any 365 consecutive days, to perform temporary duties either on a full-time or part-time or intermittent basis. The term includes experts and consultants, but does not include enlisted members of the Uniformed Services.

(t) "Supervisory employee" means:

(1) An individual holding a position in the Department at GS-16, GS-17, or GS-18 of the General Schedule or at level I, II, III, IV, or V of the Executive Schedule, or who is in a position at a comparable or higher level on any other Federal pay scale, or who holds a position pursuant to subsection (b) or (d) of section 621 of the DOE Organization Act (including an employee in the Energy Executive Service) or who is an expert or consultant employed pursuant to section 3109 of Title 5, United States Code, for more than ninety days in any calendar year and receives compensation at an annual rate equal to or in excess of the minimum rate prescribed for individuals at GS-16 of the General Schedule;

(2) The Director and Deputy Director of any State, regional, district, local, or other field office;

(3) An employee or officer who has primary responsibility for the award,

review, modification, or termination of any grant, contract, award, or fund transfer within the authority of the Secretary; including:

(i) Contracting officers;

(ii) Any other employees with authority or warrants to commit the Department to a transfer of appropriated funds to a non-Federal entity;

(iii) Source selection officials; and

(4) Any other employee or officer who, in the judgment of the Secretary or the Chairman, as appropriate, exercises sufficient decisionmaking or regulatory authority so that the provisions of Title VI of the DOE Organization Act should apply to such individual (See Appendix II).

(u) "Uniformed Services" means the Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Services (37 U.S.C. 101(3)).

(v) "Waiver" means any action by the Secretary or the Chairman, where appropriate, to exempt or exclude an individual from particular restrictions, prohibitions or requirements of these regulations, including but not limited to actions under sections 602(c), 605(a)(3) and 606(c) of the DOE Organization Act, and 18 U.S.C. 205, 207 and 208.

§ 1010.104 Responsibilities and authorities.

(a) Employees shall:

(1) Read and comply with the statutes and the rules, standards of conduct, and other regulations referred to herein. Each employee shall receive a copy of these regulations and acknowledge, in writing, such receipt prior to assuming duties in the DOE;

(2) Be mindful of the high standards of integrity expected of them in all their activities, personal and official;

(3) Not give favored treatment or competitive advantage to any member of the public, including former employees of DOE;

(4) Recognize that violation of any of the instructions or statutes referred to in these regulations may subject them to disciplinary action in addition to the penalty prescribed by law for such violation (see Subpart E); and

(5) Discuss with the reviewing official, or the Counselor, as appropriate, any problem arising out of these regulations.

(b) Reviewing officials shall:

(1) Assure that required reports are promptly filed by employees in each Office;

(2) Personally review all reports submitted to them, make determinations as appropriate, and forward all reports to the Counselor. Failure to fulfill these responsibilities may result in sanctions imposed in accordance with Subpart E;

(3) Notify employees at the time of entrance on duty and periodically thereafter of the availability of counseling services and how and where these services are available;

(4) Bring the provisions of these regulations to the attention of each employee at such times as circumstances warrant;

(5) Bring to the attention of contractors dealing with their offices those provisions of these regulations (such as "Gifts, entertainment, and favors"; "Cancellation of contracts"; and others) which may affect the actions of contractors and their employees in dealing with DOE employees; and

(6) Report to the Counselor and the Inspector General all alleged or actual misconduct of DOE employees; in consultation with the Counselor, take action where appropriate as a result of any investigation, and report to the Counselor on any action taken.

(c) The Director of Administration shall:

(1) Provide a copy of these regulations and any subsequent revision to each employee;

(2) Be responsible for transmitting notice to employees of applicable reporting requirements; and

(3) Distribute to reviewing officials those annual report forms required in Subpart D no later than May 1 of each year.

(d) The Director of Personnel shall:

(1) Distribute to prospective employees, departing employees and former supervisory employees those forms required to be submitted pursuant to Subpart D; and

(2) Distribute copies of these regulations to all prospective employees at

the time an offer of employment with the DOE is made or prior to the making of such offer, if possible.

(e) The Deputy Secretary shall assume those responsibilities placed upon the Deputy Secretary by Subpart E.

(f) The General Counsel of DOE shall:

(1) Serve as the Counselor for DOE employees other than employees performing functions within the jurisdiction of FERC;

(2) Serve as DOE's designee to the Office of Personnel Management on matters covered by these regulations;

(3) Have available for review by employees copies of pertinent laws, Executive Orders, DOE regulations, and Office of Personnel Management regulations relating to ethical standards and other conduct;

(4) Bring the provisions of these regulations to the attention of all employees annual, and at such other times as circumstances warrant;

(5) Coordinate counseling services, and assure that counseling and interpretations on questions of conflicts of interest and other matters covered by these regulations are available to employees and reviewing officials;

(6) Be responsible for the review and referral of alleged violations of these regulations to the Department of Justice or the Inspector General of DOE, as appropriate; and

(7) Maintain liaison with the General Counsel of FERC to maximize consistency in application of these regulations.

(g) The General Counsel of FERC shall: (Applicable to FERC)

(1) Serve as Counselor for employees performing functions within the jurisdiction of FERC;

(2) Perform for FERC those duties described in paragraphs (f)(3) through (f)(6) of this section; and

(3) Maintain liaison with the General Counsel of DOE to maximize consistency in application of these regulations.

(h) The Inspector General shall investigate alleged violations of these regulations.

§ 1010.105 Counseling and interpretations.

(a) Each employee's reviewing official shall be available to discuss with employees any questions or requests under these regulations.

(b) The Counselor shall be available to render advice or interpretations of these regulations to reviewing officials or to individual employees.

Subpart B—Standards of Conduct

§ 1010.201 General.

(a) It is DOE policy not to interfere in the private lives of DOE employees. However, certain standards of conduct are required by statute. This subpart sets forth DOE's regulations prescribing those and other standards of conduct designed to assure the proper performance of Government business and the maintenance of public confidence in the Government.

(b) Adherence to the regulations in this subpart requires that employees not do indirectly what would be improper to do directly.

§ 1010.202 Additional statutory provisions.

Attention of employees is directed to the following statutory provisions:

(a) The prohibitions contained in the following sections of the Atomic Energy Act of 1954, as amended: Sections 224, 225 and 226, relating to communication, receipt, and tampering with Restricted Data involving potential injury to the United States or potential advantage to a foreign nation; and section 227 relating to unauthorized disclosure of Restricted Data (42 U.S.C. 2274 through 2277).

(b) The prohibitions against the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783).

(c) The prohibitions against the disclosure of confidential information (18 U.S.C. 1905).

(d) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(e) The prohibition against proscribed political activities in subchapter III of Chapter 73 of Title 5, United States Code, and 18 U.S.C. 602, 603, 607 and 608.

(f) The prohibition against acceptance or solicitation to obtain appointive public office (18 U.S.C. 211).

(g) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(h) The provisions relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(i) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(j) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(k) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(l) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(m) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(n) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(o) The prohibition against embezzlement of Government money or property (18 U.S.C. 641).

(p) The prohibition against failing to account for public money (18 U.S.C. 643).

(q) The prohibition against an employee's private use of public money (18 U.S.C. 653).

(r) The prohibition against embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(s) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(t) The prohibition against making false entries in official records with intent to defraud or making false reports concerning money and securities with such intent (18 U.S.C. 2073).

(u) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219). The criminal penalties of this section do not apply in any case in which the Secretary sends to the Attorney General a certification that the employment of the agent as a special Government employee is in the national interest.

(v) The prohibition relating to the denial of the right to petition Congress (5 U.S.C. 7102).

(w) The prohibition against a public official appointing or promoting a relative, or advocating such an appointment or promotion (5 U.S.C. 3110).

(x) The prohibition against the employment of an individual convicted of felonious rioting or related offenses (5 U.S.C. 7313).

(y) The prohibition against arbitrary and capricious withholding of agency records requested under the Freedom of Information Act (5 U.S.C. 552).

(z) The prohibition against knowing disclosure of information the disclosure of which is prohibited; the prohibition against willfully maintaining a system of records without appropriate notice provisions; and the prohibition against knowingly and willfully requesting or obtaining any record concerning an individual under false pretenses (5 U.S.C. 552a).

(aa) House Concurrent Resolution 175, 85th Congress, 2d session, 72 Stat. B12, the "Code of Ethics for Government Service".

(bb) Prohibition against acceptance of an honorarium of more than $2,000 or honoraria totalling more than $25,000 in any calendar year (2 U.S.C. 441i).

§ 1010.203 Salary of an employee payable only by the United States.

(a) No employee, other than a special Government employee or an employee serving without compensation, shall receive any salary, or any contribution to or supplementation of salary, as compensation for services as a Federal employee, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality (18 U.S.C. 209).

(b) Nothing in this section shall be deemed to prohibit an employee from continuing to participate in a bona fide pension, retirement, group life, health, or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer, which does not cause a conflict of interest, nor from accepting contributions, awards, or other expenses under section 4111 ("Acceptance of contributions, awards and other payments") of Title 5, United States Code.

§ 1010.204 Outside employment and other outside activity.

(a) Employees shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of their Government employment. Incompatible activities include, but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, a conflict of interest;

(2) Outside employment which tends to impair the employee's mental or physical capacity to perform assigned Government duties and responsibilities in an acceptable manner;

(3) Outside work or activity that takes the employee's time or attention during the employee's official work hours. Examples of the type of work or activity that often can require the employee's time or attention during the employee's official work hours, and which would be prohibited under such circumstances, include:

(i) Lawyers conducting private practice;

(ii) Auditors doing income tax forms for fellow employees or private persons;

(iii) Real estate agents handling home or land buying/selling activities.

(b) An employee who intends to engage in outside employment shall inform the employee's reviewing official and the Counselor in advance of undertaking such activity. In addition, supervisory employees shall obtain advance approval of the employee's reviewing official and the Counselor. A record of each approval under this paragraph shall be filed in the employee's official personnel folder. In addition, a record of each approval shall be retained in the Office of the General Counsel.

(c) Within the limitations imposed by this section, employees are encouraged to engage in teaching, lecturing, and writing. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing that is dependent on information obtained as a result of the employee's Government employment, except when that information has been made available to the general public or will be made available on request, or when the Secretary gives written authorization for the use of non-public information on the basis that the use is in the public interest. In addition, DOE employees, including Presidential appointees, shall not receive compensation or anything of monetary value (such as an honorarium) for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of DOE, or which draws substantially on official data or ideas which have not become part of the body of public information, or where the sponsor is an interested party.

(d) Though not necessarily outside employment, an employee may accept a fee or other compensation for a private activity which is not prohibited by law or these regulations, after providing notice or receiving advance approval pursuant to paragraph (b) of this section. The amounts of honoraria are limited by 2 U.S.C. 441i.

(e) Except as allowed for training or to attend meetings under section 4111 ("Acceptance of contributions, awards and other payments") of Title 5, United States Code, and Executive Order 10800 ("Implementing the Government Employees Training Act"), no employee shall accept a fee from an outside source on account of a public appearance, a speech, or lecture, if the public appearance or the preparation or delivery of the speech or lecture was a part of the official duties of the employee; if the public appearance, speech, or lecture was made during official working hours; or if travel for the purpose of the public appearance, speech, or lecture was made at Government expense. In addition, no employee shall accept a fee for the preparation, publication, or review of an article, story, or book if it was prepared during official working hours and/or was a part of the official duties of the employee.

(f) An employee shall not engage in outside employment with a State or local government, except in accordance with applicable regulations of the Office of Personnel Management.

(g) This section does not preclude an employee from:

(1) Participation in the activities of national or State political parties not proscribed by law or § 1010.206 of these regulations.

(2) Participation in the affairs of or acceptance of an award for meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational or recreational, public service, or civic organization.

(h) This section does not apply to special Government employees, who are subject to the provisions of Subpart F.

§ 1010.205 Gifts, entertainment, and favors.

(a) Acceptance of gifts, entertainment, or favors, no matter how innocently tendered and received, from those who have or seek business with DOE may be a source of embarrassment to DOE and the employee involved, may affect the objective judgment of the recipient and may impair public confidence in the integrity of the business relations between DOE and industry. Therefore, except as provided in paragraph (b) of this section, DOE employees shall not knowingly solicit or accept any gift, entertainment, or favor (including complimentary meals and beverages), either directly or indirectly from any interested party. For the purpose of this section, gifts, entertainment, and favors include, but are not limited to any benefits, gratuities, loans, discounts, tickets, passes, transportation, accommodations, or hospitality given or extended to or on behalf of the recipient. This prohibition, of course, does not preclude an employee from such actions as purchasing his or her own ticket to a function sponsored by an interested party, or sitting at the same table with a representative of an interested party so long as the employee pays for his or her own meal.

(b) The following are generally exceptions to the rule set forth in paragraph (a) of this section; however, employees are cautioned to avoid any situation (even if it might be viewed as one of the stated exceptions) which might raise questions of conflict of interest or reflect discredit upon the Department.

(1) Trophies, entertainment, prizes, or awards given for public service or achievement, or given in contests which are clearly open to the public generally or which are officially approved by the Secretary for DOE employee participation.

(2) Things available impersonally to the general public or classes of the general public, such as a free exhibition at a fair.

(3) Participation in civic and community activities by DOE employees when the relationship with the interested party can reasonably be characterized as remote; for example, participation in a little league Combined Federal Campaign luncheon which is subsidized by an interested party.

(4) The acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortagage loans.

(5) Acceptance of gifts, entertainment, of favors where there is an obvious family or personal relationship between the employee and the other party, where the circumstances make it clear that it is that relationship rather than the business of the persons concerned which is the motivating factor for the gift, entertainment, or favor.

(6) Acceptance of food and refreshment of insubstantial value or acceptance of local transportation, while on official business when no provision for individual payment can be made and alternative arrangements are clearly impracticable. This exception would allow a DOE employee attending an informal business meeting at the place of business of an interested party to accept a lunch provided by the interested party where arrangements for the DOE employee to pay for the

lunch are clearly impracticable. Also local transportation may be provided where alternative arrangements are impracticable, such as transportation to and from an offshore drilling rig on official business, or contractor-provided transportation from an airport to a remote site for business purposes.

(7) Exchanges of food, refreshments, and social amenities with representatives of foreign governments or international organizations, where such exchanges are in accordance with diplomatic custom and are clearly incident to the conduct of official business.

(8) Consistent with the guidelines set forth in paragraph (d) of this section, acceptance of transportation, lodging, or subsistence from foreign governments or international organizations where the offer of such services is pursuant to the performance of functions under a treaty or United States Statute (e.g., Statute of the International Atomic Energy Agency).

(9) Consistent with the guidelines set forth in paragraph (d) of this section, acceptance of transportation, lodging, or subsistence from an entity providing training pursuant to a contract with a Federal Department of Agency, by a DOE employee serving as an instructor or lecturer at such training.

(10) Acceptance of gifts from foreign governments, under limited circumstances, in accordance with 5 U.S.C. 7342, as amended by Pub. L. 95-105, section 515 (August 15, 1977), and implementing regulations. Any such gift or thing which cannot appropriately be refused will be brought to the attention of the Counselor for advice concerning appropriate disposition.

(11) Acceptance of food and refreshment, or, consistent with the guidelines set forth in paragraph (d) of this section, acceptance of transportation, lodging, or subsistence, from a university or other educational institution, or from a consumer, environmental, industrial, technical, trade, professional, or other association or similar group, in connection with a DOE employee's participation in a widely attended luncheon, dinner, seminar, conference, or similar gathering sponsored by the donor. Such acceptance will be permitted only when the employee's reviewing official has determined it to be in the Government's interest and the Counselor has granted prior approval. Acceptance of transportation, lodging, or subsistence will not be permitted under this exception when the donor is an energy concern or an association or similar group composed mostly of energy concerns.

(12) Acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars, and other items of nominal intrinsic value.

(13) Situations not specifically covered by paragraphs (b)(1) through (12) of this section where, in the judgment of the individual concerned, the Government's interest will be served and where the Counselor has granted prior approval.

(c) An employee shall not accept transportation, lodging, or subsistence while on official travel from any source outside DOE that is not an interested party, unless such acceptance is consistent with the rules for acceptance from interested parties set forth in paragraph (b) of this section.

(d) When transportation, lodging, or subsistence, in kind, is furnished to an employee by any source outside DOE in connection with official travel, appropriate deductions shall be made in the travel, per diem, and other allowances otherwise payable to the employee. An employee may not accept personal reimbursement from a source outside DOE for expenses incident to official travel, unless authorized pursuant to 5 U.S.C. 4111 or other express statutory authority; rather, any reimbursement must be made to the Government by check payable to the Department of Energy; personnel will be reimbursed by the Government in accordance with travel regulations. In no case shall an employee accept benefits which are under prudent standards extravagant or excessive in nature.

§ 1010.206 Political activity.

(a) All employees in the Executive Branch of the Federal Government are subject to basic political activity restrictions in Subchapter III of Chapter 73 of Title 5, U.S.C. (commonly known as the Hatch Act) and Civil Service Rule IV (5 CFR Part 4). Employees are individually responsible for refraining from prohibited political activity. Ignorance of a prohibition does not excuse a violation. This section summarizes provisions of law and regulation concerning political activity of employees.

(b) Employees on leave, on leave without pay, or on furlough or terminal leave, even though the employee's resignations have been accepted, are subject to the restrictions. A separated employee who has received a lump-sum payment for annual leave, however, is not subject to the restriction during the period covered by the lump-sum payment or thereafter, provided the employee does not return to Federal employment during that period. An employee is not permitted to take leave of absence to work with a political candidate, committee, or organization or become a candidate for office with the understanding that the employee will resign his position if nominated or elected.

(c) An employee is accountable for political activity by another person acting as the employee's agent or under the employee's direction or control if the employee is thus accomplishing indirectly what may not lawfully be done directly and openly.

(d) Section 7324 of Title 5, U.S.C., provides that employees have the right to vote as they please and the right to express their opinions on political subjects and candidates. Generally, however, they are prohibited from taking an active part in political management or political campaigns or using official authority of influence to interfere with an election or affect its results. The following are exemptions from the restrictions of the statute:

(1) Employees may engage in political activity in connection with any question not specifically identified with any National or State political party. They also may engage in political activity in connection with an election if none of the candidates represent a party any of whose candidates for presidential elector received votes at the last preceding election at which presidential electors were selected.

(2) An exception relates to political campaigns in communities adjacent to the District of Columbia or in communities the majority of whose voters are employees of the Federal Government. Communities in which the exception applies are specifically designated by the Office of Personnel Management. Information regarding the localities and the conditions under which the exceptions are granted may be obtained from the personnel office or the Counselor.

(3) Employees who work on an irregular or occasional basis are exempt on those days during which they are at no time in active duty status.

(4) The Secretary as well as other officials appointed by the President by and with the advice and consent of the Senate, who determine policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws are exempt from the prohibitions concerning active participation in political management and political campaigns.

(e) There are restrictions other than those imposed by Subchapter III of Chapter 73 of Title 5, U.S.C. (the Hatch Act), and Civil Service Rule IV which relate to:

(1) Political contributions and assessments;

(2) Circulars of solicitation;

(3) Solicitation in Federal buildings;

(4) Solicitation by letter;

(5) Payment by one employee to another;

(6) Discrimination because of political contributions;

(7) Purchase and sale of public office;

(8) Political recommendations and discrimination; and

(9) Other criminal offenses set forth in 18 U.S.C., Chapter 29.

Further information concerning these restrictions may be obtained from the Counselor.

§ 1010.207 Use of Government property.

An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has positive duty to protect and conserv Government property including equi ment, supplies, and other property entrusted or issued to the employee.

§ 1010.208 Nondiscrimination.

An employee shall not be discriminated against because of race, color, religion, national origin, sex, age, politics, marital status, or on the basis of a physical handicap with respect to any position the duties of which may be efficiently performed by a person with a physical handicap. This prohibition applies to both employment and utilization of DOE employees.

§ 1010.209 Misuse of information.

(a) For the purpose of furthering a private interest, an employee shall not, except as provided in paragraph (c) of § 1010.204, directly or indirectly use, or allow the use of, official information obtained through or in connection with the employee's Government employment which has not been made available to the general public.

(b) An employee of DOE shall not improperly divulge or disclose any trade secrets, processes, financial data, or other business information which is submitted to or filed with DOE on a confidential basis.

(c) In addition to the prohibitions specified in paragraphs (a) and (b) of this section, employees are subject to the prohibition imposed by section 68a of the Atomic Energy Act of 1954, 42 U.S.C. 2098(a), "Public and Acquired Lands":

> No individual, corporation, partnership, or association, which had any part, directly or indirectly, in the development of the atomic energy program, may benefit by any location, entry, or settlement upon the public domain made after such individual, corporation, partnership, or association took part in such project, if such individual, corporation, partnership, or association, by reason of having had such part in the development of the atomic energy program, acquired confidential official information as to the existence of deposits of uranium, thorium, or other materials in the specific lands upon which such location, entry, or settlement is made and subsequent to August 30, 1954, made such location, entry, or settlement, or caused the same to be made for his, or its, or their benefit.

§ 1010.210 Indebtedness.

An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as a Federal, State, or local tax. For the purpose of this section, "in a proper and timely manner" means in a manner which DOE determines does not, under the circumstances, reflect adversely on the Government. Also, for the purpose of this section, a "just financial obligation" means one acknowledged by the employee, or reduced to judgment by a court, or one imposed by law such as Federal, State, or local taxes; any other debt contested in good faith by an employee is not subject to this section. In the event of dispute between an employee and an alleged creditor, this section does not require DOE to determine the validity or amount of the disputed debt.

§ 1010.211 Gambling, betting, and lotteries.

(a) An employee shall not participate, while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket.

(b) This section does not preclude activities:

(1) Necessitated by an employee's law enforcement duties; or

(2) Under section 3 of Executive Order 10927 (on Conduct of Fund Raising Activities) and similar Department-approved activities.

§ 1010.212 Handling of funds entrusted by fellow employees.

No employee shall receive, retain, or disburse funds entrusted to the employee by fellow employees (e.g., credit union deposits or donations to charitable organizations) except with the utmost care in the safeguarding of such funds and the maintenance of full and complete records with regard to the receipt, custody, and disbursement of such funds. Such records shall be made available to appropriate authorities upon proper request.

§ 1010.213 Endorsements.

(a) Employees are prohibited from endorsing in an official capacity the proprietary products or processes of manufacturers or the services of commercial firms for advertising, publicity, or sales purposes. Use of materials, products, or services by the Department does not constitute official endorsement.

(b) Employees are prohibited from engaging in outside employment or other outside activity which identifies DOE or any employee in an official capacity with any organization commercializing products relating to work conducted by DOE or with any commercial advertising matter.

§ 1010.214 Use of credentials.

Credentials and other Department of Energy identification devices are for use only in establishing identity or authority in connection with official business. Such credentials and identification devices or an employee's official position, status, or designation are not to be used by employees to exert influence or obtain—either directly or indirectly—privileges or rewards for themselves or others.

§ 1010.215 General conduct prejudicial to the Government.

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or other conduct prejudicial to the Government.

§ 1010.216 Guidelines for Economic Regulatory Administration employees in conduct of audits.

(a) When an employee of the Economic Regulatory Administration receives an assignment involving a person acting as either principal, or agent, with whom the employee has had a prior social or business association or any relationship which might impair or give the appearance of impairing the employee's impartiality or independence, the employee will discuss with his supervisor the possible need to have the assignment transferred to another employee.

(b) During the execution of the assignment, an employee should not enter into a social or business association with any person who is a principal or agent of the firm being audited, or into any relationship which might impair, or give the appearance of impairing his impartiality or independence. Should such a relationship develop, the employee will discuss with his supervisor the possible need to have the assignment transferred to another employee.

§ 1010.217 Cooperation with the Inspector General (applicable to FERC).

(a) Upon the duly authorized request of a representative of the Office of Inspector General, a DOE employee shall provide information requested by the representative pertaining to the operations and programs of the Department. In responding to such a request, an employee shall testify or respond to questions, under oath if specified by an investigator who is a Federal employee of the Office of Inspector General, and, where appropriate, furnish a signed statement; except that, an employee is not required to respond to questions or to testify if the answers or testimony may subject the employee to criminal prosecution. If the employee's statements or information gained by reason of such statements may not be used against the employee in a criminal prosecution, failure to respond to such a request for information could lead to disciplinary action.

(b) Employees have a duty to expose fraud, waste, inefficiency, or other forms of wrongdoing on the part of DOE employees, contractors, subcontractors, grantees, or other recipients of DOE financial assistance, or their employees, and to report such activities in accordance with this paragraph. All alleged violations of these regulations shall be referred to the Counselor and the Inspector General, and the Counselor shall review and determine appropriate action in accordance with § 1010.502(c). Reviewing officials shall report actual or alleged employee misconduct to the Counselor and the Inspector General (§ 1010.104(b)(6)). Notwithstanding any other provision in these regulations, DOE employees should, when appropriate, report directly to the Office of Inspector General any information concerning wrongdoing by Department employees, or DOE contractors, subcontractors, grantees, or other recipients of DOE financial assistance, or their employees.

[53 FR 18076, May 20, 1988]

Subpart C—Restrictions on Financial, Employment, and Similar Interests

§ 1010.301 General.

(a) The maintenance of public confidence in the Government clearly demands that a DOE employee take no action which would constitute the use of official position to advance personal or private interests.

(b) All employees must read carefully this subpart to ascertain those restrictions applicable only to certain classes of DOE employees. Any question concerning the class in which an individual belongs should be directed to the reviewing official concerned.

(c) An employee shall not:

(1) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with the employee's Government duties and responsibilities; or

(2) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through Government employment which has not been made available to the general public.

§ 1010.302 Restrictions concerning private financial interests.

(a) *All employees (18 U.S.C. 208).* Unless authorized to do so as provided hereafter in this section, no employee shall participate personally and substantially as a Government employee in a particular matter in which the employee knowingly has a financial interest.

(1) For purposes of this section—

(i) An employee "participates" in a particular matter through decision, approval, disapproval, recommendations, the rendering of advice, investigation or otherwise.

(ii) A "particular matter" is a judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other such matter.

(iii) A "financial interest" includes the interest of the employee or the employee's spouse, minor child, partner, organization in which the employee is serving as officer, director, trustee, partner, or employee, or any person or organization with whom the employee is negotiating or has an arrangement concerning prospective employment. An employee shall be deemed to be negotiating for prospective employment upon an expression of interest in response to a solicitation for future employment by either the employee or the person or organization.

(2) *Administrative waiver.* The employee's reviewing official may waive the restrictions of paragraph (a) of this section, in a particular matter for an individual if the employee's reviewing official determines in writing that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect of the individual. See Subpart E, § 1010.501(b) for procedures applicable to this waiver. Where it appears that the conflict of interest would arise in other matters in which the employee would be involved in the performance of normal duties, remedial action shall be taken.

(3) *Waiver by rule or regulations.* The Secretary may by rule or regulation waive the restrictions of paragraph (a) of this section for classes of financial interest which the Secretary determines are too remote or too inconsequential to affect the integrity of an employee's services. (See § 1010.501.) The restrictions on the following financial interests are waived pursuant to this paragraph:

(i) Financial interests in mutual funds or regulated investment companies the portfolios of which are widely diversified, and similarly constituted, commercially fungible entities.

(b) *Supervisory employees (42 U.S.C. 7212)* (Applicable to FERC). In addition to the above restrictions, no supervisory employee shall knowingly receive compensation from, or hold any official relation with, any energy concern, or own stocks or bonds of any energy concern, or have any pecuniary interest therein.

(1) All supervisory employees shall comply with the provisions of paragraph (b) of this section, prior to assuming their duties in the DOE.

(2) Waivers of the restrictions of paragraph (b) of this section, may be requested in accordance with § 1010.501.

(c) *Employees holding positions listed in Appendix IV (30 U.S.C. 1211(f))*. No employee holding a position listed in Appendix IV shall have a direct or indirect financial interest in underground or surface coal mining operations. Such covered employees shall comply with the provisions of this paragraph prior to assuming their duties in DOE.

(d) Notwithstanding the reporting requirements of Subpart D, any employee who has a financial interest (other than a financial interest waived under paragraph (a)(3) of this section) in a particular matter which is within the scope of the employee's official duties shall make a full disclosure of that interest in writing to both the employee's reviewing official and the Counselor at such time as the employee acquires the financial interest or begins participating in the particular matter.

§ 1010.303 Postemployment restrictions.

(a) *All employees (18 U.S.C. 207)*. After Government employment has ceased, no former employee may:

(1) Knowingly act as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has an interest and in which the former employee participated personally and substantially for the Government through decision, approval, disapproval, recommendation, rendering of advice, investigation, otherwise; and

(2) Appear personally before an Government court, department agency as agent or attorney fo anyone other than the United Stat in connection with any proceeding, a plication, request for a ruling or oth determination, contract, claim, contr versy, charge, accusation, arrest, other particular matter involving specific party or parties in which th United States is a party or has an terest and which was within th boundaries of the former employee official responsibilities during the la year of that employee's Governme service, for a period of one year aft termination of the employee's offic responsibility for that matter.

(b) *Supervisory employees (42 U.S. 7215)*. (Applicable to FERC) In add tion to the above, for one year aft employment with DOE ceases, exce as provided in paragraph (b)(2) of th section, no supervisory employee sh knowingly make any appearance or tendance (see § 1010.103(c)) before th Department, or make any written oral communication to, with the inte to influence the action of, the Depa ment, if such appearance or commu cation relates to any particular matt which is pending before the DOE.

(1) The prohibition in paragraph of this section, does not prevent former supervisory employee from sponding to requests from DOE of cials for information relating to th former employee's duties in the D partment.

(2) The prohibition in paragraph of this section, shall not apply to:

(i) Any appearance, attendance communication by a former supervis ry employee who is employed by a acting on behalf of, the United Stat or

(ii) Any appearance or communic tion by the individual where such a pearance or communication is made response to a subpoena, or concer any matter of an exclusively person and individual nature such as pensi benefits.

(c) *Scientific and technologic waiver*. (Applicable to FERC) T Secretary or the Chairman may wa the provisions of this section for former DOE employee in connection with a particular matter in a scientific or technological field, if the Secretary or the Chairman, as appropriate, determines that the national interest would be served by such waiver because the former employee possesses outstanding scientific or technological qualifications. (See § 1010.501.)

(d) A limited exception from the restrictions contained in paragraph (a) of this section, is available, pursuant to the Indian Self-Determination Act (25 U.S.C. 450i(f)), to former employees who are employed by Indian tribes.

§ 1010.304 Participation prohibitions.

(a) *All employees (18 U.S.C. 203 and 205).* No employee except in the proper discharge of official duties shall represent anyone before a court or Government agency in a matter in which the United States is a party or has an interest. This prohibition applies both to paid and unpaid representation of another.

(1) A special Government employee is subject to this restriction only if it is a matter in which that employee participated personally and substantially for the Government.

(2) Notwithstanding paragraph (a)(1) of this section, no special Government employee who has served more than 60 days during the preceding 365 days may represent anyone else in a matter pending before DOE.

(3) Waivers from the prohibitions of this paragraph are permitted in accordance with § 1010.501.

(b) *Supervisory employees (42 U.S.C. 7216).* (Applicable to FERC) No supervisory employee shall knowingly participate:

(1) For a period of one year after terminating any employment with any energy concern, in any Department proceeding in which the supervisory employee's former employer is substantially, directly, or materially involved, other than in a rulemaking proceeding which has a substantial effect on numerous energy concerns; or

(2) For a period of one year after commencing service in the DOE, in any Department proceeding for which, within the previous 5 years, the supervisory employee had direct responsibility, or in which the supervisory employee participated substantially or personally, while in the employment of any energy concern.

(c) (Applicable to FERC) The Secretary or the Chairman, as appropriate, may waive the restrictions of paragraph (b) of this section, in accordance with § 1010.501.

(d) A limited exception from the restrictions contained in paragraph (a) of this section is available, pursuant to the Indian Self-Determination Act (25 U.S.C. 450i(f)), to employees who are assigned to Indian tribes.

§ 1010.305 Assignees pursuant to the Intergovernmental Personnel Act and the President's Executive Interchange Program.

(a) (Applicable to FERC) The DOE may utilize individuals assigned under the Intergovernmental Personnel Act and the President's Executive Interchange Program. However, no individual will be invited by the DOE to participate in such programs if such individual would be a supervisory employee in the DOE and the business, government or institution by whom such individual is employed is an energy concern, unless the Secretary or the Chairman, as the case may be, grants an appropriate waiver pursuant to § 1010.501.

(b) Reviewing officials proposing to utilize an individual under the Intergovernmental Personnel Act or the President's Executive Interchange Program shall, prior to commencing negotiations with such individual, or the individual's current employer, submit to the Counselor, the individual's name, proposed position, salary, and current employer. The Counselor shall then determine whether it is appropriate to utilize such individual.

§ 1010.306 Exceptions and waivers.

(a) Nothing in this subpart shall be deemed to prohibit employees, if it is not otherwise inconsistent with the faithful performance of their duties, from representing without compensation any person in a disciplinary, loyalty, or other Federal personnel administrative proceeding involving such person.

(b) Provided that an employee obtains prior approval, or provides advance notification in accordance with the provisions of § 1010.204 regarding outside employment, nothing in these regulations shall be deemed to prohibit employees from representing, with or without compensation, their parents, spouse, child, or any person for whom, or for any estate for which, they are serving as guardian, executor, administrator, trustee, or other personal fiduciary, *except* in those matters in which they have participated personally and substantially as Government employees, or which are the subject of their official responsibilities.

(c) Nothing in these regulations shall be deemed to prohibit employees from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

(d) (Applicable to FERC) Nothing in this subpart shall prevent employees from requesting a waiver pursuant to Subpart E.

Subpart D—Reports

§ 1010.401 General (applicable to FERC).

(a) The Director of Personnel shall provide appropriate forms to new employees prior to their assumption of duties in the Department, and to a DOE employee assigned new duties prior to the employee's assumption of such new duties. The Director of Administration shall provide Form DOE-459 to DOE employees annually prior to May 1.

(b) Forms DOE-459 and DOE-460 shall be filed no later than the times stated in §§ 1010.403, and 1010.405 with the employee's reviewing official who shall make a determination regarding financial interests therein revealed. The reviewing official shall complete this review and forward each form with the relevant determination to the Counselor within 15 days of receipt of the form.

(c) The Counselor shall review Form DOE-461 pursuant to § 1010.406 and other forms and determinations following receipt from the reviewing officials.

(1) The Counselor or the reviewing official in coordination with the Counselor may require divestiture of certain financial interests pursuant to § 1010.302. Any required divestiture action shall be taken within the time required by the Counselor or reviewing official and confirmed in writing.

(2) A required divestiture action may be appealed pursuant to § 1010.503, or a waiver may be requested pursuant to § 1010.501 within 30 days of receipt of such advice.

(d) An employee may request from the Counselor an extension(s) of time for filing Form DOE-459. The Counselor may grant such extensions for periods up to a total of 90 days.

(e) Persons aggrieved by application of this subpart may proceed in accordance with § 1010.503.

§ 1010.402 Availability of reports (applicable to FERC).

(a) Reports under the provisions of §§ 1010.403(b), 1010.405(a)(1) and 1010.406(a)(1) will be made available to the public. Reports under the provisions of §§ 1010.403(c), 1010.405(a)(2 and 1010.406(a)(2) will be held in confidence.

(b) Reports required by law to be publicly available shall be made available at a location specified by the Counselor within 30 days after receipt of the reports by the reviewing official, or in the case of Form DOE-461, within 30 days after receipt by the Counselor.

(c) Written requests for copies of publicly available reports should be addressed to:

The General Counsel, Department of Energy or Federal Energy Regulatory Commission, (as appropriate) Washington D.C. 20585 (20426 for FERC).

(1) Persons requesting copies of reports may be required to pay a reasonable fee which may be necessary to recover the cost of reproduction and mailing of such reports.

(d) Publicly available reports will b retained by the Counselor for s years.

(e) A file of the waivers granted pu suant to § 1010.501, shall be availab from the Counselor for inspection a copying during regular working hour

(f) A record of persons requesting access pursuant to this section to any particular employee's reports shall be maintained by the Counselor and shall be available to that employee. The Counselor shall notify an employee whenever access to the employee's reports has been requested pursuant to this section.

§ 1010.403 Statements of employment and financial interests, and interests in energy concerns.

(a) (Applicable to FERC) The filing requirements of this section are applicable to all DOE employees, except those whose positions are exempt pursuant to paragragh (f) of this section.

(b) *Form DOE-459, Part A.* (Applicable to FERC) This report of interests in energy concerns:

(1) Shall be publicly available;

(2) Shall include information as requested in the sample form in Appendix III A;

(3) Shall be completed by employees within 30 days of commencement of service in the Department and on every May 15 thereafter. Notwithstanding the allowable 30 day period, prospective supervisory employees and prospective special Government employees and their appointing officials are urged to assure the filing of such reports and their appropriate review by the Counselor to identify and avoid potential violations of section 602 of the DOE Organization Act (§ 1010.302(b) of these regulations) prior to entry on duty; and

(4) Shall satisfy the requirements of section 522 of the Energy Policy and Conservation Act (EPCA), Pub. L. 94-163, section 601 *et seq.* of the DOE Organization Act, Pub. L. 95-91, and section 308 of Pub. L. 95-39.

(c) *Form DOE-459, Part B.* (Applicable to FERC) This confidential statement of employment and financial interests:

(1) Shall be held in confidence;

(2) Shall include that information requested on the sample form in Appendix III A; and

(3) Shall be filed by employees within 30 days of commencement of service in the DOE and on each May 15 thereafter. Notwithstanding the allowable 30 day period, prospective supervisory employees and prospective special Government employees and their appointing officials are urged to assure the filing of such reports and their appropriate review by the Counselor to identify and avoid potential violations of 18 U.S.C. 208 (§ 1010.302(a) of these regulations) prior to entry on duty.

(d) (Applicable to FERC) Employees required to file Form DOE-459 who cease to be DOE employees during any calendar year shall file the report within 30 days of the date of termination concerning that portion of such year beginning on January 1 and ending on the date employment terminates.

(e) Special Government employees shall keep the Form DOE-459 current throughout their employment with the Department by submission of supplementary statements, as needed, in addition to the annual report.

(f) (Applicable to FERC) (1) Section 603(c) of Pub. L. 95-91 (42 U.S.C. 7213(c)) requires the Secretary to identify specific positions, or classes thereof, within the Department which are of a nonregulatory or nonpolicymaking nature at or below GS-12 of the General Schedule, and to exempt such positions or classes and the individuals occupying those positions from the reporting requirements of section 603 of the Act. Pursuant to section 603(c), the following positions are exempt from the filing requirements of this section commencing with the dates provided in paragraph (f)(3) of this section:

(i) All positions in the classes, identified by series and grades, listed in Appendix I, except those occupied by individuals described in paragraph (f)(2) of this section; and

(ii) Any specific position at or below GS-12 of the General Schedule, or the equivalent, the duties and responsibilities of which are found by the Counselor to be substantially similar to those included in the classes listed in Appendix I to this part. A list of specific positions that have been exempted from the filing requirements of this section pursuant to this paragraph shall be maintained by the Counselor. The list shall be published at intervals established by the Counselor.

(2) Notwithstanding the provisions of paragraph (f)(1) of this section, an individual who is a supervisory employee (see § 1010.103(t) for definition of "supervisory employee"), a member of an award fee board, or a contracting officer's technical representative, is not exempt from the reporting requirements of section 603 of Pub. L. 95-91.

(3) An employee who occupies a position that has been exempted pursuant to paragraph (f)(1)(i) of this section shall not be required to file a report pursuant to this section for any period beginning on or after January 1, 1987. An employee who occupies a position that has been exempted pursuant to paragraph (f)(1)(ii) of this section shall not be required to file any report due under this section on or after the date the employee's position has been exempted. Reports for any period before January 1, 1987, in the case of an employee who occupies a position that has been exempted pursuant to paragraph (f)(1)(i) of this section, and reports due before a position has been exempted, in the case of an employee who occupies a position that has been exempted pursuant to paragraph (f)(1)(ii), shall continue to be subject to the rules regarding exemption that were in effect before April 6, 1988.

[44 FR 24697, Apr. 26, 1979, as amended at 53 FR 11241, Apr. 6, 1988]

§ 1010.404 Statement of interests in coal mining operations.

(a) All employees occupying positions listed in Appendix IV as involving functions under the Surface Mining Control and Reclamation Act (Pub. L. 95-87) must so indicate on Part C of Form DOE-459.

(b) Each employee occupying a position listed in Appendix IV must certify in Part C of Form DOE-459 that none of the listed financial interests represent a direct or indirect financial interest in an underground or surface coal mining operation except as specifically identified and described.

§ 1010.405 Prior employment report—supervisory employees (applicable to FERC).

(a) Each supervisory employee shall file Form DOE-460 identifying any entity which paid that employee compensation in excess of $2,500 in the calendar year in which he is reporting or in any of the five preceding calendar years.

(1) Those entities which the supervisory employee believes to be energy concerns shall be listed in Part A of the report.

(2) Other entities shall be listed in Part B.

(b) Such report shall include information as requested on the sample form in Appendix III B.

(c) Such report need not include:

(1) Any information considered confidential as a result of a privileged relationship, recognized by law, between such supervisory employee and any person; or

(2) Any information with respect to any person for whom services were provided by any firm or association of which such supervisory employee was a member, partner, or employee unless such supervisory employee was directly involved in the provision of such services.

(d) Part A of the report listing energy concerns shall be available to the public.

(e) Such report shall be filed within 60 days of becoming a supervisory employee in the DOE. Notwithstanding the allowable 60 day period, prospective supervisory employees and their appointing officials are urged to assure the filing of such reports and their appropriate review by the Counselor to identify and avoid potential violations of section 606 of the DOE Organization Act (§ 1010.304 of these regulations) prior to commencement of supervisory employee functions.

§ 1010.406 Postemployment report—supervisory employees (applicable to FERC).

(a) Each former supervisory employee shall file with the Counselor a report, Form DOE-461, describing any employment with any entity during the period to which such report relates, including any employment as a consultant, agent, attorney, or otherwise.

(1) Those entities which the former supervisory employee believes are

energy concerns shall be listed in Part A of the report.

(2) The other entities shall be listed in Part B.

(b) Such report shall include that information requested on the sample form in Appendix III C.

(c) Part A of this report listing energy concerns shall be available to the public.

(d) This requirement shall not apply to an individual who, at the time employment with DOE ceases, has any contract, promise, or other agreement with respect to future employment with an energy concern, provided:

(1) The individual describes such agreement in any publicly available report filed within 30 days after the individual ceases to be an employee of the DOE (including Form DOE-459); and

(2) The individual amends such report by May 15 of either of the next 2 years during which the individual has accepted any other employment.

(e) Reports under paragraph (a) of this section shall be filed in the first and second calendar years (no later than May 15 of each such year) following December 31 of the calendar year in which the reporting individual ceased to be an officer or employee of the DOE.

§ 1010.407 Filing of Forms DOE-459, DOE-460, and DOE-461 (applicable to FERC).

(a) Form DOE-459:

(1) Form DOE-459 shall be submitted by all employees whose positions are *not* listed in Appendix I.

(2) Form DOE-459 shall be submitted in accordance with § 1010.403.

(b)(1) Reviewing officials shall, as of April 15 of each year, review the positions under their jurisdiction and determine, in accordance with Appendix I, the positions which require the submission of reports from their incumbents. The affected employees shall be notified of that fact and shall be furnished with copies of the report form by their reviewing officials. By copy of the notification (or a list of the names, grades and positions of employees required to file reports), the Counselor shall be informed by the reviewing officials of those employees required to submit forms.

(2) Whenever a new position is established, the reviewing official shall determine whether the position calls for the submission of a form in accordance with Appendix I. If it is determined that a report is a requirement, the individual to be assigned to that position shall be notified (with copy to the Counselor) of the requirement (see § 1010.403 for filing procedures).

(c) Notwithstanding the filing of the annual reports required by these regulations, each employee shall at all times avoid acquiring a financial interest that could result in a violation of the conflicts of interest provisions of these regulations.

(d) *Form DOE-460 (Report on prior employment).* (1) Form DOE-460 shall be submitted in accordance with § 1010.405.

(2) Form DOE-460 shall be submitted by all supervisory employees.

(e) *Form DOE-461 (Postemployment report).* (1) Form DOE-461 shall be submitted in accordance with § 1010.406.

(2) Form DOE-461 shall be submitted by all former supervisory employees.

(3) Form DOE-461 shall be filed with the Counselor not later than May 15 of the first and second calendar years following the first full year such former employee ceased to be an employee of the DOE.

(f) Upon completion of processing, copies of reports shall be filed in the office of the Counselor.

(g) The reports required of employees by this subpart are in addition to, not in substitution for or in derogation of, any similar requirement imposed by law, order, or regulation. The submission of a report by an employee or the absence of any requirement that an employee submit such a report does not permit the employee or any other person to participate in a matter in which the employee's or the other person's participation is prohibited by law, order, or regulation.

(h) To whom reports are to be submitted (Headquarters). Submission of required reports shall be to the reviewing official as indicated below:

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(1) To the Director, Office of Government Ethics, (Government-wide Forms) and to the appropriate Counselor (Forms DOE-459, 460, and 461):

(i) The Secretary.

(ii) The Commissioners of FERC.

(2) To the Secretary:

(i) Members of the Secretary's immediate staff.

(ii) The Deputy Secretary.

(iii) The Under Secretary.

(iv) Special Government employees reporting directly to the Secretary.

(3) To the Deputy Secretary:

(i) Members of the Deputy Secretary's immediate staff.

(ii) Special Government employees reporting directly to the Deputy Secretary.

(iii) Heads of DOE organizational components who report directly to the Deputy Secretary.

(iv) Level 2 personnel (Assistant Secretary, Administrator EIA, Administrator ERA, Inspector General, Director ER, Director AD, Controller, General Counsel, Director PR, or equivalent) except those who report directly to the Under Secretary.

(4) To the Under Secretary:

(i) Members of the Under Secretary's immediate staff.

(ii) Special Government employees reporting directly to the Under Secretary.

(iii) Heads of DOE organizational components who report directly to the Under Secretary.

(5) To the Chairman of the Commission:

(i) Members of the Chairman's immediate staff.

(ii) Special Government employees reporting directly to the Chairman.

(iii) Heads of FERC organizational components who report directly to the Commission.

(6) To appropriate level 2 supervisor (Assistant Secretary, Administrator EIA, Administrator ERA, Inspector General, Director ER, Director AD, Controller, General Counsel, Director PR, or equivalent):

(i) Members of the level 2 supervisor's immediate staff.

(ii) Special Government employees reporting directly to the level 2 supervisor.

(iii) Level 3 personnel (Office Directors or equivalent) under the jurisdiction of such level 2 supervisor.

(7) To appropriate level 3 supervisor (Office Director or equivalent):

(i) Members of the level 3 supervisor's immediate staff.

(ii) Special Government employees reporting directly to the level 3 supervisor.

(iii) Level 4 personnel (Division Director or equivalent) under the jurisdiction of such level 3 supervisor.

(8) To appropriate level 4 supervisor (Division Director or equivalent):

All other employees or special Government employees required by these regulations to submit a report.

(9) In special situations, the Counselor may arrange for submission of reports to other than the employee's normal reviewing official.

(i) To whom reports are to be submitted (Field Organizations). Submission of required reports shall be to the reviewing official as indicated below.

(1) To Regional Representative, Administrator of Power Administration, Manager of Operations Office, Director of Energy Technology Center, or equivalent.

(i) Members of that official's immediate staff.

(ii) Special Government employees reporting directly to that official.

(iii) Assistant Managers, Assistant Administrators, Area Managers, heads of other field organizational components who report directly to that official, or equivalent.

(2) To Assistant Managers, Assistant Administrators, Area Managers, heads of other field organizational components who report directly to officials listed in paragraph (i)(1) of this section, or equivalent.

(i) Members of that official's immediate staff.

(ii) Special Government employees reporting directly to that official.

(iii) Office Directors, Division Directors, heads of other field organizational components who report directly to that official, or equivalent.

(3) To Office Directors, Division Directors, heads of other field organizational components who report directly

to officials listed in paragraph (i)(2) of this section, or equivalent:

All other employees or special Government employees required by these regulations to submit a report.

(4) In special situations, the Counselor may arrange for submission of reports to other than the employee's normal reviewing official.

Subpart E—Procedures and Sanctions

§ 1010.501 Waivers.

(a) (Paragraphs (a)(1), (a)(2) and (a)(4) of this section are Applicable to FERC.) Waivers may be granted of the requirements and restrictions in:

(1) Section 1010.302(b) (prohibited interests for supervisory employees) if the Secretary or the Chairman, as appropriate, finds that application of the restrictions would work an exceptional hardship on the supervisory employee or that the prohibited interest is a pension, insurance, or other similarly vested interest;

(2) Section 1010.304(b) (participation prohibitions for supervisory employees) if the Secretary or the Chairman, as appropriate, finds that application of the restrictions would work an exceptional hardship on the supervisory employee or would be contrary to the national interest;

(3) Section 1010.302(a) (participation restrictions in particular matters for all employees) if the Secretary by rule or regulation finds that a particular interest is too remote or too inconsequential to be one which can be expected to cause a conflict of interest for any employee who may hold that interest; (see also § 1010.501(b))

(4) Section 1010.303 (a) and (b) (postemployment restrictions for all former employees and former supervisory employees, respectively) if the Secretary or the Chairman, as the case may be, finds that the national interest would be served if a former employee with outstanding scientific or technological qualifications were permitted to appear, attend, or communicate with the DOE, in connection with a particular matter in a scientific or technological field; and

(5) Section 1010.304 (a)(1) and (2) (participation prohibitions for special Government employees) if the Secretary finds that the national interest would be served if a special Government employee were permitted to represent another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States.

(b) The employee's reviewing official in consultation with the Counselor may waive the provisions of § 1010.302(a) if he finds that the individual employee's financial interest is not so substantial as to be likely to affect the integrity of the services which the Government may expect of that employee.

(c) (Applicable to FERC) An employee requesting a waiver under paragraph (a) or (b) of this section shall submit a written request for waiver to the employee's reviewing official. The request shall explain the employee's duties, the nature of the conflict of interest, potential conflict of interest, or appearance of conflict of interest, the effect on the employee of the restriction or prohibition for which the employee seeks the waiver, and the reasons why the waiver should be granted.

(1) In the case of requests under paragraph (a) of this section, the reviewing official shall review the request and forward the request with the reviewing official's recommended action to the Counselor. The Counselor will review the request and the reviewing official's recommendation and, where appropriate, forward a waiver statement to the Secretary or the Chairman, as appropriate, for approval and signature.

(2) In the case of requests under paragraph (b) of this section, the employee's reviewing official, in consultation with the Counselor, shall review and determine in writing whether to grant the request.

(d) (Applicable to FERC) Waivers under paragraphs (a)(1), (a)(3), or (a)(4) of this section shall be published in the FEDERAL REGISTER.

(e) (Applicable to FERC) Waivers under paragraph (a)(2) of this section shall be filed with any record of the Department proceeding as to which the waiver, for purposes of participation, is granted.

(f) Waivers under paragraph (a)(5) or (b) of this section shall be filed in the employee's conflicts of interest file maintained by the Counselor.

§ 1010.502 Sanctions.

(a) *General criminal sanctions.* (1) Violations of 18 U.S.C. 203, 205, or 208 (§§ 1010.302 or 1010.304 of these regulations) may result in a fine of $10,000 or imprisonment for 2 years, or both.

(2) Violations of 18 U.S.C. 207 or 209 (§§ 1010.203, or 1010.303 of these regulations) may result in a fine of $5,000 or imprisonment for 1 year, or both.

(b) (Applicable to FERC) Criminal and civil sanctions under the DOE Organization Act.

(1) Any individual who is subject to, and knowingly violates, section 603 of the DOE Organization Act (§ 1010.403(b) of these regulations) shall be fined not more than $2,500 or imprisoned not more than one year, or both.

(2) Any individual who violates any of sections 602 through 606 of the DOE Organization Act (§§ 1010.302(b), 1010.303(b), 1010.304(b), 1010.403, 1010.405, or 1010.406 of these regulations) shall be subject to a civil penalty, assessed by the Secretary or the Chairman, as appropriate, in accordance with applicable law or by any district court of the United States, not to exceed $10,000 for each violation.

(3) Notwithstanding any penalty imposed under paragraph (b)(1) of this section, any violation of section 605(a) of the DOE Organization Act (§ 1010.303(b) of these regulations) shall be taken into consideration in deciding the outcome of any Department proceeding in connection with which the prohibited appearance, attendance, communication, or submission was made.

(c) (Applicable to FERC) All alleged violations of these regulations shall be referred to the Counselor and the Inspector General. The Counselor shall review the allegations and determine whether the matter should be referred to the Department of Justice for investigation, or is appropriate for investigation by the Inspector General.

(d) (Applicable to FERC) General administrative sanctions.

(1) The Secretary or the Chairm
may impose administrative sanctio
for violations of these regulations
the fullest extent provided by law a
DOE regulations.

(2) Such administrative sanctio
may be imposed for violations whi
include, but are not limited to:

(i) Late submission by employees
required reports; and

(ii) Failure by reviewing officials
perform counseling or review fu
tions.

(e) (Applicable to FERC) (1) An in
vidual shall be deemed to have kno
of or knowingly committed a describ
act or to have known of or knowin
held a described status or position
the employee knew or should ha
known of such act, interest, status,
position.

(2) An employee shall be deemed
have known of or knowingly held
interest in an energy concern if su
interest is sold or otherwise tra
ferred to the employee's spouse or
pendent while such employee is,
within 6 months prior to the date
which such employee becomes, an e
ployee of DOE.

(3) Placing of an interest under
trust by an individual shall not satis
the requirement of § 1010.302(b)
these regulations unless none of t
interests placed under such trust
such individual consists of known
nancial interests in any energy co
cern. Further information concerni
trusts may be obtained from the Cou
selor.

§ 1010.503 Appeals and grievances (app cable to FERC).

(a) An employee may request revi
by the Counselor of an action or de
sion by a reviewing official, und
these regulations, which adversely
fects that employee. Any action or
cision by the Counselor pursuant
these regulations may be appealed
writing to the Deputy Secretary,
the Chairman, as appropriate.

(b) The DOE grievance procedu
shall be available for review of the f
lowing actions and decisions:

(1) Failure to include an employe
position on the list of employe

exempt from reporting requirements (Appendix I);

(2) Inclusion of an employee on the list of employees identified as supervisory employees (Appendix II);

(3) Inclusion of employees on the list of employees covered under the Surface Mining Control and Reclamation Act of 1977 (Appendix IV); and

(4) Inclusion of a person or organization on the list of energy concerns.

§ 1010.504 Cancellation of contracts.

The Secretary reserves the right to declare void, in accordance with law, any Department award, contract, decision or other Department action or proceeding in connection with which provisions of statutes or DOE regulations are violated.

Subpart F—Special Government Employees

§ 1010.601 Use of Government employment.

Special Government employees shall not use Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for themselves or other persons, particularly those with whom they have family, business, or financial ties.

§ 1010.602 Use of inside information.

(a) Special Government employees shall not use inside information obtained as a result of Government employment for private gain for themselves or other persons either by direct action on their part or by counsel, recommendation or suggestion to other persons, particularly ones with whom they have family, business, or financial ties. For the purpose of this section, "inside information" means information obtained under Government authority which has not become part of the body of public information.

(b) A special Government employee may teach, lecture, or write in a manner not inconsistent with § 1010.204(c).

§ 1010.603 Coercion.

Special Government employees shall not use their Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to themselves or other persons, particularly those with whom they have family, business or financial ties.

§ 1010.604 Gifts, entertainment, and favors.

(a) Except as provided in paragraph (b) of this section, special Government employees, while so employed or in connection with their employment, shall not knowingly receive or solicit from a person having business with the DOE anything of value as a gift, gratuity, loan, entertainment, or favor for themselves or other persons, particularly one with whom they have family, business, or financial ties.

(b) The exceptions and limitations set forth in § 1010.205 (b), (c) and (d) shall be applicable to special Government employees.

§ 1010.605 Other provisions.

(a) In addition to the requirements of this subpart, special Government employees shall be responsible for knowing the restrictions contained in Subparts B, C, and D.

(b) (Applicable to FERC) Any special Government employee who is compensated at an annual rate equal to or greater than a GS-16 of the General Schedule, and who serves for more than 90 days in a calendar year, is considered to be a supervisory employee under these regulations and is subject to the restrictions contained in §§ 1010.302(b), 1010.303(b), and 1010.304(b).

APPENDIX I—LIST OF CLASSES OF POSITIONS EXEMPT FROM THE DISCLOSURE REQUIREMENTS OF SECTION 603 OF THE DOE ORGANIZATION ACT

The following is a list of classes of DOE positions (identified by series and grade) within the Department of Energy that are of a nonregulatory or nonpolicymaking nature at or below GS-12 of the General Schedule or the equivalent. The individuals who occupy positions that are within these classes (except individuals described in § 1010.403(f)(2)) have been exempted from the financial disclosure requirements of section 603 of the Department of Energy Organization Act (Pub. L. 95-91). (Individuals in certain confidential positions in the excepted service who fall within these classes may, nevertheless, be required to file a financial disclosure report under the Ethics in Government Act of 1978 (Pub. L. 95-521, as amended).)

All positions at GS-12 or below in the following occupational series:

018
019
020
023
028
080
081
084
085
090
099
110
130
131
132
134
140
150
160
170
180
199
201
203
212
221
230
233
235
246
260
301
302
303
304
305
309
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351
356
361
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388
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393
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401
403
404
408
430
460
462
482
486
499
501
503
525
530
540
544
560
561
590
599
602
610
690
802
806
807
808
809
817
818
856
899
904
950
963
986
1001
1016
1020
1035
1060
1071
1082
1083
1084
1087
1101 [1]
1103
1104
1105
1106
1107
1150
1160
1202
1301
1306
1310
1311
1320
1321
1340
1341
1350
1370
1371
1372
1373
1374
1399
1410
1411
1412
1421
1510
1515
1520
1521
1529
1530
1531
1550
1599
1601
1640
1654
1670
1701
1712
1910
2001
2003
2005
2010
2030
2050
2101
2102
2130
2131
2132
2134
2151
2181

[1] (Except Office of Hearings and Appeals). For Office of Hearings and Appeals, exemption for series 1101 positions is at GS-9 and below.

All positions at GS-11 or below in the following occupational series:

510

All positions at GS-9 or below in the following occupational series:

001
803
804
810
819

830
840
850
855
880
881
893
896
1101[2]
1102
1130
1170
1171
1220
1221
1222

[2] (Office of Hearings and Appeals). For all other offices, exemption for series 1101 is at GS-12 and below.[53 FR 11241, Apr. 6, 1988; 53 FR 12497, Apr. 14, 1988]

APPENDICES II-IV

NOTE: Appendices IIIA, IIIB, and IIIC appearing at 44 FR 24709, Apr. 26, 1979, are not published in the CFR. Interested persons may obtain copies from the DOE Public Reading Room, GA-152, Forrestal Building, 1000 Independence Ave., SW., Washington, DC 20585.

Appendices II and IV are reserved.

PART 1013—PROGRAM FRAUD CIVIL REMEDIES AND PROCEDURES

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1013.46 Compromise or settlement.
1013.47 Limitations.

AUTHORITY: 31 U.S.C. 3801-3812.

SOURCE: 53 FR 44385, Nov. 3, 1988, unless otherwise noted.

§ 1013.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99-509, sections 6101-6104, 100 Stat. 1874 (October 21, 1986), codified at 31 U.S.C. 3801-3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 1013.2 Definitions.

ALJ means an Admininstrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Authority means the Department of Energy.

Authority head means the Secretary or the Under Secretary of the Department of Energy.

Benefit means, in the context of "statement," anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(c) Made to the authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under § 1013.7 of this part.

Defendant means any person alleged in a complaint under § 1013.7 of this part to be liable for a civil penalty or assessment under § 1013.3 of this part.

Department means the Department of Energy.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by § 1013.10 or § 1013.37 of this part, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the Department of Energy or an officer or employee of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made*, shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization, and includes the plural of that term.

Representative means an attorney, who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico, and designated by a party in writing.

Reviewing official means the General Counsel of the Department or his designee who is—

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of the authority in which the investigating official is employed; and

(c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from, the authority, or any State, political subdivision of a State, or other party, if the United States Government provides any poztion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 1013.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement, and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement,

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other

entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

(c) *Application for certain benefits.* (1) In the case of any claim or statement made by any individual relating to any of the benefits listed in paragraph (c)(2) of this section received by such individual, such individual may be held liable for penalties and assessments under this section only if such claim or statement is made by such individual in making application for such benefits with respect to such individual's eligibility to receive such benefits.

(2) For purposes of paragraph (c) of this section, the term "benefits" means benefits under part A of the Energy Conservation in Existing Buildings Act of 1976, which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family.

(d) No proof of specific intent to defraud is required to establish liability under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(f) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 1013.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to preclude or limit such official's discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 1013.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 1013.4(b) of this part, the reviewing official determines that there is adequate evidence to believe that a person is liable under § 1013.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 1013.7 of this part.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or de-

manded in violation of § 1013.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 1013.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 1013.7 of this part only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under § 1013.3(a) of this part with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 1013.3(a) of this part does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (*e.g.*, grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 1013.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 1013.8 of this part.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 1013.10 of this part.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 1013.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his or her representative.

§ 1013.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing offical shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 1013.11 of this part. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 1013.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 1013.9(a) of this part, the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 1013.8 of this part, a notice that an initial decision shall be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under § 1013.3 of this part, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 1013.38 of this part.

(h) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the authority head decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

§ 1013.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 1013.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 1013.8 of this part. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The tentative time, date, and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 1013.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 1013.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

§ 1013.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 1013.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal basis or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the

ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the authority head may determine the matter only as part of his or her review or the initial decision upon appeal, if any.

§ 1013.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law.

§ 1013.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

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(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 1013.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 1013.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 1013.5 of the part is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 1013.9 of this part.

§ 1013.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 1013.22 and 1013.23 of this part, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 1013.24 of this part.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 1013.24 of this part.

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time, date, and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 1013.8 of this part.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 1013.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 1013.33(b) of this part. At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 1013.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time, date, and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 1013.8 of this part. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 1013.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 1013.25 Witness fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the authority, a check for witness fees and mileage need not accompany the subpoena.

§ 1013.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (*e.g.*, motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 1013.8 of this part shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid, and addressed to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate by the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 1013.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturday, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 1013.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 1013.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 1013.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 1013.3 of this Part, and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 1013.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statement) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense,

public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 1013.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 1013.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 1013.22(a) of this part.

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity *pro se* or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 1013.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, *e.g.*, to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 1013.24 of this part.

§ 1013.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 1013.24 of this part.

§ 1013.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 1013.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 1013.3 of this part;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 1013.31 of this part.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 1013.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 1013.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with § 1013.39 of this part.

§ 1013.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if any party files a motion for reconsideration under § 1013.38 of this part, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The authority head may extend the initial 30-day period for an additional 30 days if the defendant files with the authority head a request for an extension within the initial 30-day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head and the time for filing motions for reconsideration under § 1013.38 of this part has expired, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or an assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under § 1013.3 of this part is final and is not subject to judicial review.

§ 1013.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 1013.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§ 1013.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 1013.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorizes actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 1013.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 1013.42 or § 1013.43 of this part, or any amount agreed upon in a compromise or settlement under § 1013.46 of this part, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 1013.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 1013.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 1013.42 of this part or during the pendency of any action to collect penalties and assessments under § 1013.43 of this part.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 1013.42 of this part or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 1013.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 1013.8 of this part within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of notice under § 1013.10(b) of this part shall be deemed a notice of a hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

PART 1014—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

Sec.
1014.1 Scope of regulations.
1014.2 Administrative claim; when presented; appropriate office.
1014.3 Administrative claim; who may file.
1014.4 Administrative claims; evidence and information to be submitted.
1014.5 Authority to adjust, determine, compromise, and settle.
1014.6 Limitation on authority.
1014.7 Referral to Department of Justice.
1014.8 Investigation and examination.
1014.9 Final denial of claim.
1014.10 Action on approved claims.
1014.11 Penalties.

AUTHORITY: Sec. 1(a), 80 Stat. 306, (28 U.S.C. 2672); 28 CFR Part 14; sec. 644, Pub. L. 95-91, 91 Stat. 599, (42 U.S.C. 7254).

SOURCE: 45 FR 7768, Feb. 4, 1980, unless otherwise noted.

§ 1014.1 Scope of regulations.

(a) These regulations shall apply only to claims asserted under the Federal Tort Claims Act, as amended, accruing on or after January 18, 1967, for money damages against the United States for injury to, or loss of, property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Department of Energy (DOE) while acting within the scope of office or employment.

(b) The terms "DOE", "Department", and "Department of Energy" as used in this part mean the agency established by the Department of Energy Organization Act (Pub. L. 95-91), 42 U.S.C. 7101, et seq., including the Federal Energy Regulatory Commission, but do not include any contractor of the Department.

(c) The regulations in this part supplement the Attorney General's regulations in Part 14 of Chapter 1 of Title 28 CFR as amended. Those regulations, including subsequent amendments thereto, and the regulations in this part apply to the consideration by DOE of administrative claims under the Federal Tort Claims Act.

§ 1014.2 Administrative claim; when presented; appropriate office.

(a) For purposes of these regulations, a claim shall be deemed to have been presented when DOE receives, at a place designated in paragraph (b) of this section, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a definite amount for injury to or loss of property, personal injury, or death, that is alleged to have occurred by reason of the incident. A claim that should have been presented to DOE but which was mistakenly addressed to or filed with another Federal agency, shall be deemed to be presented to DOE on the date the claim is received by DOE. A claim mistakenly addressed to or filed with DOE shall be transferred to the appropriate Federal agency, if ascertainable, or returned to the claimant.

(b) Claims should be mailed in envelopes marked "Attention Office of General Counsel." Claims shall be mailed or delivered to the DOE installation or office employing the person or persons whose acts or omissions are alleged to have caused the loss, damage, or injury, unless the claimant does not know that address. If the proper address is unknown, claims may be mailed or delivered to: The General Counsel, U.S. Department of Energy, Washington, D.C. 20585. Forms may be obtained from the same places.

(c) A claim may be amended by the claimant at any time before final DOE action or before the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or a duly authorized agent or legal representative. If an amendment to a pending claim is filed in time, the DOE shall have 6 months to decide the claim as amended. The claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of an amendment.

§ 1014.3 Administrative claim; who may file.

(a) A claim for injury to or loss of property may be presented by the owner of the property interest that is the subject of the claim or the owner's duly authorized agent or legal representative.

(b) A claim for personal injury may be presented by the injured person or the claimant's duly authorized agent or legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate or by any other person legally entitled to assert such a claim under the applicable State law.

(d) A claim for a loss that was wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss that was partially compensated by an insurer with the rights of a subrogee may be presented by the insurer or the insured individually, as their respective interests appear, or jointly. Whenever an insurer presents a claim asserting the rights of a subrogee, it shall present with its claim appropriate evidence that it has the rights of a subrogee.

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of authority to present a claim on behalf of the claimant.

§ 1014.4 Administrative claims; evidence and information to be submitted.

(a) *Death.* In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing the cause of death, the date of death, and the age of the decedent.

(2) Decedent's employment or occupation at time of death, including monthly or yearly salary or earnings (if any), and the duration of last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of death.

(4) The degree of support afforded by the decedent to each survivor dependent upon decedent for support at the time of death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payment for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, the duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition between injury and death.

(8) Any other evidence or information that may have a bearing on either the responsibility of the United States for the death or the amount of damages claimed.

(b) *Personal injury.* In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by the attending physician or dentist setting forth the nature and extent of the injury, the nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, the period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the DOE or another Federal agency. A copy of the physician's report shall be made available to the claimant upon the claimant's written request, provided that the claimant has, upon request, made or agrees to make available to the DOE any physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of the claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals that future treatment will be needed, a statement of the expected expenses of such treatment.

(4) If a claim is made for loss of time from employment, a written statement from the claimant's employer showing actual time lost from employment, whether the claimant is a full-time or part-time employee, and the wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amounts of earnings actually lost.

(6) Any other evidence or information that may bear on either the responsibility of the United States for the personal injury or the damages claimed.

(c) *Property damage.* In support of a claim for injury to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership of the property interest that is the subject of the claim.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price, and salvage value, where repair is not economical.

(5) Any other evidence or information that may bear on either the responsibility of the United States for the injury to or loss of property or the damages claimed.

§ 1014.5 Authority to adjust, determine, compromise, and settle.

The General Counsel, the Deputy General Counsel, the Deputy General Counsel for Legal Services, the Assistant General Counsel for Legal Counsel, and any employees of the Department designated by the General Counsel to receive and act on tort claims at Headquarters and field locations are authorized to act on claims.

§ 1014.6 Limitation on authority.

(a) An award, compromise, or settlement of a claim in excess of $25,000 shall be made only with the prior written approval of the Attorney General or his or her designee. For the purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(b) An administrative claim may be adjusted, determined, compromised, or settled only after the Department of Justice has been consulted if, in the opinion of the General Counsel or designee:

(1) A new precedent may be involved;

(2) A question of policy may be involved;

(3) The United States may be entitled to indemnity or contribution from a third party and the DOE is unable to adjust the third party claim; or

(4) The compromise of a particular claim, as a practical matter, may control the disposition of a related claim in which the amount to be paid may exceed $25,000.

(c) An administrative claim may be adjusted, determined, compromised, or settled only after consultation with the Department of Justice when the DOE is aware that the United States or an employee, agent, or cost-type contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

(d) The authority of DOE subordinate claims officials to make awards, compromises, and settlements of over $10,000 is subject to the approval of the General Counsel, the Deputy General Counsel, or the Deputy General Counsel for Legal Services.

§ 1014.7 Referral to Department of Justice.

(a) When Department of Justice approval or consultation is required under § 1014.6, the referral or request shall be transmitted to the Department of Justice by the General Counsel or designee.

(b) When a designee of the General Counsel is processing a claim requiring consultation with, or approval of, either the DOE General Counsel or the Department of Justice, the referral or request shall be sent to the General Counsel in writing and shall contain:

(1) A short and concise statement of the facts and of the reasons for the referral or request,

(2) Copies of relevant portions of the claim file, and

(3) A statement of recommendations or views.

§ 1014.8 Investigation and examination.

The DOE may investigate, or may request any other Federal agency to investigate, a claim and may conduct, or request another Federal agency to conduct, a physical examination of a claimant and provide a report of the physical examination.

§ 1014.9 Final denial of claim.

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, or the claimant's attorney or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the Department's action, the claimant may file suit in an appropriate U.S. District Court not more than 6 months after the notification is mailed.

(b) Before the commencement of suit and before the 6-month period provided in 28 U.S.C. 2401(b) expires, a claimant, or the claimant's duly authorized agent, or legal representative, may file a written request with the DOE General Counsel for reconsideration of a final denial of a claim. Upon the timely filing of a request for reconsideration the DOE shall have 6 months from the date of filing to decide the claim, and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the request for reconsideration is filed. Final DOE action on a request for reconsideration shall be made in accordance with the provisions of paragraph (a) of this section.

§ 1014.10 Action on approved claims.

(a) Payment of any approved claim shall not be made unless the claimant executes (1) a Standard Form 1145, (2) a claims settlement agreement, or (3) a Standard Form 95, as appropriate consistent with applicable rules of the Department of Justice, Department of the Treasury, and the General Accounting Office. When a claimant is represented by an attorney, the voucher for payment shall designate both the claimant and the attorney as payees, and the check shall be delivered to the attorney, whose address shall appear on the voucher.

(b) If the claimant or the claimant's agent or legal representative accepts any award, compromise, or settlement made pursuant to the provisions of section 2672 or 2677 of Title 28, United States Code, that acceptance shall be final and conclusive on the claimant, the claimant's agent or legal representative, and any other person on whose behalf or for whose benefit the claim has been presented. The acceptance shall constitute a complete release of any claim against the United States and against any employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 1014.11 Penalties.

A person who files a false claim or makes a false or fraudulent statement in a claim against the United States may be liable to a fine of not more than $10,000 or to imprisonment for not more than 5 years, or both (18 U.S.C. 1001), and, in addtion, to a forfeiture of $2,000 and a penalty of double the loss or damage sustained by the United States (31 U.S.C 231).

PART 1015—COLLECTION OF CLAIMS OWED THE UNITED STATES

Sec.
1015.1 Purpose.
1015.2 Applicability.
1015.3 Demand for payment.
1015.4 Interest, administrative charges, and penalty charges.
1015.5 Responsibility for collection.
1015.6 Collection by administrative offset.
1015.7 Settlement of claims.
1015.8 Referral for litigation.
1015.9 Disclosure to consumer reporting agencies and referral to collection agencies.
1015.10 Credit report.

AUTHORITY: 31 U.S.C. 3701-3719; Pub. L. 97-365, 96 Stat. 1754.

SOURCE: 53 FR 24624, June 29, 1988, unless otherwise noted.

§ 1015.1 Purpose.

This part establishes procedures for the Department of Energy (DOE) to collect, compromise, or terminate collection action on claims of the United States for money or property arising from activities under DOE jurisdiction. It specifies the agency procedures and the rights of the debtor applicable to claims for the payment of debts owed to the United States. It incorporates, as appropriate, the Federal Claims Collection Standards (4 CFR Parts 101-105). It sets forth procedures by which DOE:

(a) Will collect claims owed to the United States;

(b) Will determine and collect interest and other charges on those claims;

(c) Will compromise claims; and

(d) Will refer unpaid claims for litigation.

[53 FR 24624, June 29, 1988; 53 FR 27798, July 22, 1988]

§ 1015.2 Applicability.

(a) This part applies to all claims due the United States under the Federal Claims Collection Act, as amended by the Debt Collection Act (31 U.S.C. 3701-3719), arising from activities under the jurisdiction of DOE unless such claims are otherwise subject to applicable laws or regulations. For purposes of this part, claims include, but are not limited to, amounts due the United States from fees, loans, loan guarantees, overpayments, fines, civil penalties, damages, interest, sale of products and services, and other sources. This part provides the procedures for collection of claims by administrative offset under 31 U.S.C. 3716. DOE 2200.2, *Collection From Employees for Indebtedness to the United States*, provides the procedures for collection of claims by Federal salary offset under 5 U.S.C. 5514. The failure of DOE to include in this part any provision of the Federal Claims Collection Standards does not prevent DOE from applying the provision. The failure of DOE to comply with any provision of this part or of the Federal Claims Collection Standards shall not be available as a defense to any debtor in terms of affecting the merits of the underlying indebtedness.

(b) All claims due from Federal employees will be collected in accordance with DOE 2200.2, *Collection from Employees for Indebtedness to the United States*, or successor internal directives. DOE 2200.2 provides for hearings as required under 5 U.S.C. 5514 and 4 CFR Part 102.

(c) Claims arising from the audit of transportation accounts pursuant to 31 U.S.C. 3726 shall be determined, collected, compromised, terminated, or settled in accordance with regulations published under the authority of 31 U.S.C. 3726 (see 41 CFR Parts 101-141, administered by the Director, Office of Transportation Audits, General Services Administration) and are otherwise excepted from these regulations.

(d) (1) Claims arising out of acquisition contracts, subcontracts, and purchase orders which are subject to the Federal Acquisition Regulation Systems, including the Federal Acquisition Regulation, 48 CFR Subpart 32.6, and the Department of Energy Acquisition Regulations, 48 CFR Subpart

932.6, shall be determined or settled in accordance with those regulations.

(2) Claims arising out of financial assistance instruments (e.g., grants, subgrants, contracts under grants, cooperative agreements, and contracts under cooperative agreements) and loans and loan guarantees shall be determined or settled in accordance with internal DOE directives. Relevant provisions currently are set forth primarily at 10 CFR 600.26 and 10 CFR 600.112(f)

[53 FR 24624, June 29, 1988; 53 FR 27798, July 22, 1988]

§ 1015.3 Demand for payment.

(a) A total of three progressively stronger written demands at not more than approximately 30-day intervals will normally be made unless a response or other information indicates that a further demand would be futile or unnecessary. When necessary to protect the Government's interest, written demand may be preceded by other appropriate actions under the Federal Claims Collection Standards, including immediate offset, as provided in paragraph (d)(2) of this section, and/or referral for litigation.

(b) The initial written demand for payment should inform the debtor of the following:

(1) The basis for the claim;

(2) The amount of the claim;

(3) Any right to a review of the claim within DOE;

(4) The date by which DOE expects full payment and after which the account is considered delinquent (this is the due date and is normally not more than 30 days from the date the written initial demand was either mailed, hand-delivered, or otherwise transmitted);

(5) The provision for interest, penalties, and administrative charges in accordance with 31 U.S.C. 3717, if payment is not received by the due date (see § 1015.4 for details regarding interest, administrative charges, and penalty charges); and

(6) The DOE's intent to utilize any applicable collection actions made available by the Debt Collection Act of 1982 and the Federal Claims Collection Standards. When determined necessary to protect the Government's interest, DOE may initiate any of the actions available under the referenced Act and/or Standards. These actions may include, but are not limited to, immediate referral for litigation, administrative offset (as provided in paragraph (d)(2) of this section), reports to credit bureaus, and referrals to collection agencies.

(c) If the debt is not paid by the date specified in the initial written demand, two progressively stronger demands shall be sent to the debtor unless a response or other information indicates that additional written demands would either be futile or unnecessary. These written demands will be timed so as to provide an adequate period of time within which the debtor could be expected to respond. While shorter periods of time are acceptable, intervals of approximately 30 days should be sufficient. Depending on the circumstances of the particular case, the demand letters may state:

(1) The amount of any late payment charge (interest, penalties, and administrative charges) added to the debt;

(2) That the delinquent debt may be reported to a credit reporting agency;

(3) That the debt may be referred to a private collection agency for collection;

(4) That the debt may be collected through administrative offset in accordance with the Federal Claims Collection Standards (4 CFR Part 102); and

(5) That the debt may be referred for litigation.

(d)(1) Before collecting a debt by administrative offset, the debtor shall be advised of the following information either in the initial written demand and/or subsequent written demands, or by separate notice of DOE's intent to collect the debt by administrative offset:

(i) Nature and amount of debt;

(ii) Payment due date;

(iii) The intent of DOE to collect by administrative offset (in accordance with the Federal Claims Collection Standards (4 CFR Part 102)), including requesting other Federal agencies to help in the offset whenever possible, if the debtor has not made voluntary payment, has not requested a hearing or review of the claim within DOE as set out in paragraph (d)(1)(v) of this section, or has not made arrangements for payment as set out in paragraph (d)(1)(vi) of this section by the payment due date;

(iv) The right of the debtor to inspect and copy the DOE records related to the claim. Any costs associated therewith shall be borne by the debtor. The debtor shall give reasonable notice in advance to DOE of the date upon which it intends to inspect and copy the records involved;

(v) The right of the debtor to a hearing or review of the claim. DOE shall provide the debtor with a reasonable opportunity for an oral hearing when: (A) An applicable statute authorizes or requires DOE to consider waiver of the indebtedness involved, the debtor requests waiver of the indebtedness, and the waiver determination turns on an issue of credibility or veracity; or (B) the debtor requests reconsideration of the debt and DOE determines that the question of indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the debt turns on an issue of credibility or veracity. Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary-type hearing, although DOE will document all significant matters discussed at the hearing. This section does not require an oral hearing with respect to debt collection systems in which determinations of indebtedness or waiver rarely involve issues of credibility or veracity and DOE has determined that review of the written record is ordinarily an adequate means to correct prior mistakes. In administering such a system, DOE is not required to sift through all of the requests received in order to accord oral hearings in those few cases which may involve issues of credibility or veracity. In those cases where an oral hearing is not required by this section, DOE will accord the debtor a "paper" hearing, that is, DOE will make its determination on the request for waiver or reconsideration based upon a review of the written record. If the claim is disputed in full or in part, the debtor's written response to the demand must include a request for review of the claim within DOE. If the debtor disputes the claim, the debtor shall explain why the debt is incorrect. The explanation should be supported by affidavits, canceled checks, or other relevant information. The written response must reach DOE by the payment due date. A written response received after the payment due date may be accepted if the debtor can show that the delay was due to circumstances beyond the debtor's control or failure to receive notice of the time limit. The debtor's written response shall state the basis for the dispute. If only part of the claim is disputed, the undisputed portion should be paid by the date stated in the initial demand. DOE shall notify the debtor, within 30 days whenever feasible, whether DOE's determination of the debt has been sustained, amended, or canceled. If DOE either sustains or amends its determination, it shall notify the debtor of its intent to collect by administrative offset unless payment is received within 15 days of the mailing of the notification of its decision; and

(vi) The right of the debtor to offer to make a written agreement to repay the amount of the claim. The acceptance of such an agreement is discretionary with DOE. If the debtor requests a repayment arrangement because a payment of the amount due would create a financial hardship, DOE will assess the debtor's financial condition based on financial statements submitted by the debtor. Dependent upon the evaluation of the financial condition of the debtor, DOE and the debtor may agree to a written installment repayment schedule. The debtor should execute a confess-judgment note which specifies all of the terms of the arrangement. The size and frequency of the installment payments should bear a reasonable relation to the size of the debt and the debtor's ability to pay. Interest, administrative charges, and penalty charges shall be provided for in the note. The debtor shall be provided with a written explanation of the consequences of signing a confess-judgment note. The debtor shall sign a statement acknowledging receipt of the written explanation which shall provide that the statement was read and understood before execution of the note and that the note is being signed knowingly and voluntarily. Some form of objective evidence of these facts will be maintained in DOE's file on the debtor.

(2) In cases in which the procedural requirements specified in this paragraph have previously been provided to the debtor in connection with the same debt under some other statutory or regulatory authority, such as pursuant to a notice of audit disallowance, DOE is not required to duplicate those requirements before taking administrative offset. Furthermore, DOE may effect administrative offset against a payment to be made to a debtor prior to completion of the required procedures if failure to take the offset would substantially prejudice the Government's ability to collect the debt and the time before the payment is to be made does not reasonably permit the completion of those procedures. Such prior offset will be promptly followed by completion of those procedures. Amounts recovered by administrative offset found not to be owed to DOE shall be promptly refunded.

(e) At any time during the collection cycle, DOE may take any of the actions authorized under this section or under the Federal Claims Collection Standards. These actions include, but are not limited to, reports to credit bureaus, referrals to collection agencies, termination of contract, debarment, and administrative offset, as authorized in 31 U.S.C. 3701-3719.

[53 FR 24624, June 29, 1988; 53 FR 27798, July 22, 1988]

§ 1015.4 Interest, administrative charges, and penalty charges.

(a) DOE shall assess interest on unpaid claims at the rate of the current value of funds to the Treasury as prescribed by the Secretary of the Treasury on the date the computation of interest begins unless a higher rate of interest is necessary to protect the interests of the Government. DOE shall assess administrative charges to cover the costs of processing and handling overdue claims. Administrative charges will be assessed concurrent with the interest assessment and will be based on actual costs incurred or an average of additional costs incurred in processing and handling claims in similar stages of delinquency. DOE shall assess penalty charges of six percent a year on any part of a debt more than 90 days past due. Such assessment will be retroactive to the first day the debt became delinquent. The imposition of interest, administrative charges, and penalty charges is made in accordance with 31 U.S.C. 3717.

(b) Interest will be computed from the date the initial demand is mailed, hand-delivered, or otherwise transmitted to the debtor. If the claim or any portion thereof is paid within 30 days after the date on which interest began to accrue, the associated interest shall be waived. This period for waiver of interest may be extended in individual cases if there is good cause to do so and it is in the public interest. Interest will only be computed on the principal of the claim and the interest rate will remain fixed for the duration of the indebtedness, except where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement. A new rate which reflects at a minimum the current value of funds to the Treasury at the time the new agreement is executed may be set, if applicable, and interest on interest and related charges may be charged where the debtor has defaulted on a previous repayment agreement. Charges which accrued but were not collected under the defaulted agreement shall be added to the principal to be paid under the new repayment schedule.

(c) DOE may waive interest, administrative charges, or penalty charges if it finds that one or more of the following conditions exist:

(1) The debtor is unable to pay any significant sum toward the claim within a reasonable period of time;

(2) Collection of interest, administrative charges, or penalty charges will jeopardize collection of the principal of the claim; or

(3) It is otherwise in the best interests of the United States, including the situation in which an offset or installment payment agreement is in effect.

(d) *Exemptions.* (1) The provisions of 31 U.S.C. 3717 do not apply:

(i) To debts owed by any State or local government;

(ii) To debts arising under contracts which were executed prior to, and were in effect on (i.e., were not completed as of) October 25, 1982;

(iii) To debts where an applicable statute, regulation required by statute, loan agreement, or contract either prohibits such charges or explicitly fixes the charges that apply to the debts involved; or

(iv) Debts arising under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States.

(2) DOE may, however, assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

[53 FR 24624, June 29, 1988; 53 FR 27798, July 22, 1988]

§ 1015.5 Responsibility for collection.

(a) Heads of DOE Headquarters Elements and Field Elements or their designees must immediately notify the appropriate finance office of claims arising from their operations. A claim will be recorded and controlled by the responsible finance office upon receipt of documentation from a competent authority establishing the amount due.

(b) The collection of claims under the control of the finance offices will be aggressively pursued in accordance with the provisions of Part 102 of the Federal Claims Collection Standards (4 CFR Part 102). Whenever feasible, debts owed to the United States, together with interest, administrative charges, and penalty charges, should be collected in full in one lump sum. If the debtor requests installment payments, the finance offices will be responsible for determining the financial hardship of debtors and, when appropriate, shall arrange installment payment schedules. Claims which cannot be collected directly or by administrative offset shall be written off as administratively uncollectible in accordance with authority delegated to the Heads of DOE Field Elements and the Controller.

(c) The Controller or designee, in consultation with the General Counsel or other designated Counsel at Headquarters, or Heads of DOE Field Elements or designees, in consultation with the Chief Counsels or other designated Counsels in field locations, may compromise or suspend or terminate collection action on referred claims that do not exceed $20,000, exclusive of interest, penalties, and administrative charges, in accordance with the Federal Claims Collection Act and the Federal Claims Collection Standards Parts 103 and 104 (4 CFR Parts 103 and 104).

(d) Recommendations to compromise or suspend or terminate collection action on claims that exceed $20,000, exclusive of interest, penalties, and administrative charges, will be referred to the Department of Justice consistent with paragraph (c) of this section and in accordance with the Federal Claims Collection Act and the Federal Claims Collection Standards. Referrals to the Department of Justice shall be made in accordance with 4 CFR Part 105 of the Federal Claims Collection Standards

§ 1015.6 Collection by administrative offset.

(a) *Administrative offset.* (1) Whenever feasible and not otherwise prohibited, after a debtor fails to pay the claim, request a review of the claim, or make an arrangement for payment, DOE shall collect claims under this part by means of administrative offset against obligations of the United States to the debtor, pursuant to 31 U.S.C. 3716. In appropriate circumstances, DOE may give due consideration to the debtor's financial condition or whether offset would tend to substantially interfere with or defeat the purposes of the program authorizing the payments against which offset is contemplated. For example, under a grant program in which payments are made in advance of the grantee's performance, offset will normally be inappropriate. This concept generally does not apply, however, where payment is in the form of reimbursement. Determination as to whether collection by administrative offset is feasible will be made by DOE on a case-by-case basis, in the exercise of sound discretion. DOE will consider not only whether administrative offset can be accomplished both practically and legally, but also whether offset is best suited to further and protect all of the Government's interests.

(2) DOE will not initiate administrative offset to collect a debt under 31 U.S.C. 3716 more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably be known by the DOE official or officials who were charged with the responsibility to discover and collect such debt.

(3) DOE is not authorized by 31 U.S.C. 3716 to use administrative offset with respect to:

(i) Debts owed by any State or local government;

(ii) Debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States; or

(iii) Any case in which collection of the type of debt involved by administrative offset is explicitly provided for or prohibited by another statute.

However, unless otherwise provided for by contract or law, debts or payments which are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority.

(4) Salary offsets and offsets against military retired pay are governed by 5 U.S.C. 5514.

(5) Collection by administrative offset of amounts payable from the Civil Service Retirement and Disability Fund will be made pursuant to 31 U.S.C. 3716 and 5 U.S.C. 5705 and regulations thereunder.

(6) Collections made by administrative offset under 31 U.S.C. 3716, shall be in accordance with the procedural requirements set forth in § 1015.3(d) of this part.

(b) *Interagency requests.* (1) Requests to DOE by other Federal agencies for administrative offset should be in writing and forwarded to the Department of Energy, Office of the Controller (MA-3), 1000 Independence Avenue, SW., Washington, DC 20585.

(2) Requests by DOE to other Federal agencies holding funds payable to the debtor should be in writing and forwarded, certified return receipt, as specified by that agency in its regulations. If such rule is not readily available or identifiable, the request should be submitted to that agency's office of legal counsel with a request that it be processed in accordance with their internal procedures.

(3) Requests to DOE should be processed within 30 calendar days of receipt. If such processing is not practical or feasible, notice to extend the time period for another 30 calendar days should be forwarded 10 calendar days prior to the expiration of the first 30-day period.

(4) Requests to or from DOE must be accompanied by a written certification that the debtor owes the debt (including the amount) and that the requesting agency has fully complied with the provisions of 4 CFR 102.3. DOE will cooperate with other agencies in effecting collection unless the offset would be otherwise contrary to law.

(5) If administrative offset cannot be effected through DOE or other known Federal agency accounts payable, then DOE will place a complete stop order against amounts otherwise payable to the debtor by placing the name of that debtor on the Department of the Army "List of Contractors Indebted to the United States." If any amounts are discovered under this procedure, they will be offset against the debt owed to DOE provided that applicable provisions of 4 CFR Parts 101-105 have been met and the offset would not otherwise be contrary to law.

§ 1015.7 Settlement of claims.

(a) In accordance with the provisions of 4 CFR Part 103, DOE officials listed in § 1015.5(c) of this part may settle claims not exceeding $20,000, exclusive of interest, penalties, and administrative charges, by compromise at less than the principal of the claim if:

(1) The debtor shows an inability to pay the full amount within a reasonable time or refuses to pay the claim in

full and DOE is unable to enforce collection in full within a reasonable time by enforced collection proceedings;

(2) There is real doubt concerning the Government's ability to prove its case in court for the full amount claimed, either because of the legal issues involved or a bona fide dispute as to the facts;

(3) The amount of the claim does not justify the actual foreseeable cost of collecting the claim; or

(4) A combination of the above reasons.

(b) DOE may suspend or terminate collection action in accordance with the terms and procedures contained in 4 CFR Part 104.

§ 1015.8 Referral for litigation.

Claims on which aggressive collection action has been taken in accordance with 4 CFR Part 102 and which cannot be compromised or on which collection action cannot be suspended or terminated under 4 CFR Parts 103 and 104 will be referred to the General Accounting Office or the Department of Justice, as appropriate, in accordance with the procedures in 4 CFR Part 105.

§ 1015.9 Disclosure to consumer reporting agencies and referral to collection agencies.

DOE may disclose delinquent debts to consumer reporting agencies in accordance with 31 U.S.C. 3711(f) and may refer delinquent debts to debt collection agencies under the revised Federal Claims Collection Standards and other applicable authorities. Information will be disclosed to reporting agencies and referred to collection agencies in accordance with the terms and conditions of agreements entered into between the General Services Administration, DOE, and the reporting and collection agencies. The terms and conditions of such agreements shall specify that all of the rights and protections afforded to the debtor under 31 U.S.C. 3711(f) have been fulfilled.

§ 1015.10 Credit report.

In order to aid DOE in making appropriate determinations as to the collection and compromise of claims; the collection of interest, administrative charges, and penalty charges; the use of administrative offset; the use of other collection methods; and the likelihood of collecting the claim, DOE may institute a credit investigation of the debtor at any time following receipt of knowledge of the claim.

PART 1016—SAFEGUARDING OF RESTRICTED DATA

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AUTHORITY: Sec. 161i, 68 Stat. 948 (42 U.S.C. 2201).

SOURCE: 48 FR 36432, Aug. 10, 1983, unless otherwise noted.

GENERAL PROVISIONS

§ 1016.1 Purpose.

The regulations in this part establish requirements for the safeguarding of Secret and Confidential Restricted Data received or developed under an access permit. This part does not apply to Top Secret information since no such information may be forwarded to an access permittee within the scope of this regulation.

§ 1016.2 Scope.

The regulations in this part apply to all persons who may require access to Retricted Data used, processed, stored, reproduced, transmitted, or handled in connection with an access permit.

§ 1016.3 Definitions.

(a) *Access authorization or security clearance.* An administrative determination by the DOE that an individual who is either a DOE employee, applicant for employment, consultant, assignee, other Federal department or agency employee (and other persons who may be designated by the Secretary of Energy), or a DOE contractor or subcontractor employee and an access permittee is eligible for access to Restricted Data. Access authorizations or security clearances granted by DOE are designated as "Q," "Q(X)," "L," "L(X)," "Top Secret," or "Secret." For the purpose of this chapter only "Q," "Q(X)," "L," and "L(X)" access authorizations or clearances will be defined.

(1) "Q" access authorizations or clearances are based upon full field investigations conducted by the Federal Bureau of Investigation, Office of Personnel Management, or another Government agency which conducts personnel security investigations. They permit an individual to have access, on a "need to know" basis, to Top Secret, Secret, and Confidential Restricted Data, Formerly Restricted Data, National Security Information, or special nuclear material in Category I or II quantities as required in the performance of duties.

(2) "Q(X)" access authorizations or clearances are based upon the same full field investigations as described in § 1016.3(a)(1), above. When "Q" access authorizations or clearances are granted to access permittees they are identified as "Q(X)" access authorizations or clearances and authorize access only to the type of Secret Restricted Data as specified in the permit and consistent with Appendix A, 10 CFR Part 725, "Categories of Restricted Data Available."

(3) "L" access authorizations or clearances are based upon National Agency Checks and Inquiries (NACI) for Federal employees, or National Agency Checks (NAC) for non-Federal employees, conducted by the Office of Personnel Management. They permit an individual to have access, on a "need to know" basis, to Confidential Restricted Data, Secret and Confidential Formerly Restricted Data, or Secret and Confidential National Security Information, required in the performance of duties, provided such information is not designated "CRYPTO" (classified cryptographic information), other classified communications security ("COMSEC") information, or intelligence information.

(4) "L(X)" access authorizations or clearances are based upon the same National Agency Checks as described in paragraph (a)(3), of this section. When "L" access authorizations or clearances are granted to access permittees, they are identified as "L(X)" access authorizations or clearances and authorize access only to the type of Confidential Retricted Data as specified in the permit and consistent with Appendix A, 10 CFR Part 725, "Categories of Restricted Data Available."

(b) *Act.* The Atomic Energy Act of 1954 (68 Stat. 919) as amended.

(c) *Authorized classifier.* An individual authorized in writing by appropriate DOE authority to classify, declassify, or downgrade the classification of information, work, projects, documents, and materials.

(d) *Classified mail address.* A mail address established for each access permittee approved by the DOE to which all Restricted Data for the permittee is to be sent.

(e) *Classified matter.* Documents and material containing classified information.

(f) *Combination lock.* A built-in combination lock on a security container which is of tempered steel alloy hard plate, at least ¼" in thickness and Rockwell hardness of C-63 to C-65, of sufficient size and so located as to sufficiently impede access to the locking mechanism by drilling of the lock or container.

(g) *DOE.* The United States Department of Energy or its duly authorized representatives.

(h) *Document.* Any piece of recorded information regardless of its physical form or characteristics.

(i) *Formerly Restricted Data.* Classified information jointly determined by the DOE and the Department of Defense to be related primarily to the military utilization of atomic weapons and removed by the DOE from the Restricted Data category pursuant to Section 142(d) of the Atomic Energy Act of 1954, as amended.

(j) *Infraction.* An act or omission involving failure to comply with DOE safeguards and security orders or directives, and may include a violation of law.

(k) *Intrusion alarm.* A tamper-indicating electrical, electro-mechanical, electro-optical, electronic or similar device which will detect unauthorized intrusion by an individual into a building or security area, and alert protective personnel by means of actuated visible and audible signals.

(l) *Material.* A chemical substance without regard to form; fabricated or processed item; or assembly, machinery, or equipment.

(m) *Matter.* Documents or material.

(n) *National Security.* The national defense and foreign relations of the United States.

(o) *National Security Information.* Information that has been determined pursuant to Executive Order 12356 of April 2, 1982, "National Security Information" or any predecessor order to require protection against unauthorized disclosure and that is so designated.

(p) *"Need to know."* A determination by persons having responsibility for classified information or mattter, that a proposed recipient's access to such classified information or matter is necessary in the performance of official, contractual, or access permit duties of employment under cognizance of the DOE.

(q) *Permittee.* The holder of an Access Permit issued pursuant to the regulations set forth in 10 CFR Part 725, "Permits For Access to Restricted Data."

(r) *Person.* Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than DOE, any State or any political subdivision of, or any political entity within a State, or other entity; and any legal successor, representative, agency, or agency of the foregoing.

(s) *Protective personnel.* Guards or watchmen or other persons designated responsibility for the protection of classified matter.

(t) *Restricted Data.* All data concerning design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Act.

(u) *Security area.* A physically defined space containing classified matter and subject to physical protection and personnel access controls.

(v) *Security clearance.* See access authorization.

(w) *Security facility.* Any facility, including an access permittee, which has been approved by the DOE for using, processing, storing, reproducing, transmitting, or handling classified matter.

(x) *Security facility approval.* A determination by the DOE that a facility, including an access permittee, is eligible to use, process, store, reproduce, transmit, or handle classified matter.

(y) *Security Plan.* A written plan by the access permittee, and submitted to the DOE for approval, which outlines the permittee's proposed security procedures and controls for the protection of Restricted Data and which includes a floor plan of the area in which the matter is to be used, processed, stored, reproduced, transmitted, or handled.

(z) *Security survey.* An onsite examination by a DOE representative of all devices, equipment, and procedures employed at a security facility to safeguard classified matter.

§ 1016.4 Communications.

Communications concerning rulemaking, i.e., petition to change Part 1016, should be addressed to the Assistant Secretary for Defense Programs (DP-1), U.S. Department of Energy, Washington, D.C. 20545. All other communications concerning the regulations in this part should be addressed to U.S. Department of Energy Operations Offices as listed in Appendix B of 10 CFR Part 725, administering access permits for the geographical area.

§ 1016.5 Submission of procedures by access permit holder.

No access permit holder shall have access to Restricted Data until he shall have submitted to the DOE a written statement of his procedures for the safeguarding of Restricted Data and for the security education of his employees, and DOE shall have determined and informed the permittee that his procedures for the safeguarding of Restricted Data are in compliance with the regulations in this part and that his procedures for the security education of his employees, who will have access to Restricted Data, are informed about and understand the regulations in this part.

§ 1016.6 Specific waivers.

DOE may, upon application of any interested party, grant such waivers from the requirements of this part as it determines are authorized by law and will not constitute an undue risk to the common defense and security.

§ 1016.7 Interpretations.

Except as specifically authorized by the Secretary of Energy in writing, no interpretation of the meaning of the regulations in this part by any officer or employee of DOE other than a written interpretation by the General Counsel will be recognized to be binding upon DOE.

PHYSICAL SECURITY

§ 1016.8 Approval for processing access permittees for security facility approval.

(a) An access permittee who has a need to use, process, store, reproduce, transmit, or handle Restricted Data at any location in connection with its permit shall promptly request a DOE security facility approval.

(b) The request shall include the following information: The name and address of the permittee; the extent and scope of the classified activity and the highest classification of Restricted Data to be received; a written statement in the form of a security plan which outlines the permittee's proposed security procedures and controls for the protection of Restricted Data, including a floor plan of the areas(s) in which the classified matter is to be used, processed, stored, reproduced, transmitted, and handled.

(c) The DOE will promptly inform the permittee of the acceptability of the request for further processing and will notify the permittee of its decision in writing.

§ 1016.9 Processing security facility approval.

The following receipt of an acceptable request for security facility approval, the DOE will perform an initial security survey of the permittee's facility to determine that granting a security facility approval would be consistent with the national security. If DOE makes such a determination, security facility approval will be granted. If not, security facility approval will be withheld pending compliance with the security survey recommendations or until a waiver is granted pursuant to § 1016.6 of this part.

§ 1016.10 Grant, denial, or suspension of security facility approval.

Notification of the DOE's grant, denial, or suspension of security facility approval will be furnished the permittee in writing, or orally with written confirmation. This information may also be furnished to representatives of the DOE, DOE contractors, or other Federal agencies having a need to transmit Restricted Data to the permittee.

§ 1016.11 Cancellation of requests for security facility approval.

When a request for security facility approval is to be withdrawn or cancelled, the DOE Operations Office will be notified by the requester immediately by telephone and confirmed in writing so that processing of this approval may be terminated.

§ 1016.12 Termination of security facility approval.

Security facility approval will be terminated when:

(a) There is no longer a need to use, process, store, reproduce, transmit, or handle Restricted Data at the facility; or

(b) The DOE makes a determination that continued security facility approval is not in the interest of national security.

In such cases the permittee will be notified in writing of the determination, and the procedures outlined in § 1016.39 of this part will apply.

§ 1016.21 Protection of Restricted Data in storage.

(a) Persons who possess Restricted Data pursuant to an Access Permit shall store Secret and Confidential documents and material when not in use in accordance with one of the following methods:

(1) In a locked vault, safe, or safe-type steel file cabinet having a 3-position dial-type combination lock; or

(2) In a dual key, bank safety deposit box; or

(3) In a steel file cabinet secured by a steel lock bar and a 3-position dial-type changeable combination padlock; or

(4) In a locked steel file cabinet when located in a security area established under § 1016.23 or when the cabinet or the place in which the cabinet is located is under DOE-approved intrusion alarm protection.

(b) Changes of combination: Each permittee shall change the combination on locks of his safekeeping equipment whenever such equipment is placed in use, whenever an individual knowing the combination no longer requires access to the repository as a result of change in duties or position in the permittee's organization, or termination of employment with the permittee or whenever the combination has been subjected to compromise, and in any event at least once a year. Permittees shall classify records of combinations no lower than the highest classification of the documents and material authorized for storage in the safekeeping equipment concerned.

(c) The lock on safekeeping equipment of the type specified in paragraph (a)(4) of this section shall be replaced immediately whenever a key is lost.

§ 1016.22 Protection while in use.

While in use, documents and material containing Restricted Data shall be under the direct control of an appropriately cleared individual, and the Restricted Data shall be capable of being removed from sight immediately.

§ 1016.23 Establishment of security areas.

(a) When, because of their nature or size, it is impracticable to safeguard documents and material containing Restricted Data in accordance with the provisions of §§ 1016.21 and 1016.22, a security area to protect such documents and material shall be established.

(b) The following controls shall apply to security areas:

(1) Security areas shall be separated from adjacent areas by a physical barrier designed to prevent entrance into such areas, and access to the Restricted Data within the areas, by unauthorized individuals.

(2) During working hours, admittance shall be controlled by an appropriately cleared individual posted at each unlocked entrance.

(3) During nonworking hours, admittance shall be controlled by protective personnel on patrol, with protective personnel posted at unlocked entrances, or by such intrusion alarm system as DOE may approve.

(4) Each individual authorized to enter a security area shall be issued a distinctive badge or pass when the number of employees assigned to the area exceeds thirty.

§ 1016.24 Special handling of classified material.

When the Restricted Data contained in material is not ascertainable by observation or examination at the place where the material is located and when the material is not readily removable because of size, weight, radioactivity, or similar factors, DOE may authorize the permittee to provide such lesser protection than is otherwise required by §§ 1016.21 to 1016.23 inclusive, as DOE determines to be commensurate with the difficulty of removing the material.

§ 1016.25 Protective personnel.

Whenever protective personnel are required by § 1016.23, such protective personnel shall:

(a) Possess a "Q" or "L" security clearance or access authorization or "Q(X)" or "L(X)" access authorization if the Restricted Data being protected is classified Confidential, or a "Q" security clearance or access authorization or "Q(X)" access authorization if the Restricted Data being protected is classified Secret.

(b) Be armed with sidearms of not less than .38 caliber.

CONTROL OF INFORMATION

§ 1016.31 Access to Restricted Data.

(a) Except as DOE may authorize, no person subject to the regulations in this part shall permit any individual to have access to Secret or Confidential Restricted Data in his possession unless the individual has an appropriate security clearance or access authorization granted by DOE, or has been certified by DOD or NASA through DOE, and;

(1) The individual is authorized by an Access Permit to receive Restricted Data in the categories involved and, in the case of Secret Restricted Data, the permittee determines that such access is required in the course of his duties, or

(2) The individual needs such access in connection with such duties as a DOE employee or DOE contractor employee, or as certified by DOD or NASA.

(b) Inquiries concerning the clearance status of individuals, the scope of Access Permits, or the nature of contracts should be addressed to the DOE Operations Office administering the permit as set forth in Appendix B of Part 725.

§ 1016.32 Classification and preparation of documents.

(a) *Classification.* Restricted Data generated or possessed by an Access Permit holder must be appropriately marked. CG-UF-3, "Guide to the Unclassified Fields of Research," will be furnished each permittee. In the event a permittee originates classified information which falls within the definition of Restricted Data or information which he is not positive is not within that definition and CG-UF-3 does not provide positive classification guidance for such information, he shall designate the information as Confidential, Restricted Data and request classification guidance from the DOE through the Classification Officer at the Operations Office administering the Permit, who will refer the request to the Director, Office of Classification, U.S. DOE, Washington, D.C. 20545 if he does not have authority to provide the guidance.

(b) *Classification consistent with content.* Each document containing Restricted Data shall be classified Secret or Confidential according to its own content.

(c) *Document which custodian believes improperly classified or lacking appropriate classification markings.* If a person receives a document which, in his opinion, is not properly classified, or omits the appropriate classification markings, he shall communicate with the sender and suggest the classification which he believes appropriate. Pending final determination of proper classification, such documents shall be safeguarded with the highest classification in question.

(d) *Classification markings.* Unless otherwise authorized below, the assigned classification of a document shall be conspicuously marked or stamped at the top and bottom of each page and on the front cover, if any, and the document shall bear the following additional markings on the first page and on the front cover:

> RESTRICTED DATA
>
> This document contains Restricted Data as defined in the Atomic Energy Act of 1954. Its transmittal or the disclosure of its contents in any manner to an unauthorized person is prohibited.

(e) *Documentation.* (1) All Secret documents shall bear on the first page a properly completed documentation stamp such as the following: This document consists of — pages. Copy No. — of — Series —.

(2) The series designation shall be a capital letter beginning with the letter "A" designating the original set of copies prepared. Each subsequent set of copies of the same documents shall be identified by the succeeding letter of the alphabet.

(f) *Letter of transmittal.* A letter of transmitting Restricted Data shall be marked with a classification at least as high as its highest classified enclosure. When the contents of the letter of transmittal warrant lower classification or requires no classification, a stamp or marking such as the following shall be used in the letter:

When separated from enclosures handle this document as ——.

(g) *Permanently fastened documents.* Classified books or pamphlets, the pages of which are permanently and securely fastened together, shall be conspicuously marked or stamped with the assigned classification in letters at least one-fourth (¼) inch in height at the top and bottom on the outside front cover, on the title page, on the front page, and on the inside and outside of the back cover. The additional markings referred to in paragraph (d) of this section shall be placed on the first page and on the front cover.

(h) *Physically connected documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. It shall bear only one overall classification, although pages, paragraphs, sections, or components thereof may bear different classifications. Each document separated from the file or group shall be handled in accordance with its individual classification.

(i) *Attachment of security markings.* Documents which do not lend themselves to marking or stamping shall have securely affixed or attached a tag, sticker, or similar device bearing the appropriate security markings.

§ 1016.33 External transmission of documents and material.

(a) *Restrictions.* (1) Documents and material containing Restricted Data shall be transmitted only to persons who possess appropriate clearance or access authorization and are otherwise eligible for access under the requirements of § 1016.31.

(2) In addition, such documents and material shall be transmitted only to persons who possess facilities for their physicial security consistent with this part. Any person subject to the regulations in this part who transmits such documents or material shall be deemed to have fulfilled his obligations under this subparagraph by securing a written certification from the prospective recipient that such recipient possesses facilities for its physical security consistent with this part.

(3) Documents and material containing Restricted Data shall not be exported from the United States without prior authorization of DOE.

(b) *Preparation of documents.* Documents containing Restricted Data shall be prepared for transmission outside an individual installation in accordance with the following:

(1) They shall be enclosed in two sealed, opaque envelopes or wrappers.

(2) The inner envelope or wrapper shall be addressed in the ordinary manner and sealed with tape, the appropriate classification shall be placed on both sides of the envelope, and the additional marking referred to in § 1016.32(d) shall be placed on the side bearing the address.

(3) The outer envelope or wrapper shall be addressed in the ordinary manner. No classification, additional marking, or other notation shall be affixed which indicates that the docu-

ment enclosed therein contains classified information or Restricted Data.

(4) A receipt which identifies the document, the date of transfer, the recipient, and the person transferring the document shall accompany the document and shall be signed by the recipient and returned to the sender whenever the custody of a Secret document is transferred.

(c) *Preparation of material.* Material, other than documents, containing Restricted Data shall be prepared for shipment outside an individual installation in accordance with the following:

(1) The material shall be so packaged that the classified characteristics will not be revealed.

(2) A receipt which identifies the material, the date of shipment, the recipient, and the person transferring the material shall accompany the material, and the recipient shall sign such receipt whenever the custody of Secret material is transferred.

(d) *Methods of transportation.* (1) Secret matter shall be transported only by one of the following methods:

(i) By messenger-courier system specifically created for that purpose.

(ii) Registered mail.

(iii) By protective services provided by United States air or surface commercial carriers under such conditions as may be preserved by the DOE.

(iv) Individuals possessing appropriate DOE security clearance or access authorization who have been given written authority by their employers.

(2) Confidential matter may be transported by one of the methods set forth in paragraph (d)(1) of this section or by U.S. first class, express, or certified mail.

(e) *Telecommunication of classified information.* There shall be no telecommunication of Restricted Data unless the secure telecommunication system has been approved by the DOE.

(f) *Telephone conversations.* Classified information shall not be discussed over the telephone.

§ 1016.34 Accountability for Secret/Restricted Data.

Each permittee possessing documents containing Secret Restricted Data shall establish a document accountability procedure and shall maintain records to show the disposition of all such documents which have been in his custody at any time.

§ 1016.35 Authority to reproduce Restricted Data.

Secret Restricted Data will not be reproduced without the written permission of the originator, his successor, or high authority. Confidential Restricted Data may be reproduced to the minimum extent necessary consistent with efficient operation without the necessity for permission.

§ 1016.36 Changes in classification.

Documents containing Restricted Data shall not be downgraded or declassified except as authorized by DOE. Requests for downgrading or declassification shall be submitted to the DOE Operations Office administering the permit; or U.S. DOE, Washington, D.C. 20545, Attention: Office of Classification. If the appropriate authority approves a change of classification or declassification, the previous classification marking shall be canceled and the following statement, properly completed, shall be placed on the first page of the document:

Classification canceled (or changed to)
____
(Insert appropriate classification)
by ___________________________
(Person authorizing change in classification)
by ___________________________
(Signature of person making change and date thereof)

Any persons making a change in classification or receiving notice of such a change shall forward notice of the change in classification to holders of all copies as shown in their records.

§ 1016.37 Destruction of documents or material containing Restricted Data.

Documents containing Restricted Data may be destroyed by burning, pulping, or another method that assures complete destruction of the information which they contain. If the document contains Secret Restricted Data, a permanent record of the subject, title, report number of the document, its date of preparation, its series designation and copy number, and the date of destruction shall be signed by the person destroying the document and shall be maintained in the office of the last custodian. Restricted Data contained in material, other than documents, may be destroyed only by a method that assures complete obliteration, removal, or destruction of the Restricted Data.

§ 1016.38 Suspension or revocation of access authorization.

In any case where the access authorization of an individual subject to the regulations in this part is suspended or revoked in accordance with the procedures set forth in 10 CFR Part 710, such individual shall, upon due notice from DOE of such suspension or revocation and demand by DOE, deliver to DOE any and all Restricted Data in his possession for safekeeping and such further disposition as DOE determines to be just and proper.

§ 1016.39 Termination, suspension, or revocation of security facility approval.

(a) If the need to use, process, store, reproduce, transmit, or handle classified matter no longer exists, the security facility approval will be terminated. The permittee may deliver all Restricted Data to the DOE or to a person authorized to receive them; or the permittee may destroy all such Restricted Data. In either case, the facility must submit a certification of nonpossession of Restricted Data to the DOE.

(b) In any instance where security facility approval has been suspended or revoked based on a determination of the DOE that further possession of classified matter by the permittee would endanger the common defense and national security, the permittee shall, upon notice from the DOE, immediately deliver all Restricted Data to the DOE along with a certificate of nonpossession of Restricted Data.

§ 1016.40 Termination of employment or change of duties.

Each permittee shall furnish promptly to DOE written notification of the termination of employment of each individual who possesses an access authorization under his Permit or whose duties are changed so that access to Restricted Data is no longer needed. Upon such notification, DOE may:

(a) Terminate the individual's access authorization, or

(b) Transfer the individual's access authorization to the new employer of the individual to allow continued access to Restricted Data where authorized, pursuant to DOE regulations.

§ 1016.41 Continued applicability of the regulations in this part.

The expiration, suspension, revocation, or other termination of a security clearance or access authorization or security facility approval shall not relieve any person from compliance with the regulations in this part.

§ 1016.42 Reports.

Each permittee shall immediately report to the DOE office administering the permit any alleged or suspected violation of the Atomic Energy Act of 1954, as amended, Espionage Act, or other Federal statutes related to Restricted Data. Additionally, the permittee shall report any infractions, losses, compromises, or possible compromise of Restricted Data.

§ 1016.43 Inspections.

The DOE shall make such inspections and surveys of the premises, activities, records, and procedures of any person subject to the regulations in this part as DOE deems necessary to effectuate the purposes of the Act, E.O. 12356, and DOE orders and procedures.

§ 1016.44 Violations.

An injunction or other court order may be obtained prohibiting any violation of any provision of the Act or any regulation or order issued thereunder. Any person who willfully violates, attempts to violate, or conspires to violate any provision of the Act or any regulation or order issued thereunder, including the provisions of this part, may be guilty of a crime and upon conviction may be punished by fine or imprisonment, or both, as provided by law.

PART 1017—IDENTIFICATION AND PROTECTION OF UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION

Sec.

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AUTHORITY: Sec. 210, Pub. L. 97-90, 95 Stat. 1169 (42 U.S.C. 2168) as amended by sec. 17, Pub. L. 97-415, January 4, 1983.

SOURCE: 50 FR 15822, Apr. 22, 1985, unless otherwise noted.

§ 1017.1 Purpose and scope.

(a) This part contains regulations of the Department of Energy (DOE) implementing section 148 (42 U.S.C. 2168) of the Atomic Energy Act which prohibits the unauthorized dissemination of certain unclassified government information. This information, identified by the term "Unclassified Controlled Nuclear Information" (UCNI), is limited to information concerning atomic energy defense programs.

(b) These regulations—

(1) Provide for the review of information prior to its designation as UCNI;

(2) Describe how information is determined to be UCNI;

(3) Establish minimum physical protection standards for documents and material containing UCNI;

(4) Specify who may have access to UCNI; and

(5) Establish a procedure for the imposition of penalties on persons who violate section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations.

§ 1017.2 Applicability.

These regulations apply to—

(a) Any person authorized access to UCNI;

(b) Any person not authorized access to UCNI who acquires, attempts to acquire, or conspires to acquire, in violation of these regulations, Government information in any document or material containing an UCNI notice (refer to § 1017.15); and

(c) Any person not authorized access to UCNI but who wants to be authorized access to UCNI.

§ 1017.3 Definitions.

As used in this part—

(a) "Atomic Energy Act" means the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*).

(b) "Atomic Energy Defense Programs" means activities, equipment, and facilities of the DOE or other Government agencies utilized or engaged in support of the—

(1) Development, production, testing, sampling, maintenance, repair, modification, assembly, utilization, transportation, or retirement of nuclear weapons or components of nuclear weapons;

(2) Production, utilization, or transportation of nuclear material for military applications; or

(3) Safeguarding of activities, equipment, or facilities which support the functions in paragraphs (b)(1) and (b)(2) of this section, including the protection of nuclear weapons, components of nuclear weapons, or nuclear material for military applications at a fixed facility or in transit.

(c) "Authorized Individual" means a person who has been granted routine access to UCNI under § 1017.16(a).

(d) "Component" means any operational, experimental, or research-related part, subsection, design, or material used in the manufacture or utilization of a nuclear weapon, nuclear explosive device, or nuclear weapon test assembly.

(e) "Controlling Official" means an individual authorized under § 1017.7(a) to make a determination that specific Government information is, is not, or is no longer UCNI, such determination serving as the basis for determinations by a Reviewing Official that a document or material contains, does not contain, or no longer contains UCNI.

(f) "Denying Official" means an individual authorized under § 1017.12(b) to deny a request made under statute or Executive order for all or any portion of a document or material containing UCNI.

(g) "Document or Material" means the physical medium on or in which information is recorded, or a product or substance which contains or reveals information, regardless of its physical form or characteristics.

(h) "Formerly Restricted Data" means a category of information classified under section 142 d. of the Atomic Energy Act.

(i) "Government" means the Executive Branch of the United States Government.

(j) "Government Information" means any fact or concept, regardless of its physical form or characteristics, that is owned by, produced by or for, or otherwise controlled by the United States Government.

(k) "In Transit" means the physical movement of a nuclear weapon, a component of a nuclear weapon, or nuclear material from one part to another part of a facility or from one facility to another facility. An item is considered "in transit" until it has been relinquished to the custody of the authorized recipient at its ultimate destination. An item in temporary storage pending shipment to its ultimate destination is "in transit."

(l) "National Security Information" means a category of information classified under Executive Order 12356, "National Security Information," or its successor executive orders.

(m) "Nuclear Material" means special nuclear material, byproduct material, or source material as defined by sections 11 aa., 11e., and 11z., respectively, of the Atomic Energy Act, or any other material used in the production, testing, utilization, or assembly of nuclear weapons or components of nuclear weapons that the Secretary determines to be nuclear material under § 1017.10(a).

(n) "Nuclear Weapon" means atomic weapon.

(o) "Physical Security" means the combination of operational and security equipment, personnel, and procedures used to protect facilities, information, documents, or material against theft, sabotage, diversion, or other criminal acts.

(p) "Restricted Data" means a category of information classified under section 142 of the Atomic Energy Act.

(q) "Reviewing Official" means an individual authorized under § 1017.12(a) to make a determination, based on guidelines which reflect decisions of Controlling Officials, that a document or material contains UCNI.

(r) "Safeguards" means an integrated system of physical protection, personnel reliability, accountability, and material control measures designed to deter, prevent, detect, and respond to unauthorized access, diversion, or possession of a nuclear weapon, a component of a nuclear weapon or nuclear material.

(s) "Secretary" means the Secretary of Energy.

(t) "Unauthorized Dissemination" means the intentional or negligent transfer, in any manner, by any person, of information contained in a document or material determined by a Reviewing Official to contain UCNI and marked in accordance with § 1017.15 to any person other than an Authorized Individual or a person granted special access to UCNI under § 1017.16(b).

(u) "Unclassified Controlled Nuclear Information" means certain unclassified government information prohibited from unauthorized dissemination under section 148 of the Atomic Energy Act—

(1) Which concerns atomic energy defense programs;

(2) Which pertains to—

(i) The design of production facilities or utilization facilities;

(ii) Security measures (including security plans, procedures, and equipment) for the physical protection of—

(A) Production or utilization facilities;

(B) Nuclear material contained in such facilities; or

(C) Nuclear material in transit; or

(iii) The design, manufacture, or utilization of any nuclear weapon or component if the design, manufacture, or utilization of such weapon or component was contained in any information declassified or removed from the Restricted Data category by the Assistant Secretary for Defense Programs (or the head of the predecessor agency of the Department of Energy) pursuant to section 142 of the Atomic Energy Act; and

(3) Whose unauthorized dissemination, as determined by a Controlling Official, could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of—

(i) Illegal production of nuclear weapons; or

(ii) Theft, diversion, or sabotage of nuclear materials, equipment, or facilities.

§ 1017.4 Policy.

It is the policy of the DOE to make information publicly available to the fullest extent possible. These regulations shall be interpreted and implemented so as to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security, consistent with the requirement in section 148 of the Atomic Energy Act to prohibit the unauthorized dissemination of UCNI. For example—

(a) Although UCNI is not subject to disclosure under the Freedom of Information Act (FOIA), documents or material containing both UCNI and other information which is not UCNI shall have the portions of the document or material not containing UCNI released to the maximum possible extent in response to a request made under the FOIA, subject to other exemptions of the FOIA; and

(b) To the fullest extent possible, the fundamental DOE policy of full disclosure of documents prepared under the National Environmental Policy Act (NEPA) and its implementing regulations will be followed. In some cases, this will mean that UCNI may be excised from documents to be made publicly available and prepared as an appendix, or otherwise segregated so as to allow the release of the nonsensitive portions of a document.

§ 1017.5 Prohibitions.

Government information shall not be controlled as UCNI in order to—

(a) Conceal violations of law, inefficiency, or administrative error;

(b) Prevent embarrassment to a person or organization;

(c) Restrain competition; or

(d) Prevent or delay the release of any information that does not properly qualify as UCNI.

§ 1017.6 Exemptions.

(a) Information exempt from these regulations includes—

(1) Information that is not government information;

(2) Information that concerns activities, facilities, or equipment outside the scope of atomic energy defense programs;

(3) Information that is classified as Restricted Data, Formerly Restricted Data, or National Security Information, or that is protected from disclosure under section 147 of the Atomic Energy Act (42 U.S.C. 2167);

(4) Basic scientific information (i.e., information resulting from research directed toward increasing fundamental scientific knowledge or understanding rather than any practical application of that knowledge);

(5) Applied scientific information (i.e., information resulting from research whose objective is to gain knowledge or understanding necessary for determining the means by which a specific need may be met) but not including that pertaining to:

(i) The design of production facilities or utilization facilities;

(ii) Security measures (including security plans, procedures, and equipment) for the physical protection of:

(A) Production or utilization facilities,

(B) Nuclear material contained in such facilities, or

(C) Nuclear material in transit; or

(iii) The design, manufacture, or utilization of any nuclear weapon or component if the design, manufacture, or utilization of such weapon or component was contained in any information declassified or removed from the Restricted Data category by the Secretary (or the head of the predecessor agency of the Department of Energy) pursuant to section 142 of the Atomic Energy Act;

(6) Safety information used to protect employees from occupational hazards, except for government information that reveals an exploitable vulnerability or design element that is UCNI;

(7) Radiation exposure data and all other personal health information;

(8) Information pertaining to the public health and safety and to the protection of the environment, except for government information that reveals an exploitable vulnerability or design element that is UCNI;

(9) Information concerning the transportation of low level or commercially generated radioactive waste; and

(10) Waste Isolation Pilot Plant (WIPP) information, except for government information that deals with safeguards or physical security for the WIPP project.

(b) Documents exempt from these regulations include—

(1) Documents prepared under Council on Environmental Quality regulations or DOE guidelines complying with the National Environmental Policy Act, except those portions of a document revealing an exploitable vulnerability or design element that is UCNI;

(2) Documents or material that a Reviewing Official determines to have been widely disseminated in the public domain (e.g., to a public library or a university library); and

(3) For documents which contain UCNI, any reasonably segregable portions of documents which do not contain UCNI or which contain information otherwise exempt from disclosure.

§ 1017.7 Identification of unclassified controlled nuclear information.

(a) *Authorities*—(1) *Controlling Officials.* A Controlling Official having cognizance over certain government information is authorized to make a determination that the government information is or is not UCNI. A Controlling Official with overall cognizance over UCNI under consideration for decontrol is authorized to make a determination that the information is no longer UCNI. Each Controlling Official having cognizance over UCNI under consideration for decontrol shall concur in the determination to decontrol the UCNI prior to the UCNI being decontrolled.

(2) *Designation.* The Secretary may designate the Deputy Secretary, the Under Secretary, a Secretarial Officer of the DOE, or a Manager of a DOE Operations Office to be a Controlling Official for government information within his or her cognizance. The Controlling Official may redelegate his or her authority in accordance with the redelegation provisions in the designation of authority from the Secretary.

(3) Controlling Officials shall exercise their authorities in strict compliance with the rules, prohibitions, and exemptions described in these regulations.

(b) *Criteria.* Prior to a specific type of information being identified and controlled as UCNI, a Controlling Official shall insure that the information under review meets each of the following criteria:

(1) The information is government information.

(2) The information is limited to information concerning atomic energy defense programs.

(3) The information is within the scope of at least one of the three categories of UCNI in § 1017.8.

(4) Unauthorized dissemination of the information under review meets the adverse effect test in § 1017.9.

(5) The information is the minimum amount of information necessary to be controlled to protect the health and

safety of the public or the common defense and security.

(6) The purpose for controlling the information is not prohibited under § 1017.5.

(7) The information is not exempt from these regulations under § 1017.6.

(c) *Procedures.* A Controlling Official shall report each determination to control or decontrol UCNI to the Assistant Secretary for Defense Programs for—

(1) Inclusion in the quarterly report required in § 1017.11; and

(2) Incorporation into guidelines which Reviewing Officials consult in their review of documents and material for UCNI.

§ 1017.8 Categories of unclassified controlled nuclear information.

In order for information to be considered for control as UCNI, it must be within the scope of at least one of the following categories and it must meet each of the other criteria in § 1017.7(b).

(a) *Category A—Unclassified Controlled Production or Utilization Facility Design Information.* This category includes certain unclassified government information concerning—

(1) The design of production or utilization facilities which are related to atomic energy defense programs; or

(2) Design-related operational information concerning the production, processing, or utilization of nuclear material for atomic energy defense programs.

(b) *Category B—Unclassified Controlled Safeguards and Security Information.* This category includes certain unclassified government information concerning security measures for the protection of—

(1) Production or utilization facilities related to atomic energy defense programs;

(2) Nuclear material to be used for military applications, regardless of its physical state or form, contained in these facilities; or

(3) Nuclear material to be used for military applications, regardless of its physical state or form, that is in transit.

(c) *Category C—Declassified Controlled Nuclear Weapon Information.* This category includes certain declassified government information concerning the design, manufacture, or utilization of nuclear weapons or components of nuclear weapons that was once classified as Restricted Data but which has been declassified or removed from the Restricted Data Category by the Assistant Secretary for Defense Programs (or the head of predecessor agencies of the Department of Energy) under section 142 of the Atomic Energy Act.

§ 1017.9 Adverse effect test.

(a) *Determination.* In order for a Controlling Official to control government information as UCNI, the Controlling Official shall make a determination that the unauthorized dissemination of the government information under review could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of—

(1) Illegal production of a nuclear weapon; or

(2) Theft, diversion, or sabotage of nuclear material, equipment, or facilities.

(b) *Other factors.* In making a determination under § 1017.9(a), a Controlling Official may consider how the dissemination of government information under review for control as UCNI could assist a potential criminal in—

(1) Selecting a target for an act of theft, diversion, or sabotage of nuclear material, equipment, or facilities (e.g., relative importance of a facility; location, form, and quantity of nuclear material);

(2) Planning and committing an act of theft, diversion, or sabotage of nuclear material, equipment, or facilities (e.g., design of operational and security systems; building plans; methods and procedures for transfer, accountability, and handling of nuclear material; security plans, procedures, and capabilities);

(3) Measuring the success of an act of theft, diversion or sabotage of nuclear material, equipment, or facilities (e.g., actual or hypothetical conse-

quences of the sabotage of specific vital equipment or facilities);

(4) Illegally fabricating, acquiring, or detonating a nuclear explosive device (e.g., unclassified nuclear weapon design information useful in designing a primitive nuclear device; location of unique nuclear materials needed to fabricate such a device; location of a nuclear weapon); or

(5) Dispersing hazardous nuclear material which could be used as an environmental contaminant (e.g., location, form, and quantity of nuclear material).

§ 1017.10 Nuclear material determinations.

(a) The Secretary may determine that a material other than special nuclear material, byproduct material, or source material as defined by the Atomic Energy Act is included within the scope of the term "nuclear material" if—

(1) The material is used in the production, testing, utilization; or assembly of atomic weapons or components of atomic weapons; and

(2) Unauthorized acquisition of the material could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security because the specific material—

(i) Could be used as a hazardous environmental contaminant; or

(ii) Could be of significant assistance in the illegal production of a nuclear weapon.

(b) Designation of a material as a nuclear material under paragraph (a) of this section does not make all information about the material UCNI. Specific information about the material must still meet each of the criteria in § 1017.7(b) prior to its being identified and controlled as UCNI.

§ 1017.11 Quarterly report.

The Assistant Secretary for Defense Programs shall prepare a report on a quarterly basis, to be made available upon request to any interested person, detailing the application during the previous quarter of each regulation or order prescribed or issued under section 148 of the Atomic Energy Act, including these regulations. Requests for this report may be sent to the Assistant Secretary for Defense Programs (refer to § 1017.16(b)(1) for the address).

This report must—

(a) Identify types of government information determined to be UCNI by any Controlling Official during the previous quarter;

(b) Include a justification specifying why the government information is UCNI; and

(c) Include a justification that these regulations have been applied so as to protect from disclosure only the minimum amount of government information necessary to protect the health and safety of the public or the common defense and security.

§ 1017.12 Review and denial of documents or material.

(a) *Reviewing Officials.* A Reviewing Official with cognizance over the information contained in a document or material is authorized to—

(1) Make a determination, based on guidelines which reflect decisions of Controlling Officials, that the document or material contains, does not contain, or no longer contains UCNI; and

(2) Apply or remove UCNI markings to or from the document or material.

(b) *Denying Officials.* A Denying Official with cognizance over the information contained in a document or material is authorized to deny a request made under a statute or Executive order for all or any portion of the document or material that contains UCNI. The Denying Official bases his or her denial on guidelines which reflect decisions of Controlling Officials. The Denying Official insures that the Reviewing Official who determined that the document or material contains UCNI correctly applied and interpreted the guidelines.

(c) *Designation.* Reviewing and Denying Officials are designated in accordance with Departmental directives issued by the Secretary.

§ 1017.13 Retirement of documents or material.

(a) *Unmarked documents or material.* Any document or material which is not marked as containing UCNI but which contains government information within the scope of the categories in § 1017.8 shall be marked with the notice in § 1017.15(a)(2) upon retirement to a repository (e.g., an agency's centralized records storage area, a Federal Records Center, the National Archives of the United States). The Secretary may approve alternative procedures to those described in this paragraph.

(b) *Marked documents or material.* A document or material containing an UCNI notice (refer to § 1017.15) is not required to be reviewed by a Reviewing Official upon or subsequent to retirement, except that a Reviewing Official shall review any retired document or material upon request for its release into the public domain.

(c) *Existing documents or material.* Any document or material retired to a repository prior to the effective date of these regulations need not be reviewed for UCNI. However, any such document or material that is subsequently determined by a Reviewing Official to contain UCNI must be marked and protected by the repository in accordance with these regulations, upon notification from the Reviewing Official to the repository having the document or material.

§ 1017.14 Joint information, documents, or material.

(a) *Joint Information.* A Controlling Official shall coordinate with any other Government agency or DOE organization having cognizance over the information under consideration for control or decontrol prior to making the determination that the information is or is no longer UCNI.

(b) *Joint documents or material.* A Reviewing Official or a Denying Official reviewing a document or material for decontrol and public release shall coordinate this review with the DOE organization or Government agency originating the document or material and with each DOE organization or Government agency having cognizance over any information contained in the document or material.

(c) *Resolution of disagreements.* Since the DOE has overall cognizance over all UCNI and sole responsibility for implementation of section 148 of the Atomic Energy Act, the Secretary has the final authority to resolve all disagreements concerning—

(1) The identification of UCNI that is within the cognizance of more than one DOE organization or of a Government agency in addition to the DOE; or

(2) The control or decontrol or all or any part of any document or material originated by or for the DOE or another Government agency that contains UCNI.

(d) *Notification of determinations.* An official making a determination concerning joint information, documents, or material shall inform affected organizations within the DOE or in other Government agencies of his or her determination.

(e) *Other government information control systems.* A document containing information within the scope of section 148 of the Atomic Energy Act may also contain information within the scope of other government information control systems. Where this is the case, the requirements of the more restrictive system apply.

§ 1017.15 Markings on documents or material.

(a) *Documents or material which may contain UCNI.* (1) Any person who originates or has in his or her possession a document or material that the person believes may contain UCNI, may mark in a conspicuous manner the document or material with the notice in the paragraph (a)(2) of this section prior to transmitting the document or material to a Reviewing Official for a formal determination.

(2) Any Authorized Individual who originates or has in his or her possession a document or material that the Authorized Individual believes may contain UCNI, shall mark in a conspicuous manner the document or material with the following notice—

(i) Prior to transmitting the document or material outside of the Authorized Individual's organization;

(ii) Prior to transmitting the document or material to a Reviewing Official; or

(iii) Upon the retirement of the document or material under § 1017.13:

NOT FOR PUBLIC DISSEMINATION

May contain Unclassified Controlled Nuclear Information subject to section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168). Approval by the Department of Energy prior to release is required.

(b) *Documents or material which contain UCNI.* A Reviewing Official shall mark in a conspicuous manner each document or material that the Reviewing Official determines to contain UCNI with one of the following notices:

(1) UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION NOT FOR PUBLIC DISSEMINATION

Unauthorized dissemination subject to civil and criminal sanctions under section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

(2) Not for Public Dissemination

Unauthorized dissemination subject to civil and criminal sanctions under 42 U.S.C. 2168.

(c) *Other markings.* UCNI markings may be applied regardless of any other distribution control markings (e.g., "Official Use Only," company proprietary) that are also on a document or material.

§ 1017.16 Access to unclassified controlled nuclear information.

(a) *Routine access.* (1) A Reviewing Official is an Authorized Individual for documents or material that the Reviewing Official determines to contain UCNI.

(2) An Authorized Individual, for UCNI in his or her possession or control, may determine that another person is an Authorized Individual who may be granted access to the UCNI, subject to the following limitations, and who may further disseminate the UCNI under the provisions of this section. The person to be granted routine access to the UCNI must—

(i) Have a need-to-know in the performance of official duties or DOE authorized activities for the UCNI to which routine access is to be granted; and

(ii) Be a U.S. citizen who is—

(A) A Government employee or a member of the U.S. Armed Forces;

(B) An employee of a Government contractor or subcontractor, or of a prospective Government contractor or subcontractor for the purpose of bidding on a Government contract or subcontract;

(C) A Government consultant or DOE advisory committee member;

(D) A Member of Congress;

(E) A staff member of a congressional committee or of an individual Member of Congress;

(F) The Governor of a State, his or her designated representative, or a State government official;

(G) A local government official or an Indian tribal government official;

(H) A member of a State, local, or Indian tribal law enforcement or emergency response organization; or

(I) A DOE access permittee authorized access by the Secretary under Part 725 of this title to Restricted Data applicable to civil use of atomic energy; or

(iii) Be a person who is not a U.S. citizen but who is—

(A) A Government employee or a member of the U.S. Armed Forces;

(B) An employee of a Government contractor or subcontractor; or

(C) A Government consultant or DOE advisory committee member; or

(iv) Be a person who is not a U.S. citizen but who may be granted routine access to UCNI by an Authorized Individual in conjunction with—

(A) An international nuclear cooperative activity approved by the Government;

(B) U.S. diplomatic dealings with foreign government officials;

(C) An agreement for cooperation under section 123 of the Atomic Energy Act; or

(D) Provisions of treaties, mutual defense acts, Government contracts or subcontracts.

(3) The Secretary may impose additional administrative controls concerning the granting of routine access to UCNI by an Authorized Individual to a person who is not a U.S. citizen.

(4) An Authorized Individual may only disseminate UCNI to another Authorized Individual or to a person granted special access to UCNI under paragraph (b) of this section.

(5) The Assistant Secretary for Defense Programs may waive any of the requirements for determination of routine access to UCNI specified in paragraph (a) of this section.

(b) *Special access.* (1) A person not authorized routine access to UCNI under paragraph (a) of this section may submit a request for special access to UCNI to the—

Assistant Secretary for Defense Programs, U.S. Department of Energy,
Washington, DC 20585

(2) Such a request must include—

(i) The name, current residence or business address, birthplace, birthdate, and country of citizenship of the person submitting the request;

(ii) A description of the UCNI for which special access is being requested;

(iii) A description of the purpose for which the UCNI is needed; and

(iv) Certification by the requester of his or her understanding of and willingness to abide by these regulations.

(3) The Assistant Secretary for Defense Programs shall base his or her decision to grant special access to UCNI on an evaluation of—

(i) The sensitivity of the UCNI for which special access is being requested (i.e., the worst-case, adverse effect on the health and safety of the public or the common defense and security which would result from illegal use of the UCNI);

(ii) The purpose for which the UCNI is needed (e.g., will the UCNI be used for commercial or other private purposes or will it be used for public benefit to fulfill statutory or regulatory responsibilities);

(iii) The likelihood of unauthorized dissemination by the requester of the UCNI; and

(iv) The likelihood of the requester using the UCNI for illegal purposes.

(4) The Assistant Secretary for Defense Programs shall attempt to notify a person who requests special access to UCNI within 30 days of receipt of the request as to whether or not special access to the requested UCNI is granted. If a final determination on the request cannot be made within 30 days or receipt of the request, the Assistant Secretary for Defense Programs shall notify the requester, within 30 days of the request, as to when the final determination on the request may be made.

(5) A person granted special access to UCNI is not an Authorized Individual under paragraph (a) of this section and shall not further disseminate the UCNI.

(c) *Notification of responsibilities*—(1) *Routine access.* An Authorized Individual granting routine access to UCNI to another person under paragraph (a) of this section shall notify each person granted such access (other than when the person being granted such access is a Government employee, a member of the U.S. Armed Forces, or an employee of a Government contractor or subcontractor) of applicable regulations and orders concerning UCNI and of any special redistribution limitations that the Authorized Individual determines to apply for the specific UCNI to which routine access is being granted.

(2) *Special access.* The Assistant Secretary for Defense Programs shall notify each person granted special access to UCNI under paragraph (b) of this section of applicable regulations concerning UCNI prior to dissemination of the UCNI to the person.

(d) *Other persons.* Persons not granted routine access to UCNI under paragraph (a) of this section or special access to UCNI under paragraph (b) of this section shall not have access to UCNI.

§ 1017.17 Physical protection requirements.

(a) *General.* UCNI requires protection from unauthorized dissemination. UCNI must be protected and controlled in a manner consistent with that customarily accorded other types of unclassified but sensitive information (e.g., proprietary business information, personnel or medical records of employees, attorney-client information). Each Government agency and Government contractor authorized access to UCNI shall establish and maintain a system for the protection of UCNI in their possession or under their control that is consistent with the physical protection standards established in this section. Each Authorized Individual or person granted special access to UCNI under § 1017.16(b) who receives, acquires, or produces UCNI or a document or material containing UCNI shall take reasonable and prudent steps to ensure that it is protected from unauthorized dissemination by adhering to these regulations and their implementing directives.

(b) *Protection in use or storage.* An Authorized Individual or a person granted special access to UCNI under § 1017.16(b) shall maintain physical control over any document or material containing an UCNI notice that is in use so as to prevent unauthorized access to it. When any document or material containing an UCNI notice is not in use, it must be stored in a secure container (e.g., locked desk or file cabinet) or in a location where access is limited (e.g., locked or guarded office, controlled access facility).

(c) *Reproduction.* A document or material containing an UCNI notice may be reproduced to the minimum extent necessary consistent with the need to carry out official duties without permission of the originator, provided the reproduced document or material is marked and protected in the same manner as the original document or materials.

(d) *Destruction.* A document or material containing an UCNI notice may be disposed of by any method which assures sufficiently complete destruction to prevent its retrieval (providing the disposal is authorized by the Archivist of the United States under 41 CFR 101-11.4 and by agency records disposition schedules).

(e) *Transmission.* (1) A document or material containing an UCNI notice must be packaged to prevent disclosure of the presence of UCNI when transmitted by a means which could allow access to the document or material by a person who is not an Authorized Individual or a person granted special access to UCNI under § 1017.6(b). The address and return address must be indicated on the outside of the package.

(2) A document or material containing an UCNI notice may be transmitted by—

(i) U.S. first class, express, certified, or registered mail;

(ii) Any means approved for the transmission of classified documents or material;

(iii) An Authorized Individual or a person granted special access to UCNI under § 1017.16(b), when he or she can control access to the document or material being transmitted; or

(iv) Any other means determined by the Assistant Secretary for Defense Programs to be sufficiently secure.

(3) UCNI may be discussed or transmitted over an unprotected telephone or telecommunications circuit when required by operational considerations. More secure means of communication should be utilized whenever possible.

(f) *Automated Data Processing (ADP).* UCNI may be processed or produced on any ADP system which is certified for classified information or which complies with the guidelines of Office of Management and Budget Circular No. A-71, "Security of Federal Automated Information Systems" or which has been approved for such use in accordance with the provisions of applicable DOE directives.

§ 1017.18 Violations.

(a) *Civil Penalty.* Any person who violates section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations, is subject to a civil penalty. The Assistant Secretary for Defense Programs may recommend to the Secretary imposition of this civil penalty, which shall not exceed $100,000 for each violation.

(1) *Written Notification.* (i) Whenever the Assistant Secretary for Defense Programs believes that a person is subject to imposition of a civil penalty under the provisions of section 148b(1) of the Atomic Energy Act, the Assistant Secretary for Defense Programs shall notify the person in writing by certified mail, return receipt requested, of—

(A) The date, facts, and nature of each act or omission with which the person is charged;

(B) The particular provision of section 148 of the Atomic Energy Act or its implementing regulations or orders involved in the violation;

(C) Each penalty which the Assistant Secretary for Defense Programs proposes to recommend the Secretary impose and its amount;

(D) The right of the person to submit to the Assistant Secretary for Defense Programs the person's written reply to each of the allegations in the notification letter. The person shall mail or deliver any reply letter within twenty days of receipt of the notification letter from the Assistant Secretary for Defense Programs.

(E) The right of the person to submit to the Assistant Secretary for Defense Programs a written request for a hearing under paragraph (a)(2) of this section.

(F) The fact that, upon failure of the person to pay any civil penalty imposed by the Secretary, the penalty may be collected by civil action under paragraph (a)(5) of this section.

(ii) The Assistant Secretary for Defense Programs shall respond in writing within ten days of the receipt of a reply or a hearing request letter.

(iii) The Assistant Secretary for Defense Programs, at the request of the person accused of a violation, may extend for a reasonable period the time limit for submitting a reply or a hearing request letter.

(2) *Hearing.* Any person who receives a notification letter under paragraph (a)(1)(i) of this section may request a hearing to answer under oath or affirmation the allegations contained in the notification letter. The person shall mail or deliver any hearing request letter to the Assistant Secretary for Defense Programs within twenty days of receipt of the notification letter. Upon receipt from the person of a written request for a hearing, the Assistant Secretary for Defense Programs shall request that the Secretary appoint a Hearing Officer and, if necessary, a Hearing Counsel.

(i) *The Hearing Counsel.* The Hearing Counsel, if appointed, shall—

(A) Represent the Department;

(B) Consult with the person or the person's counsel prior to the hearing; and

(C) Examine and cross-examine witnesses during the hearing.

(ii) *The Hearing Officer.* The He ing Officer shall—

(A) Be responsible for the admin trative preparations for the hearing;

(B) Convene the hearing as soon is reasonable;

(C) Conduct the hearing in manner which is fair and impartial;

(D) Arrange for the presence of w nesses and physical evidence at t hearing;

(E) Make a recommendation th violation of section 148 of the Atom Energy Act or any regulation or ord of the Secretary issued under secti 148 of the Atomic Energy Act, inclu ing these regulations, has occurr only if the DOE proves by the prepo derance of the evidence that such violation occurred; and

(F) Submit his or her recommend tion, accompanied by a statement the findings and reasons supporti them, to the Secretary for the Secr tary's final determination on the i position of a civil penalty.

(iii) *Rights of the person.* The pers may—

(A) Present evidence in his or h own behalf, through witnesses, or documents;

(B) Cross-examine witnesses a rebut records or other physical e dence (except as provided in par graph (a)(2)(iv)(D) of this section);

(C) Be present during the enti hearing (except as provided in par graph (a)(2)(iv)(D) of this section);

(D) Be accompanied, represente and advised by counsel of his or h own choosing; and

(E) Testify in his or her own beha

(iv) *Conduct of the Hearing.*

(A) A summarized record of t hearing shall be made.

(B) All relevant and material e dence is admissible (except as provid in paragraph (a)(2)(iv)(D) of this se tion); however, formal rules of e dence are not applicable.

(C) Witnesses shall testify und oath and are subject to cross-examin tion (except as provided in paragra (a)(2)(iv)(D) of this section).

(D) If the Hearing Officer dete mines that the testimony of a witne or any documentary or physical e dence contains classified informatio or UCNI, such testimony or eviden will not be considered unless it is material. If it is material, a nonsensitive summary of the testimony or records or description of the physical evidence shall be made available to the person to the maximum extent possible, consistent with the requirements of national security or the public health and safety. In all such cases, the Hearing Officer, in considering such testimony or evidence, shall take into account that the person did not have an opportunity to cross-examine the witness or review the actual document or evidence.

(E) The DOE bears the burden of proving that a violation of section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations, has occurred.

(v) *Failure to request a hearing.* If the person fails to file a written request for a hearing within the specified time period, the person relinquishes his or her right to a hearing. If the person does not request a hearing, the Assistant Secretary for Defense Programs shall transmit his or her recommendation, with any supporting materials, to the Secretary for the Secretary's final determination on the imposition of the civil penalty.

(3) *Final determination.* The Secretary makes the final determination on the disposition of a violation. The Secretary may uphold, compromise or mitigate, or remit any penalty recommended by the Assistant Secretary for Defense Programs.

(4) *Appeal.* A person whom the Secretary has determined violated section 148 of the Atomic Energy Act or any regulations or orders of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations, may appeal the determination of the Secretary to an appropriate United States District Court.

(5) *Collection of Penalty.* (i) The Secretary may request the Attorney General to institute a civil action to collect a penalty imposed by the Secretary under this section.

(ii) The Attorney General has the exclusive power to uphold, compromise or mitigate, or remit any civil penalty imposed by the Secretary under this section and referred to the Attorney General for collection.

(b) *Criminal penalty.* Any person who violates section 148 of the Atomic Energy Act or any regulations or orders of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations may be subject to a criminal penalty under section 223 of the Atomic Energy Act. In such case, the Secretary refers the matter to the Attorney General for investigation and possible prosecution.

PART 1018—REFERRAL OF DEBTS TO IRS FOR TAX REFUND OFFSET

Sec.
1018.1 Purpose.
1018.2 Applicability and scope.
1018.3 Administrative charges.
1018.4 Notice requirement before offset.
1018.5 Review within the Department.
1018.6 Departmental determination.
1018.7 Stay of offset.

AUTHORITY: 31 U.S.C. 3720A; Pub. L. 98-369; 98 Stat. 1153.

SOURCE: 54 FR 773, Jan. 9, 1989 (interim), unless otherwise noted.

§ 1018.1 Purpose.

This part establishes procedures for the Department of Energy (DOE) to refer past-due debts to the Internal Revenue Service (IRS) for offset against the income tax refunds of persons owing debts to DOE. It specifies the agency procedures and the rights of the debtor applicable to claims for the payment of debts owed to DOE.

§ 1018.2 Applicability and scope.

(a) These regulations implement 31 U.S.C. 3720A which authorizes the IRS to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the United States.

(b) For purposes of this section, a past-due legally enforceable debt referable to the IRS is a debt which is owed to the United States and:

(1) Except in the case of a judgment debt, has been delinquent for at least three months but has not been delinquent for more than ten years at the time the offset is made;

(2) Cannot be currently collected pursuant to the salary offset provisions of 5 U.S.C. 5514(a)(1);

(3) Is ineligible for administrative offset under 31 U.S.C. 3716(a) by reason of 31 U.S.C. 3716(c)(2) or cannot be collected by administrative offset under 31 U.S.C. 3716(a) by the Department against amounts payable to or on behalf of the debtor by or on behalf of the Dapartment;

(4) With respect to which DOE has given the taxpayer at least 60 days from the date of notification to present evidence that all or part of the debt is not past-due or legally enforceable, has considered evidence presented by such taxpayer, and has determined that an amount of such debt is past-due and legally enforceable;

(5) Has been disclosed by DOE to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless a consumer reporting agency would be prohibited from using such information by 15 U.S.C. 1681c, or unless the amount of the debt does not exceed $100.00;

(6) With respect to which DOE has notified or has made a reasonable attempt to notify the taxpayer that the debt is past-due and, unless repaid within 60 days thereafter, the debt will be referred to the IRS for offset against any overpayment of tax;

(7) Is at least $25.00;

(8) All other requirements of 31 U.S.C. 3720A and the Department of the Treasury regulations codified at 26 CFR 301.6402-6T relating to the eligibility of a debt for tax return offset have been satisfied.

§ 1018.3 Administrative charges.

In accordance with 10 CFR Part 1015, all administrative charges incurred in connection with the referral of the debts to the IRS shall be assessed on the debt and thus increase the amount of the offset.

§ 1018.4 Notice requirement before offset.

A request for reduction of an IRS tax refund will be made only after the DOE makes a determination that an amount is owed and past-due and provides the debtor with 60 days written notice. The DOE's notice of intention to collect by IRS tax refund offset (Notice of Intent) will state:

(a) The amount of the debt;

(b) That unless the debt is repaid within 60 days from the date of the DOE's Notice of Intent, DOE intends to collect the debt by requesting the IRS to reduce any amounts payable to the debtor as refunds of Federal taxes paid by an amount equal to the amount of the debt and all accumulated interest and other charges;

(c) That the debtor has a right to present evidence that all or part of the debt is not past-due or legally enforceable; and

(d) A mailing address for forwarding any written correspondence and a contact name and phone number for any questions.

§ 1018.5 Review within the Department.

(a) *Notification by Debtor.* A debtor who receives a Notice of Intent has the right to present evidence that all or part of the debt is not past-due or not legally enforceable. To exercise this right, the debtor must:

(1) Send a written request for a review of the evidence to the address provided in the notice.

(2) State in the request the amount disputed and the reasons why the debtor believes that the debt is not past-due or is not legally enforceable.

(3) Include in the request any documents which the debtor wishes to be considered or state that additional information will be submitted within the remainder of the 60-day period.

(b) *Submission of evidence.* The debtor may submit evidence showing that all or part of the debt is not past-due or not legally enforceable along with the notification required by paragraph (a) of this section. Failure to submit the notification and evidence within 60 days will result in an automatic referral of the debt to the IRS without further action by DOE.

(c) *Review of the evidence.* DOE will consider all available evidence related to the debt. Within 30 days, if feasible, DOE will notify the debtor whether DOE has sustained, amended, or cancelled its determination that the debt is past-due and legally enforceable.

§ 1018.6 Departmental determination.

(a) Following review of the evidence, DOE will issue a written decision which will include the supporting rationale for the decision.

(b) If DOE either sustains or amends its determination, it shall notify the debtor of its intent to refer the debt to the IRS for offset against the debtor's Federal income tax refund. If DOE cancels its original determination, the debt will not be referred to IRS.

§ 1018.7 Stay of offset.

If the debtor timely notifies the DOE that he or she is exercising the right described in § 1018.5(a) of this part and timely submits evidence in accordance with § 1018.5(b) of this part, any notice to the IRS will be stayed until the issuance of a written decision which sustains or amends its original determination.

PART 1020—GRAND JUNCTION REMEDIAL ACTION CRITERIA

Sec.
1020.1 Purpose.
1020.2 Scope.
1020.3 Definitions.
1020.4 Interpretations.
1020.5 Communications.
1020.6 General radiation exposure level criteria for remedial action.
1020.7 Criteria for determination of possible need for remedial action.
1020.8 Determination of possible need for remedial action where criteria have not been met.
1020.9 Factors to be considered in determination of order of priority for remedial action.
1020.10 Selection of appropriate remedial action.

AUTHORITY: Sec. 203, Pub. L. 92-314, 86 Stat. 226.

SOURCE: 41 FR 56777, Dec. 30, 1976, unless otherwise noted. Redesignated at 46 FR 2972, Jan. 13, 1981.

§ 1020.1 Purpose.

(a) The regulations in this part establish the criteria for determination by DOE of the need for, priority of and selection of appropriate remedial action to limit the exposure of individuals in the area of Grand Junction, Colo., to radiation emanating from uranium mill tailing which have been used as a construction-related material.

(b) The regulations in this part are issued pursuant to Pub. L. 92-314 (86 Stat. 222) of June 16, 1972.

§ 1020.2 Scope.

The regulations in this part apply to all structures in the area of Grand Junction, Colo., under or adjacent to which uranium mill tailings have been used as a construction-related material between January 1, 1951, and June 16, 1972, inclusive.

§ 1020.3 Definitions.

As used in this part:

(a) "Secretary" means the Secretary of Energy or his duly authorized representative.

(b) "Area of Grand Junction, Colo.," means Mesa County, Colo.

(c) "Background" means radiation arising from cosmic rays and radioactive material other than uranium mill tailings.

(d) "DOE" means the U.S. Department of Energy or any duly authorized representative thereof.

(e) "Construction-related material" means any material used in the construction of a structure.

(f) "External gamma radiation level" means the average gamma radiation exposure rate for the habitable area of a structure as measured near floor level.

(g) "Indoor radon daughter concentration level" means that concentration of radon daughters determined by: (1) Averaging the results of 6 air samples each of at least 100 hours duration, and taken at a minimum of 4-week intervals throughout the year in a habitable area of a structure, or (2) utilizing some other procedure approved by the Commission.

(h) "Milliroentgen (mR) means a unit equal to one-thousandth (1/1000) of a roentgen which roentgen is defined as an exposure dose of X or gamma radiation such that the associated corpuscular emission per 0.001293 gram of air produces, in air, ions carrying one electrostatic unit of quantity of electricity of either sign.

(i) "Radiation" means the electromagnetic energy (gamma) and the particulate radiation (alpha and beta) which emanate from the radioactive decay of radium and its daughter products.

(j) "Radon daughters" means the consecutive decay products of radon-222. Generally, these include Radium A (polonium-218), Radium B (lead-281), Radium C (bismuth-214), and Radium C' (polonium-214).

(k) "Remedial action" means any action taken with a reasonable expectation of reducing the radiation exposure resulting from uranium mill tailings which have been used as construction-related material in and around structures in the area of Grand Junction, Colo.

(l) "Surgeon General's guidelines" means radiation guidelines related to uranium mill tailings prepared and released by the Office of the U.S. Surgeon General, Department of Health, Education and Welfare on July 27, 1970.

(m) "Uranium mill tailings" means tailings from a uranium milling operation involved in the Federal uranium procurement program.

(n) "Working Level" (WL) means any combination of short-lived radon daughter products in 1 liter of air that will result in the ultimate emission of 1.3×10^5 MeV of potential alpha energy.

[41 FR 56777, Dec. 30, 1976. Redesignated and amended at 46 FR 2972, Jan. 13, 1981]

§ 1020.4 Interpretations.

Except as specifically authorized by the Secretary in writing, no interpretation of the meaning of the regulation in this part by an office or employee of DOE other than a written interpretation by the General Counsel will be recognized to be binding upon DOE.

[46 FR 2972, Jan. 13, 1981]

§ 1020.5 Communications.

Except where otherwise specified in this part, all communications concerning the regulations in this part should be addressed to the Director, Environmental and Safety Engineering Division, U.S. Department of Energy, Washington, D.C. 20545.

[46 FR 2972, Jan. 13, 1981]

§ 1020.6 General radiation exposure level criteria for remedial action.

The basis for undertaking remedial action shall be the applicable guidelines published by the Surgeon General of the United States. These guidelines recommend the following graded action levels for remedial action in terms of external gamma radiation level (EGR) and indoor radon daughter concentration level (RDC) above background found within dwellings constructed on or with uranium mill tailings:

EGR	RDC	Recommendation
Greater than 0.1 mR/hr	Greater than 0.05 WL	Remedial action indicated
From 0.05 to 0.1 mR/hr	From 0.01 to 0.05 WL	Remedial action may be suggested
Less than 0.05 mR/hr	Less than 0.01 WL	No remedial action indicated

§ 1020.7 Criteria for determination of possible need for remedial action.

Once it is determined that a possible need for remedial action exists, the record owner of a structure shall be notified of that structure's eligibility for an engineering assessment to confirm the need for remedial action and to ascertain the most appropriate remedial measure, if any. A determination of possible need will be made if as a result of the presence of uranium mill tailings under or adjacent to the structure, one of the following criteria is met:

(a) Where DOE approved data on indoor radon daughter concentration levels are available:

(1) For dwellings and schoolrooms: An indoor radon daughter concentration level of 0.01 WL or greater above background.

(2) For other structures: An indoor radon daughter concentration level of 0.03 WL or greater above background.

(b) Where DOE approved data on indoor radon daughter concentration levels are not available:

(1) For dwellings and schoolrooms:

(i) An external gamma radiation level of 0.05 mR/hr. or greater above background.

(ii) An indoor radon daughter concentration level of 0.01 WL or greater above background (presumed).

(A) It may be presumed that if the external gamma radiation level is equal to or exceeds 0.02 mR/hr. above background, the indoor radon daughter concentration level equals or exceeds 0.01 WL above background.

(B) It should be presumed that if the external gamma radiation level is less than 0.001 mR/hr. above background, the indoor radon daughter concentration level is less than 0.01 WL above background, and no possible need for remedial action exists.

(C) If the external gamma radiation level is equal to or greater than 0.001 mR/hr. above background but is less than 0.02 mR/hr. above background, measurements will be required to ascertain the indoor radon daughter concentration level.

(2) For other structures: (i) An external gamma radiation level of 0.15 mR/hr. above background averaged on a room-by-room basis.

(ii) No presumptions shall be made on the external gamma radiation level/indoor radon daughter concentration level relationship. Decisions will be made in individual cases based upon the results of actual measurements.

§ 1020.8 Determination of possible need for remedial action where criteria have not been met.

The possible need for remedial action may be determined where the criteria in § 1020.7 have not been met if various other factors are present. Such factors include, but are not necessarily limited to, size of the affected area, distribution of radiation levels in the affected area, amount of tailings, age of individuals occupying affected area, occupancy time, and use of the affected area.

[41 FR 56777, Dec. 30, 1976. Redesignated and amended at 46 FR 2972, Jan. 13, 1981]

§ 1020.9 Factors to be considered in determination of order of priority for remedial action.

In determining the order of priority for execution of remedial action, consideration shall be given, but not necessarily limited to, the following factors:

(a) Classification of structure. Dwellings and schools shall be considered first.

(b) Availability of data. Those structures for which data on indoor radon daughter concentration levels and/or external gamma radiation levels are available when the program starts and which meet the criteria in § 1020.7 will be considered first.

(c) Order of application. Insofar as feasible remedial action will be taken in the order in which the application is received.

(d) Magnitude of radiation level. In general, those structures with the highest radiation levels will be given primary consideration.

(e) Geographical location of structures. A group of structures located in the same immediate geographical vicinity may be given priority consideration particularly where they involve similar remedial efforts.

(f) Availability of structures. An attempt will be made to schedule remedial action during those periods when remedial action can be taken with minimum interference.

(g) Climatic conditions. Climatic conditions or other seasonal considerations may affect the scheduling or certain remedial measures.

[41 FR 56777, Dec. 30, 1976. Redesignated and amended at 46 FR 2972, Jan. 13, 1981]

§ 1020.10 Selection of appropriate remedial action.

(a) Tailings will be removed from those structures where the appropriately averaged external gamma radiation level is equal to or greater than 0.05 mR/hr. above background in the case of dwellings and schools and 0.15 mH/hr. above background in the case of other structures.

(b) Where the criterion in paragraph (a) of this section is not met, other remedial action techniques, including but not limited to sealants, ventilation, and shielding may be considered in addition to that of tailings removal. DOE shall select the remedial action technique or combination of techniques, which it determines to be the most appropriate under the circumstances.

PART 1021—COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

Sec.
1021.1 Background.
1021.2 Adoption of CEQ Regulations.
1021.3 Revocation of previous NEPA regulations.
1021.4 Applicability.
1021.5 Effective date.

AUTHORITY: National Environmental Policy Act, 42 U.S.C. 4321 et seq.

SOURCE: 44 FR 45918, Aug. 6, 1979, unless otherwise noted.

§ 1021.1 Background.

(a) The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*) establishes national policies and goals for the protection of the environment. Section 102(2) of NEPA contains certain procedural requirements directed toward the attainment of such goals. In particular, all Federal agencies are required to give appropriate consideration to the environmental effects of their proposed actions in their decisionmaking and to prepare detailed environmental statements on recommendations or reports on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.

(b) Executive Order 11991 of May 24, 1977, directed the Council on Environmental Quality (CEQ) to issue regulations to implement the procedural provisions of NEPA. Accordingly, CEQ issued final NEPA regulations (40 CFR Parts 1500-1508) on November 29, 1978.

§ 1021.2 Adoption of CEQ Regulations.

The Department of Energy (DOE) hereby adopts the CEQ regulations for implementing the procedural provisions of NEPA (40 CFR Parts 1500-1508).

§ 1021.3 Revocation of previous NEPA regulations.

DOE hereby revokes the NEPA regulations previously promulgated by the Energy Research and Development Administration (10 CFR Part 711) and the Federal Energy Administration (10 CFR Part 208) as well as the NEPA regulations of other predecessor agencies of DOE to the extent they had applied to functions transferred to DOE pursuant to the DOE Organization Act.

§ 1021.4 Applicability.

This part applies to all organizational elements of DOE, except the Federal Energy Regulatory Commission.

§ 1021.5 Effective date.

The effective date of these regulations is July 30, 1979.

PART 1022—COMPLIANCE WITH FLOODPLAIN/WETLANDS ENVIRONMENTAL REVIEW REQUIREMENTS

Subpart A—General

Sec.
1022.1 Background.
1022.2 Purpose and scope.
1022.3 Policy.
1022.4 Definitions.
1022.5 Applicability.

Subpart B—Procedures for Floodplain/Wetlands Review

1022.11 Floodplain/wetlands determination.
1022.12 Floodplain/wetlands assessment.
1022.13 Applicant responsibilities.
1022.14 Public review.
1022.15 Notification of decision.
1022.16 Requests for authorizations or appropriations.
1022.17 Follow-up.
1022.18 Timing of floodplain/wetlands actions.
1022.19 Selection of a lead agency and consultation among participating agencies.
1022.20 Public inquiries.
1022.21 Updating regulations.

AUTHORITY: E.O. 11988 (May 24, 1977); and E.O. 11990 (May 24, 1977).

SOURCE: 44 FR 12596, Mar. 7, 1979, unless otherwise noted.

Subpart A—General

§ 1022.1 Background.

Executive Order (E.O.) 11988—Floodplain Management (May 24, 1977), requires each Federal agency to issue or amend existing regulations and procedures to ensure that the potential effects of any action it may take in a floodplain are evaluated and that its planning programs and budget requests reflect consideration of flood hazards and floodplain management. Guidance for implementation of the Order is provided in the Floodplain Management Guidelines of the U.S. Water Resources Council (40 FR 6030, Feb. 10, 1978). Executive Order 11990—Protection of Wetlands (May 24, 1977), requires all Federal agencies to issue or amend existing procedures to ensure consideration of wetlands protection in decisionmaking. It is the intent of both Executive orders that Federal agencies implement the floodplain/wetlands requirements through existing procedures such as those established to implement the National Environmental Policy Act (NEPA) of 1969. In those instances where the impacts of actions in floodplains and/or wetlands are not significant enough to require the preparation of an environmental impact statement (EIS) under section 102(2)(C) of NEPA, alternative floodplain/wetlands evaluation procedures are to be established.

§ 1022.2 Purpose and scope.

(a) This part establishes policy and procedures for discharging the Department of Energy's (DOE's) responsibilities with respect to compliance with E.O. 11988 and E.O. 11990, including:

(1) DOE policy regarding the consideration of floodplain/wetlands factors in DOE planning and decisionmaking; and

(2) DOE procedures for identifying proposed actions located in floodplain/wetlands, providing opportunity for early public review of such proposed actions, preparing floodplain/wetlands assessments, and issuing statements of findings for actions in a floodplain.

(b) To the extent possible, DOE will accommodate the requirements of E.O. 11988 and E.O. 11990 through applicable DOE NEPA procedures.

§ 1022.3 Policy.

DOE shall exercise leadership and take action to:

(a) Avoid to the extent possible the long- and short-term adverse impacts associated with the destruction of wetlands and the occupancy and modification of floodplains and wetlands, and avoid direct and indirect support of floodplain and wetlands development wherever there is a practicable alternative.

(b) Incorporate floodplain management goals and wetlands protection considerations into its planning, regulatory, and decisionmaking processes, and shall to the extent practicable:

(1) Reduce the hazard and risk of flood loss;

(2) Minimize the impact of floods on human safety, health, and welfare;

(3) Restore and preserve natural and beneficial values served by floodplains;

(4) Require the construction of DOE structures and facilities to be, at a minimum, in accordance with the standards and criteria set forth in, and consistent with the intent of, the regulations promulgated by the Federal Insurance Administration pursuant to the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4001 *et seq.*;

(5) Minimize the destruction, loss, or degradation of wetlands;

(6) Preserve and enhance the natural and beneficial values of wetlands;

(7) Promote public awareness of flood hazards by providing conspicuous delineations of past and probable flood heights on DOE property which has suffered flood damage or is in an identified flood hazard area and which is used by the general public; and

(8) Prior to the completion of any financial transaction related to an area located in a floodplain, which is guaranteed, approved, regulated or insured by DOE, inform any private participating parties of the flood-related hazards involved.

(c) Undertake a careful evaluation of the potential effects of any DOE action taken in a floodplain and any new construction undertaken by DOE in wetlands not located in a floodplain.

(d) Identify, evaluate, and, as appropriate implement alternative actions which may avoid or mitigate adverse floodplain/wetlands impacts; and

(e) Provide opportunity for early public review of any plans or proposals for actions in floodplains and new construction in wetlands.

§ 1022.4 Definitions.

For purposes of this part:

(a) "Action" means any DOE activity, including, but not limited to:

(1) Acquiring, managing, and disposing of Federal lands and facilities;

(2) DOE-undertaken, financed, or assisted construction and improvements; and

(3) The conduct of DOE activities and programs affecting land use, including but not limited to water and related land resources planning, regulating and licensing activities.

(b) "Base Flood" means that flood which has a 1 percent chance of occurrence in any given year (also known as a 100-year flood).

(c) "Critical Action" means any activity for which even a slight chance of flooding would be too great. Such actions may include the storage of highly volatile, toxic, or water reactive materials.

(d) "Environmental Assessment" (EA) means a document for which DOE is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) or a finding of no significant impact, (2) aid DOE compliance with NEPA when no EIS is necessary, and (3) facilitate preparation of an EIS when one is necessary. The EA shall include brief discussions of the need for the proposal, alternatives, environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

(e) "Environmental Impact Statement" means a document prepared in accordance with the requirements of section 102(2)(C) of NEPA.

(f) "Facility" means any man-placed item other than a structure.

(g) "Finding of No Significant Impact" (FONSI) means a document prepared by DOE which briefly presents the reasons why an action will not significantly effect on the human environment and for which an EIS therefore will not be prepared.

(h) "Flood or Flooding" means a temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland and/or tidal waters, and/or the unusual and rapid accumulation or runoff of surface waters from any source.

(i) "Floodplain" means the lowlands adjoining inland and coastal waters and relatively flat areas and flood-prone areas of offshore islands including, at a minimum, that area inundated by a 1 percent or greater chance flood in any given year. The base floodplain is defined as the 100-year (1.0 percent) floodplain. The critical action floodplain is defined as the 500-year (0.2 percent) floodplain.

(j) "Floodplain Action" means any DOE action which takes place in a floodplain.

(k) "Floodplain/Wetlands Assessment" means an evaluation consisting of a description of a proposed action, a discussion of its effects on the floodplain/wetlands, and consideration of alternatives.

(l) "Floodproofing" means the modification of individual structures and facilities, their sites, and their contents to protect against structural failure, to keep water out, or to reduce the effects of water entry.

(m) "High Hazard Areas" means those portions of riverine and coastal floodplains nearest the source of flooding which are frequently flooded and where the likelihood of flood losses and adverse impacts on the natural and beneficial values served by floodplains is greatest.

(n) "Minimize" means to reduce to the smallest degree practicable.

(o) "New Construction" for the purpose of compliance with E.O. 11990 includes draining, dredging, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun or authorized after October 1, 1977.

(p) "Practicable" means capable of being accomplished within existing constraints. The test of what is practicable depends on the situation and includes consideration of many factors, such as environment, cost, technology, and implementation time.

(q) "Public Notice" means a brief notice published in the FEDERAL REGISTER, and circulated to affected and interested persons and agencies, which describes a proposed floodplain/wetlands action and affords the opportunity for public review.

(r) "Preserve" means to prevent modification to the natural floodplain/wetlands environment or to maintain it as closely as possible to its natural state.

(s) "Restore" means to reestablish a setting or environment in which the natural functions of the floodplain can again operate.

(t) "Statement of Findings" means a statement issued pursuant to E.O. 11988 which explains why a DOE action is proposed in a floodplain, lists alternatives considered, indicates whether the action conforms to State and local floodplain standards, and describes steps to be taken to minimize harm to or within the floodplain.

(u) "Structure" means a walled or roofed building, including mobile homes and gas or liquid storage tanks.

(v) "Wetlands" means those areas that are inundated by surface or groundwater with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflow, mudflats, and natural ponds.

(w) "Wetlands Action" means an action undertaken by DOE in a wetlands not located in a floodplain, subject to the exclusions specified at § 1022.5(c).

§ 1022.5 Applicability.

(a) This part shall apply to all organizational units of DOE, except that it shall not apply to the Federal Energy Regulatory Commission.

(b) This part shall apply to all proposed floodplain/wetlands actions, including those sponsored jointly with other agencies, where practicable alternatives to the proposed action are still available. With respect to programs and projects for which the appropriate environmental review has been completed or a final EIS filed prior to the effective date of these regulations, DOE shall, in lieu of the procedures set forth in this part, review the alternatives identified in the environmental review or in the final EIS to determine whether an alternative action may avoid or minimize impacts on the floodplain/wetlands. If project or program implementation has progressed to the point where review of alternatives is no longer practicable, or if DOE determines after a review of alternatives to take action in a floodplain, DOE shall design or modify the selected alternative in order to minimize potential harm to or within the floodplain and to restore and preserve floodplain values. DOE shall publish in the FEDERAL REGISTER, a brief description of measures to be employed and shall endeavor to notify appropriate Federal, State, and local agencies and persons or groups known to be interested in the action.

(c) This part shall not apply to wetlands projects under construction prior to October 1, 1977; wetlands projects for which all of the funds have been appropriated through fiscal year 1977; or wetlands projects and programs for which a draft or final EIS was filed prior to October 1, 1977. With respect to proposed actions located in wetlands (not located in a floodplain), this part shall not apply to the issuance by DOE of permits, licenses, or allocations to private parties for activities involving wetlands which are located on non-Federal property.

(d) This part applies to activities in furtherance of DOE responsibilities for acquiring, managing, and disposing of Federal lands and facilities. When property in a floodplain or wetlands is proposed for lease, easement, right-of-way, or disposal to non-Federal public or private parties, DOE shall: (1) Identify those uses that are restricted under Federal, State, or local floodplains or wetlands regulations; (2) attach other appropriate restrictions to the uses of the property; or (3) withhold the property from conveyance.

(e) This part applies to activities in furtherance of DOE responsibilities for providing federally undertaken, financed, or assisted construction and improvements. Applicants for assistance shall provide DOE with an analysis of the impacts which would result from any proposed wetland or floodplain activity.

(f) This part applies to activities in furtherance of DOE responsibilities for conducting Federal activities and programs affecting land use, including but not limited to, water and related resource planning, regulating and licensing activity.

(g) This part ordinarily shall not apply to routine maintenance of existing facilities and structures on DOE property within a floodplain/wetlands since such actions normally have minimal or no adverse impact on a floodplain/wetlands. However, where unusual circumstances indicate the possibility of impact on a floodplain/wetlands, DOE shall consider the need for a floodplain/wetlands assessment for such actions.

(h) The policies and procedures of this part which are applicable to floodplain actions shall apply to all proposed actions which occur in a wetlands located in a floodplain.

Subpart B—Procedures for Floodplain/Wetlands Review

§ 1022.11 Floodplain/wetlands determination.

(a) Concurrent with its review of a proposed action to determine appropriate NEPA requirements, DOE shall determine the applicability of the floodplain management and wetlands protection requirements of this part.

(b) In making the floodplain determination, DOE shall utilize the Flood Insurance Rate Maps (FIRM's) or the Flood Hazard Boundary Maps (FHBM's) prepared by the Federal Insurance Administration of the Department of Housing and Urban Development to determine if a proposed action is located in the base or critical action floodplain, as appropriate. For a proposed action in an area of predominantly Federal or State land holdings where FIRM or FHBM maps are not available, information shall be sought from the land administering agency (e.g., Bureau of Land Management, Soil Conservation Service, etc.) or from agencies with floodplain analysis expertise.

(c) In making the wetlands determination, DOE shall utilize information available from the following sources, as appropriate:

(1) U.S. Fish and Wildlife Service National Wetlands Inventory;

(2) U.S. Department of Agriculture Soil Conservation Service Local Identification Maps;

(3) U.S. Geological Survey Topographic Maps;

(4) State wetlands inventories; and

(5) Regional or local government-sponsored wetland or land use inventories.

§ 1022.12 Floodplain/wetlands assessment.

(a) If DOE determines, pursuant to §§ 1022.5 and 1022.11, that this part is applicable to the proposed action, DOE shall prepare a floodplain/wetlands assessment, which shall contain the following information:

(1) *Project Description.* This section shall describe the nature and purpose of the proposed action, and shall include a map showing its location with respect to the floodplain and/or wetlands. For actions located in a floodplain, the high hazard areas shall be delineated and the nature and extent of the potential hazard shall be discussed.

(2) *Floodplain/Wetlands Effects.* This section shall discuss the positive and negative, direct and indirect, and long- and short-term effects of the proposed action on the floodplain and/or wetlands. The effects of a proposed floodplain action on lives and property, and on natural and beneficial floodplain values shall be evaluated. For actions taken in wetlands, the effects on the survival, quality, and natural and beneficial values of the wetlands shall be evaluated.

(3) *Alternatives.* Alternatives to the proposed action which may avoid adverse effects and incompatible development in the floodplain/wetlands shall be considered, including alternate sites, actions, and no action. Measures that mitigate the adverse ef-

fects of actions in a floodplain or wetlands, including but not limited to minimum grading requirements, runoff controls, design and construction constraints, and protection of ecology-sensitive areas shall be addressed.

(b) For proposed floodplain or wetlands actions for which an EA or EIS is required, the floodplain/wetlands assessment shall be prepared concurrent with and included in the appropriate NEPA document.

(c) For floodplain/wetlands actions for which neither an EA or EIS is prepared, a separate document shall be issued as the floodplain/wetlands assessment.

§ 1022.13 Applicant responsibilities.

DOE may require applicants for a DOE permit, license, certificate, financial assistance, contract award, allocation or other entitlement to submit a report on a proposed floodplain/wetlands action. The report shall contain the information specified at § 1022.12 and shall be prepared in accordance with the guidance contained in this part.

§ 1022.14 Public review.

(a) For proposed floodplain/wetlands actions for which an EIS is required, the opportunity for early public review will be provided through applicable NEPA procedures. A Notice of Intent to prepare an EIS may be used to satisfy this requirement.

(b) For proposed floodplain/wetlands actions for which no EIS is required, DOE shall provide the opportunity for early public review through publication of a Public Notice, which shall be published in the FEDERAL REGISTER, as soon as practicable after a determination that a floodplain/wetlands may be affected and at least 15 days prior to the issuance of a statement of findings with respect to a proposed floodplain action. DOE shall take appropriate steps to inform Federal, State, and local agencies and persons or groups known to be interested in or affected by the proposed floodplain/wetlands action. The Public Notice shall include a description of the proposed action and its location and may be incorporated with other notices issued with respect to the proposed action.

(c) Following publication of the Public Notice, DOE shall allow 15 days for public comment prior to making its decision on the proposed action, except as specified in § 1022.18(c). At the close of the public comment period, DOE shall reevaluate the practicability of alternatives to the proposed floodplain/wetlands action and the mitigating measures, taking into account all substantive comments received.

§ 1022.15 Notification of decision.

(a) If DOE finds that no practicable alternative to locating in the floodplain/wetlands is available, consistent with the policy set forth in E.O. 11988, DOE shall, prior to taking action, design or modify its action in order to minimize potential harm to or within the floodplain/wetlands.

(b) For actions which will be located in a floodplain, DOE shall publish a brief (not to exceed three pages) statement of findings which shall contain:

(1) A brief description of the proposed action, including a location map;

(2) An explanation indicating why the action is proposed to be located in the floodplain;

(3) A list of alternatives considered;

(4) A statement indicating whether the action conforms to applicable State or local floodplain protection standards; and

(5) A brief description of steps to be taken to minimize potential harm to or within the floodplain.

For floodplain actions which require preparation of an EA or EIS, the statement of findings may be incorporated into the FONSI or final EIS, as appropriate, or issued separately. Where no EA or EIS is required, DOE shall publish the statement of findings in the FEDERAL REGISTER and distribute copies to Federal, State, and local agencies and others who submitted comments as a result of the Public Notice. For floodplain actions subject to the Office of Management and Budget (OMB) Circular A-95, DOE shall send the statement of findings to the State and areawide A-95 Clearinghouses for the geographic area affected.

§ 1022.16 Requests for authorizations or appropriations.

DOE shall indicate in any requests for new authorizations or appropriations transmitted to OMB, if a proposed action will be located in a floodplain or wetlands, whether the proposed action is in accord with the requirements of E.O. 11990 E.O. 11988, and these regulations.

§ 1022.17 Follow-up.

For those DOE actions taken in floodplain/wetlands, DOE shall verify that the implementation of the selected alternative, particularly with regard to any adopted mitigating measures, is proceeding as described in the floodplain/wetlands assessment and statement of findings.

§ 1022.18 Timing of floodplain/wetlands actions.

(a) Prior to implementing a proposed floodplain action, DOE shall endeavor to allow at least 15 days of public review after publication of the statement of findings.

(b) With respect to wetlands actions (not located in a floodplain), DOE shall take no action prior to 15 days after publication of the Public Notice in the FEDERAL REGISTER.

(c) Where emergency circumstances, statutory deadlines, of overriding considerations of program or project expense or effectiveness exist, the minimum time periods may be waived.

§ 1022.19 Selection of a lead agency and consultation among participating agencies.

When DOE and one or more other Federal agencies are directly involved in a floodplain/wetlands action, DOE shall consult with such other agencies to determine if a floodplain/wetlands assessment is required, to identify the appropriate lead or joint agency responsibilities, to identify the applicable regulations, and to establish procedures for interagency coordination during the environmental review process.

§ 1022.20 Public inquiries.

Inquiries regarding DOE's flo
plain/wetlands activities may be
rected to the Assistant Secretary
Environment, Department of Ener
Washington, D.C. 20545.

§ 1022.21 Updating regulations.

DOE shall periodically review th
regulations, evaluate their effecti
ness, and make appropriate revisions

PART 1023—CONTRACT APPEALS

Subpart A—Rules of the Board of Contra Appeals

PREFACE

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1023.1 Scope and purpose.
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Subpart A—Rules of the Board of Contract Appeals

AUTHORITY: Pub. L. 95-91, sec. 301,
Stat. 577; Pub. L. 95-563; EO 10789.

SOURCE: 44 FR 64270, Nov. 6, 1979, unle
otherwise noted.

PREFACE

§ 1023.1 Scope and purpose.

These rules are intended to gove
all appeals procedures before the De
partment of Energy Board of Contra
Appeals (Board) which are within th
coverage of the Contract Disputes Ac
of 1978 (Pub. L. 95-563, Nov. 1, 197

§ 1023.2 Effective date.

These rules shall apply to all appe
relating to contracts which are subje
to the Contract Disputes Act of 19

and entered into on or after March 1, 1979. At the contractor's election, they shall also apply to appeals relating to earlier contracts, if such contracts are subject to the Contract Disputes Act of 1978, and the appeal relates to claims pending before the contracting officer on March 1, 1979.

§ 1023.3 Jurisdiction for considering appeals.

(a) The Department of Energy Board of Contract Appeals (referred to herein as the "Board" or "EBCA") shall consider and determine appeals from decisions of contracting officers pursuant to the Contract Disputes Act of 1978 (Pub. L. 95-563, 41 U.S.C. 601-613, also hereinafter referred to as the "Act") relating to contracts made by (1) the Department of Energy or (2) any other executive agency when such agency or the Administrator for Federal Procurement Policy has designated the Board to decide the appeal. In addition, the Board shall consider and determine appeals from decisions of contracting officers arising from other contracts which include an appropriate disputes clause.

(b) The Board may consider and determine other matters, not inconsistent with its statutory duties, as assigned by the Secretary.

(c) In each proceeding the Board shall make a final decision which is impartial, fair and just to the parties based on the record of the case.

§ 1023.4 Organization and location of the Board.

(a) The Board is located in the Washington, D.C. metropolitan area and its address is: Webb Building, Room 1006, 4040 N. Fairfax Drive, Arlington, Virginia 22203.

(b) The Board consists of a Chair, a Vice Chair, and other members, all of whom are attorneys-at-law duly licensed by any state, commonwealth, territory, or the District of Columbia. Members of the Board are selected and appointed to serve in the same manner as hearing examiners pursuant to Section 3105 of title 5, United States Code with an additional requirement that each member shall have had not fewer than five years experience in public contract law. Members are designated Administrative Judges and the Chair, Chief Administrative Judge.

(c) The Administrative Judge assigned to hear and develop the record on an appeal has authority to act for the Board in all matters with respect to such appeal that are not dispositive of the appeal.

(d) Except for appeals considered under the expedited small claims or accelerated procedures, appeals are assigned to a panel of three Administrative Judges of the Board who decide the case by a majority vote.

§ 1023.5 Ex-parte conduct.

Written or oral communications with the Board by or for one party without participation or notice to the other, is not permitted. No member of the Board or of the Board's staff shall consider nor shall any person, directly or indirectly involved in an appeal, submit to the Board or to the Board's staff, off-the-record, any evidence, explanation, analysis, or advice (whether written or oral) regarding any matter at issue in an appeal. This provision does not apply to consultation between Board members nor to communications concerning the Board's administrative functions or procedures.

§ 1023.6 General guidelines.

(a) It is impractical to articulate a rule to fit every circumstance which may be encountered. Accordingly, these rules will be interpreted and applied consistent with the Board's policy to provide for the just, speedy, and inexpensive determination of appeals.

(b) It is the Board's objective to encourage full disclosure of all relevant facts and to discourage surprise.

(c) Each specified time limitation is a maximum, and should not be fully used if the action described can be accomplished in a shorter period. Informal communication between the parties is encouraged to reduce time periods as much as possible.

(d) The Board shall conduct proceedings so as to assure compliance with the security regulations and requirements of the Department or agency involved.

§ 1023.20 Rules of practice.

The following rules of practice shall govern the procedure as to all contract disputes appealed to this Board in accordance with this subpart:

PRELIMINARY PROCEDURES

Rule

1 Appeals, how taken.
2 Notice of appeal, contents.
3 Docketing of appeals.
4 Contracting officer appeal file.
5 Motions.
6 Appellants election of procedure.
7 Pleadings.
8 Amendments of pleadings or record.
9 Hearing election.
10 Submission of appeal without a hearing.
11 Prehearing briefs.
12 Prehearing conference.
13 Optional Small Claims (Expedited) procedure.
14 Optional Accelerated procedure.
15 Settling the record.
16 Discovery—General.
17 Discovery—Depositions, interrogatories, admissions, production and inspection.
18 Subpoenas.
19 Time and service of papers.

Hearings

20 Hearings—Time and place.
21 Hearings—Notice.
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Representation

24 Appellant.
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26 Decisions.
27 Motion for reconsideration.
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Dismissals

29 Dismissals without prejudice.
30 Dismissal for failure to prosecute.

Sanctions

31 Failure to obey Board order.

PRELIMINARY PROCEDURES

Rule 1 Appeals, How Taken. (a) Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy of the notice shall be furnished at the same time to the contracting officer from whose descision the appeal is taken.

(b) Where the contractor has submitted a claim of $50,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and where the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a claim in excess of $50,000 to the contracting officer and the contracting officer has failed to issue a decision within a reasonable time, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure to issue a decision.

(d) Upon docketing of appeals filed pursuant to (b) or (c) of this Rule, the Board, at its option, may stay further proceedings pending issuance of a final decision by the contracting officer within the time fixed by the Board, or order the appeal to proceed without the contracting officer's decision.

Rule 2 Notice of Appeal, Contents. A notice of appeal must indicate that an appeal is being taken and must identify the contract (by number), and the department, administration, agency or bureau involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal should be signed by the appellant (the contractor making the appeal), or by the appellant's duly authorized representative or attorney. The complaint referred to in Rule 7 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

Rule 3 Docketing of Appeals. When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice of docketing shall be mailed promptly to all parties (with a copy of these rules to appellant).

Rule 4 Contracting Officer Appeal File. (a) Composition: Within 30 days after receipt of notice that an appeal has been docketed, the contracting officer shall assemble and transmit to the Board one copy of the appeal file with an additional copy each to appellant (except that items 1 and 2, below, need not be retransmitted to the appellant) and to attorney for respondent. The appeal file shall consist of all documents pertinent to the appeal, including:

(1) The contracting officer's decision and findings of fact from which the appeal is taken;

(2) The contract, including pertinent specifications, modifications, plans, and drawings;

(3) All correspondence between the parties pertinent to the appeal, including the letters of claim in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent.

(b) Organization: Documents in the appeal file may be originals, legible facsimiles, or anthenticated copies. They shall be arranged in chronological order, where practicable, and indexed to identify readily the contents of the file. The contracting officer's final decision and the contract shall be conveniently placed in the file for ready reference.

(c) Supplements: Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant may supplement the file by transmitting to the Board any additional documents which it considers pertinent to the appeal and shall furnish two copies of such documents to attorney for respondent.

(d) Burdensome documents. The Board may waive the requirement of furnishing to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when a party has shown that doing so would impose an undue burden. At the time a party files with the Board a document as to which such a waiver has been granted, the other party shall be notified that the document or a copy is available for inspection at the offices of the Board or of the party filing the document.

(e) Status of Documents: Documents in the appeal file or supplements thereto shall become part of the historical record but shall not be included in the record upon which the Board's decision will be rendered unless each individual document has been offered and admitted into evidence.

Rule 5 *Motions.* (a) Any timely motion may be considered by the Board. Motions shall be in writing (unless made during a conference or a hearing), shall indicate the relief or order sought, and shall state with particularity the grounds therefore. Those motions which would dispose of a case shall be filed promptly and shall be supported by a brief. The Board may, on its own motion initiate any motion by notice to the parties.

(b) Parties may respond to a dispositive motion within 20 days of receipt, or as otherwise ordered by the Board. Answering material to all other motions may be filed within 10 days after receipt. Replies to responses ordinarily will not be allowed.

(c) Board rules relating to pleadings, service and number of copies shall apply to all motions. In its discretion, the Board may permit a hearing on a motion, and may require presentation of briefs, or it may defer a decision pending hearing on both the motion and the merits.

Rule 6 *Appellants election of procedures.* (a) The election to use Small Claims (Expedited) (Rule 13) or Accelerated (Rule 14) procedures is available only to appellant. The election shall be filed with the Board in writing no later than 30 days after receipt of notice that the appeal has been docketed, unless otherwise allowed by the Board.

(b) Where the amount in dispute is $50,000 or less, appellant may elect to use the Accelerated procedures. Where the amount is $10,000 or less, appellant may elect to use the Small Claims (Expedited) or the Accelerated procedures. Any question regarding the amount in dispute shall be determined by the Board.

Rule 7 *Pleadings.* (a) *Complaint.* Within 30 days after receipt of notice that the appeal has been docketed, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. A copy of the complaint shall be served upon the attorney for the respondent or, if the identity of the latter is not known, upon the General Counsel, Department of Energy, Forrestal Building, Washington, D.C. 20585. If the complaint is not filed within 30 days and in the opinion of the Board the issues before the Board are sufficiently defined, appellant's claim and Notice of Appeal may be deemed to set forth its complaint and the respondent shall be so notified.

(b) *Answer.* Within 30 days after receipt of complaint, or a Rule 7(a) notice from the Board, the respondent shall file with the Board an original and two copies of an Answer, setting forth simple, concise and direct statements of respondent's defense to each claim asserted by appellant. This pleading shall fulfill the generally recognized requirements of an Answer, and shall set forth any affirmative defenses or counter-claims as appropriate. Should the answer not be filed within 30 days, the Board may, in its discretion, enter a general denial on behalf of the respondent and the parties shall be so notified.

Rule 8 *Amendments of Pleadings or Record.* (a) The Board upon its own initiative or upon application by a party may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The application for such an order suspends the time for responsive pleadings. The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleadings upon conditions fair to both parties.

(b) When issues not raised by the pleadings are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised in the pleadings. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. Similarly, if evidence is objected to at a hearing on the ground that it is not relevant to an issue raised by the pleadings, it may be admitted but the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

Rule 9 *Hearing Election.* Except as may be required under Rules 13 or 14, each party shall advise the Board following service upon appellant of respondent's Answer, or a Rule 7(b) Notice from the Board, whether it desires a hearing as prescribed in Rules 20 through 23.

Rule 10 *Submission of Appeal without a Hearing.* Either party may elect to waive a hearing and to submit its case upon the record as settled pursuant to Rule 15. Waiver by one party shall not deprive the other party of an opportunity for a hearing. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submission to be supplemented by oral argument and by briefs.

Rule 11 *Prehearing Briefs.* The Board may, in its discretion, require the parties to submit prehearing briefs in any case or motion. If the Board does not require briefs, either party may, upon timely notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party.

Rule 12 *Prehearing Conference.* (a) Whether the case is to be submitted under Rule 10, or heard pursuant to Rules 20 through 23, the Board may, upon its own initiative or upon the application of either party, arrange a telephone conference or call upon the parties to appear before an administrative judge for a conference to consider:

(1) Simplification, clarification, or severing of the issues;

(2) The possibility of obtaining stipulations, admissions, agreements and rulings on documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(3) Agreements and rulings to facilitate discovery;

(4) Limitation of the number of expert witnesses, or avoidance with similar cumulative evidence;

(5) The possibility for settlement of any or all of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal including the filing of proposed Findings of Fact and Conclusions of Law, briefs, and other such papers.

(b) Any conference results not reflected in a transcript shall be reduced to writing by the Administrative Judge and the writing shall thereafter constitute part of the evidentiary record.

Rule 13 *Optional Small Claims (Expedited) Procedure.* (a) the Small Claims (Expedited) procedure for disputes involving $10,000, or less, provides for simplified rules of procedure to facilitate the decision of an appeal, whenever possible, within 120 days after the Board receives written notice of the election.

(b) Promptly upon receipt of an appellant's election of the Small Claims (Expedited) procedure in accordance with Rule 6, the assigned Administrative Judge will arrange an informal meeting or a telephone conference with both parties to:

(1) Identify and simplify the issues in dispute;

(2) Establish a simplified procedure appropriate to the particular appeal;

(3) Determine whether a hearing is desired, and, if so, fix a time and place;

(4) Establish a schedule for the expedited resolution of the appeal; and

(5) Assure that procedures have been instituted for informal discussions on the possibility of settlement of any or all of the disputes in question.

(c) Failure to request an oral hearing within 15 days of receipt of notice of the Small Claims election shall be deemed a waiver and an election to submit the case on the record under Rule 10.

(d) The subpoena power set forth in Rule 18 is available for use under the Small Claims (Expedited) procedure.

(e) The filing of pleadings, motions, discovery proceedings or prehearing procedures will be permitted only to the extent consistent with the requirement of conducting the hearing at the scheduled time and place or, if no hearing is scheduled, of closing the record at an early time so as to permit a decision of the appeal within the target limit of 120 days. The Board, in its discretion, may impose shortened time periods for any actions required or permitted under these rules, necessary to enable the Board to decide the appeal within the target date allowing whatever time, up to 30 days, that it considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(f) Decisions in appeals considered under the Small Claims (Expedited) procedure will be rendered by a single Administrative Judge. If there is a hearing, the presiding Administrative Judge may, exercising discretion, hear closing oral arguments of the parties and then render an oral decision on the record. Whenever such an oral decision is rendered, the Board subsequently will furnish the parties with a written transcript of the decision for record and payment purposes and to establish the date for commencement of the time period for filing a motion for reconsideration under Rule 27.

(g) Decisions of the Board under the Small Claims (Expedited) procedure shall have no value as precedent for future cases and, in the absence of fraud, cannot be appealed.

Rule 14 *Optional Accelerated Procedure.* (a) This option makes available an Accelerated procedure, for disputes involving $50,000 or less, whereby the appeal is resolved, whenever possible, within 180 days from board notice of the election.

(b) Promptly upon receipt of appellant's election of the Accelerated procedure in accordance with Rule 6, the assigned Administrative Judge will arrange an informal meeting or a telephone conference with both parties to:

(1) Identify and simplify the issues in dispute;

(2) Establish a simplified procedure appropriate to the particular appeal;

(3) Determine whether a hearing is desired and, if so, fix a time and place;

(4) Establish a schedule for the accelerated resolution of the appeal; and

(5) Assure that procedures have been instituted for informal discussions on the possibility of settlement of any or all of the disputes in question.

(c) Failure by either party to request an oral hearing within 15 days of receipt of notice of the election under Rule 6 shall be deemed a waiver and an election to submit on the record under Rule 10.

(d) The subpoena power set forth in Rule 18 is available for use under the Accelerated procedure.

(e) The filing of pleadings, motions, discovery proceedings or prehearing procedures will be permitted only to the extent consistent with the requirement for conducting the hearing at the scheduled time and place or, if no hearing is scheduled, the closing of the record at an early time so as to permit decision of the appeal within the target limit of 180 days. The Board, in its discretion, may impose shortened time periods for any actions required or permitted under these rules, necessary to enable the Board to decide the appeal within the target date, allowing whatever time, up to 30 days, that it considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(f) Decisions in appeals considered under the Accelerated procedure will be rendered by a single Administrative Judge with the concurrence of another assigned Administrative Judge or an additional member in the event of disagreement.

Rule 15 *Settling the Record.* (a) The record upon which the Board's decision will be rendered consists of the documents, papers and exhibits admitted in evidence, and the pleadings, prehearing conference memoranda or orders, prehearing briefs, admissions, stipulations, transcripts of conferences and hearings, and posthearing briefs. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board. In cases submitted pursuant to Rule 10 the evidentiary records shall be comprised of those documents, papers and exhibits submitted by the parties and admitted by the Board.

(b) Except as the Board, in its discretion, may otherwise order, no proof shall be received in evidence after completion of the evidentiary hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

Rule 16 *Discovery—General.* (a) General Policy and Protective Orders—The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting trade secrets or other confidential information or documents.

(b) Expenses—Each party bears its own expenses associated with discovery, unless in the discretion of the Board, the expenses are apportioned otherwise.

(c) Subpoenas—Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 18.

Rule 17 *Discovery—Depositions, Interrogatories, Admissions, Production and Inspection.* (a) When Depositions Permitted—If the parties are unable to agree upon the taking of a deposition, the Board may, upon application of either party and for good cause shown, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination.

(b) Orders on Depositions—The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, as governed by order of the Board.

(c) Depositions as Evidence—No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received as evidence at such hearing. It will not ordinarily be received as evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(d) Interrogatories, etc.—After an appeal has been filed with the Board, a party may serve on the other party: (1) Written interrogatories to be addressed separately in writing, signed under oath and answered within 30 days unless objections are filed within 10 days of receipt; (2) a request for the admission of specified facts or the authenticity of any documents, to be answered or objected to within 30 days after service. The factual statements and the authenticity of the documents shall be deemed admitted upon failure of a party, to timely respond; and (3) a request for the production, inspection and copying of any documents or objects not privileged, which are relevant to the appeal.

(e) Any discovery engaged in under this Rule shall be subject to the provisions of Rule 16.

Rule 18 *Subpoenas.* (a) Voluntary Cooperation—Each party is expected to cooperate and make available witnesses and evidence under its control without issuance of a subpoena. Additionally, parties will secure voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.

(b) Procedure

(1) Upon request of a party and after a showing of relevance a subpoena may be issued requiring the attendance of a witness for the purpose of taking testimony at a deposition or hearing and, if appropriate, the production by the witness, at the deposition or hearing, of documentary evidence, including inspection and copying, as designated in the subpoena.

(2) The request shall identify the name, title, and address of the person to whom the subpoena is addressed, the specific documentary evidence sought, the time and place proposed and a showing of relevancy to the appeal.

(3) Every subpoena shall state the name of the Board, the title of the appeal, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified documentary evidence at a time and place therein specified. The presiding Administrative Judge shall sign the subpoena and may, in his discretion, enter the name of the witness, or the documentary evidence sought, or may leave it blank. The party requesting the subpoena shall complete the subpoena before service.

(4) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781-1784.

(c) Requests to Quash or Modify—Upon motion made promptly but in any event not later than the time specified in the subpoena for compliance, the Board may: (i) Quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown; (ii) condition denial of the motion upon payment by the person in whose behalf the subpoena was issued of the reasonable cost of producing the subpoenaed documentary evidence; or (iii) apply protective provisions under Rule 16(a).

(d) Service—

(1) The party requesting the subpoena shall arrange for service.

(2) A subpoena may be served at any place by a United States Marshal or Deputy Marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena shall be made by personally delivering a copy to the person named therein and tendering the fees for one day's attendance and the mileage that would be allowed in the courts of the United States. When the subpoena is issued on behalf of the United States or an officer or agency of the United States, money payments need not be tendered in advance of attendance.

(3) The party requesting a subpoena shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and any documentary evidence the witness has produced.

(e) Contumacy or Refusal to Obey a Subpoena. In case of a contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

Rule 19 *Time and Service of Papers.* (a) All pleadings, briefs or other papers submitted to the Board shall be filed in triplicate and a copy shall be sent to other parties. Such communications shall be sent by delivering in person or by mailing, properly addressed with postage prepaid, to the opposing party or, where the party is represented by counsel, to its counsel. Pleadings, briefs or other papers filed with the Board shall be accompanied by a statement, signed by the originating party, saying when, how, and to whom a copy was sent.

(b) The Board may extend any time limitation for good cause and in accordance with legal precedent. All requests for time extensions shall be in writing except when raised during a recorded hearing.

(c) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day. Unless otherwise stated in a Rule or Board Order, dates will be met and papers considered filed when deposited in the mail system of the U.S. Postal Service, or hand-delivery is acknowledged at the Board offices.

HEARINGS

Rule 20 *Hearings: Time and Place.* Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, the requirements for expedited or accelerated procedures and other pertinent factors. On request by either party and for good cause, the Board may, in its discretion, change the time and place of a hearing.

Rule 21 *Hearings: Notice.* The parties shall be given at least 15 days notice of time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearing shall be promptly acknowledged by the parties. Failure to promptly acknowledge shall be deemed consent to the time and place.

Rule 22 *Hearings: Unexcused Absence of a Party.* The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the presiding Administrative Judge may order the hearing to proceed and the case will be regarded as submitted by the absent party as under Rule 10.

Rule 23 *Hearings: Rules of Evidence and Examination of Witnesses.* (a) Nature of Hearings—Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and the respondent may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding judge. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.

(b) Examination of Witnesses—Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding Administrative Judge shall otherwise order.

REPRESENTATION

Rule 24 *Appellant.* An individual appellant may appear before the Board in person, a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

Rule 25 *Respondent.* Counsel may, in accordance with their authority, represent the interest of the Government or other client before the Board. They shall file notices of appearance with the Board, and serve notice on appellant or appellant's attorney.

BOARD DECISION

Rule 26 *Decisions.* Except as allowed under Rule 13, decisions of the Board shall be in writing upon the record as described in Rule 15 and will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions shall be available for public inspection at the offices of the Board.

Rule 27 *Motion for Reconsideration.* (a) Motion for reconsideration shall set forth specifically the grounds relied upon to sustain the motion and shall be filed within 30 days after receipt of a copy of the Board's decision.

(b) Motions for reconsideration of cases decided under either the Small Claims (Expedited) procedure or the Accelerated procedure need not be decided within the original 120-day or 180-day limit, but shall be processed and decided rapidly.

Rule 28 *Remand from Court.* Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders.

DISMISSALS

Rule 29 *Dismissal Without Prejudice.* In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

Rule 30 *Dismissal for Failure to Prosecute.* Whenever a record discloses the failure of any party to file documents required by these rules, respond to notices or correspondence from the Board or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be dismissed or granted, as appropriate. If no cause, the Board may take such action as it deems reasonable and proper.

SANCTIONS

Rule 31 *Failure to Obey Board Order.* If any party fails or refuses to obey an order issued by the Board, the Board may issue such orders as it considers necessary to the just and expeditious conduct of the appeal, including dismissal with prejudice.

Subpart B—Rules of the Contract Adjustment Board

AUTHORITY: Pub. L. 95-91, sec. 301, 91 Stat. 577; Pub. L. 85-804, 72 Stat. 972, 50 U.S.C. 1433; E.O. 10789; DOE Order 1100.4.

SOURCE: 45 FR 36053, May 29, 1980, unless otherwise noted.

§ 1023.200 Delegation.

The Board of Contract Appeals when sitting in its designated capacity as the Contract Adjustment Board exercises the authority of the Secretary on applications for extraordinary relief under Pub. L. 85-804 involving contractual fairness cases as defined in 41 CFR 9-17, and also as to such other matters as may be referred to the Board by the Secretary or his designee.

§ 1023.201 Applicable rules.

The Contract Adjustment Board shall proceed to hear and decide matters brought before it, with sole regard to the merits of each matter, in the same general manner as when it presides as the Board of Contract Appeals. (See rules under 10 CFR Part 1023, Subpart A.)

§ 1023.202 Matters pending as contract appeals.

A matter otherwise before the Board of Contract Appeals which also appears to be an application for extraordinary relief under Pub. L. 85-804 involving contractual fairness, may be heard and decided by the Contract Adjustment Board (upon proper application made by the petitioner, and with due consideration to the circumstances and equities as they affect all parties), provided it is placed on the Contract Adjustment Board's docket for such cases.

§ 1023.203 Decisions.

Decisions of the Contract Adjustment Board shall be made in writing and served simultaneously on all parties. Although recorded, the Contract Adjustment Board's decisions are not considered to be judicial in character and may not be cited as precedents in other matters brought to the Contract Adjustment Board.

PART 1024—PROCEDURES FOR FINANCIAL ASSISTANCE APPEALS

Sec.

1024.1 Scope and purpose.
1024.2 Authority.
1024.3 General.
1024.4 Rules of procedure.

AUTHORITY: Dept. of Energy Organization Act, Pub. L. 95-91, 91 Stat. 577 (42 U.S.C. 7101, et seq.); E.O. 10789; Pub. L. 95-224, 92 Stat. 3 (41 U.S.C. 501-509).

SOURCE: 45 FR 29764, May 5, 1980, unless otherwise noted.

§ 1024.1 Scope and purpose.

These procedures establish a process permitting recipients of financial assistance to appeal adverse final decisions made by financial assistance officers or contracting officers. The objective is to provide a timely, just, and inexpensive resolution of disputes involving grants, cooperative agreements, loan guarantees, loan agreements, or other financial assistance instruments.

§ 1024.2 Authority.

The authority of the Board derives from direct delegation of the Secretary to hear and decide finally for the Department appeals from any decision brought before it on disputes arising under financial assistance agreements.

§ 1024.3 General.

(a) A recipient or party to a grant, cooperative agreement, loan guarantee or agreement, or other such financial assistance may have a right to appeal disputes with the Department. Such a right may be set forth in statutes, in Departmental regulations dealing with the type of financial assistance involved, or in the agreement itself.

(b) Appeals are decided by the Financial Assistance Appeals Board in Accordance with the procedures set forth in these regulations. Decisions will be by majority vote and will be the final disposition of the matter within the Department.

(1) The Board is located in the Washington, D.C. metropolitan area and its address is: Webb Building, Room 1006, 4040 North Fairfax Drive, Arlington, Virginia 22203.

(2) The Administrative Judge assigned to hear and develop the record on an appeal has authority to act for the Board with respect to such appeal within the limits assigned and as set forth in these rules.

(c) In order that a right to appeal may be exercised in a timely manner, a financial assistance recipient must appeal, in writing, within 60 days after a financial assistance officer, or contracting officer has issued a "final decision" on the matter.

(d) The appeal may take one of the following three alternative courses, depending on the amount of the claim and degree of formality desired or needed:

(1) The first method is to proceed on the basis of a written record, without any oral presentations. It is the quickest and simplest process available to an appellant. All appeals involving less than $10,000 will be decided on this basis, unless, on application made by the appellant, or the respondent, the Board rules otherwise. This method is also available for appeals where the amount in dispute is more than $10,000 if an election is made in accordance with Rule 2. (See § 1024.4)

(2) A second method is to use a conference-type hearing in which the written record is supplemented with an informal oral presentation. It is the second fastest process available to an appellant and is conducted in a relatively informal manner which may require little, if any, testimony, and may even be conducted by a telephone conference call where deemed appropriate.

(3) The third method, and the most time consuming is the use of an adversary evidentiary hearing. Because of the procedural and logistical aspects involved, this method is more expensive and time consuming than the other two methods for both the appellant and respondent. Generally, this method is used only if there are complex facts in dispute.

(e) All three methods are designed to be as informal as possible; nevertheless, it should be recognized that the Board must have an adequate record on which to base a sound decision. While an orderly presentation of evidence is required, the Board attempts to be as flexible as possible in the interests of arriving at an impartial, inexpensive and expeditious resolution of the matter.

(f) The services of an attorney are not necessarily required, especially as to the first method. The appellant should note, however, that the respondent is represented by an attorney. Hearings, if held, are transcribed, and witnesses are required to present information or evidence at such hearings under oath. In each case, the Board shall issue a written decision unless otherwise requested by a party and the request is approved.

§ 1024.4 Rules of procedure.

The following rules of procedure shall govern all financial assistance disputes appealed to the Board in accordance with this subpart:

RULE

1. Filing of an appeal; acknowledgment.
2. Selection of an appeal method.
3. Development of the record.
4. Objections to evidence submitted.
5. Alternative methods of appeal.
6. Parties to the appeal.
7. Representation before the Board.
8. Dismissal for failure to meet deadlines and other requirements.
9. The Board's powers, functions, and responsibilities.
10. Ex parte communications (communications outside the record).
11. Notice and location of hearings.
12. Calculation of time periods.

RULE 1. FILING OF AN APPEAL; ACKNOWLEDGMENT

(a) A brief written notice of appeal, along with a copy of the final agency decision being appealed shall be submitted within 60 days after receipt of the decision. The notice must indicate that an appeal is intended, and must clearly state the issues in controversy, and the relief requested. This notice, if sufficiently detailed, may serve as the appellant's initial complaint. See Rule 3(a).

(b) The appeal notice shall be mailed or delivered to the financial Assistance Appeals Board (for address see § 1024.3(b)(1)), with a copy to the official whose decision is being appealed, and a second copy to the General Counsel, Department of Energy, Washington D.C. 20585.

(c) upon receiving the appeal notice, the Board will promptly acknowledge receipt of the notice of appeal and will notify the parties of the date docketed.

RULE 2. SELECTION OF AN APPEAL METHOD

Unless submitted earlier, within 20 days after the appellant receives the Board's notice of docketing, the appellant must submit to the Board, with copy to respondent, a letter electing one of the three methods available for processing the appeal. For disputes involving less than $10,000, method "1" (as set forth in Rule 5(a)) will automatically apply unless appellant specifically petitions and is granted the right to proceed under one of the other two methods. In exceptional circumstances, the respondent may likewise request the use of one of the other two methods. This election letter must identify the attorney or other person who will repesent the appellant, if the notice of appeal did not already do so. (See Rule 7(a)). In case the parties disagree as to the appeal method to be used, the Board will finally decide.

RULE 3. DEVELOPMENT OF THE RECORD

(a) Appellant; complaint. (1) Within 30 days after receiving the docketing notice from the Board, the appellant shall:

(i) submit a complaint, or

(ii) submit a specific request (for approval by the Board), that the final decision as issued by the financial assistance officer or contracting officer, together with the notice of appeal, adequately describe the matter in dispute and will serve as the complaint.

(2) The complaint shall include: A copy of the decision appealed from; relevant portions of the applicable assistance agreements; a statement of the amount, if any, in dispute; and, if the appellant is proceeding under method 1 or 2, a copy of any documents supporting its claim. The documents must be organized chronologically and accompanied by an indexed list identifying each document by date, originator and addressee.

(3) To reduce the burden on the appellant, the appellant may specify, in an appropriate index, those relevant documents already in the possession of the respondent which the respondent will then add to those documents submitted in its answer.

(b) Respondent; answer. (1) Respondent shall submit an answer within 30 days after receipt of a complaint, or after receipt of a notice from the Board that the decision and notice of appeal shall serve as the complaint. The Board may enter a general denial on behalf of the respondent upon its failure to submit an answer within the time limitation.

(2) In its answer the respondent shall submit to the Board, with copy to appellant, two copies of any documents, other than those submitted by appellant in its complaint—which the respondent considers to be material. These should be organized and indexed as required under paragraph (a) of this rule and shall include those documents already in the possession of the Department and identified and requested by the appellant in accordance with paragraph (a) of this rule.

(c) The Board, on its own initiative, or in response to an appropriate request from a party to the dispute, may order a party to submit additional material wherever the Board considers it useful in resolving the dispute.

RULE 4. OBJECTIONS TO EVIDENCE SUBMITTED

(a) Any objection to a document or other evidence submitted in the complaint or answer shall be raised as early as possible. The parties shall attempt to resolve such objections informally between themselves before asking the Board to intercede.

(b) For those appeals that are to be resolved on the basis of a written record under method 1, either party may object to inclusion of materials or documents at any point prior to conclusion of the briefing schedule.

(c) For those appeals that are submitted for resolution using method 2, either party may object to inclusion of materials or documents at any time prior to the conclusion of the hearing.

(d) For those appeals processed under method 3, any materials or documents submitted shall not be included in the record upon which the Board's decision will be based unless they are specifically offered and admitted into evidence.

(e) The Board will use the Federal Rules of Evidence as a guide in determining admissibility of evidence but may exercise its sound discretion where appropriate.

RULE 5. ALTERNATIVE METHODS OF APPEAL

(a) Method 1. Proceeding on the written record. (1) Within 20 days after the appellant receives the respondent's answer, the appellant may submit to the Board (with a copy to respondent) a brief or statement containing the appellant's argument in support of its claim. Within 20 days after receipt of the appellant's brief or statement, the respondent may submit to the Board (with a copy to the appellant) a brief or statement containing the agency's response. Appellant may submit a further reply, but must do so within 10 days after appellant's receipt of respondent's submission.

(2) *Accelerating the procedure.* The appellant may choose one or more of the following mechanisms to speed the process.

(i) The appellant may choose to submit a single brief or statement with, or as part of, its election letter, and may consolidate the election letter with its notice of appeal.

(ii) Where the appeal involves an amount in dispute of less that $10,000, the appellant may, upon specific request, have the Board issue a brief final order affirming or reversing the agency financial assistance officer or contracting officer decision, without a written decision.

(3) *Inadequate record.* (i) If the Board decides that the written record presented is inadequate, the Board may present written questions to the parties; require further briefing on specified issues; require that oral testimony be presented; or take any other action that it considers necessary to develop a record upon which to base a sound decision.

(ii) One or both parties may sometimes believe that an issue on appeal requires more development than has been achieved on the written record. Therefore, on request of either or both parties, and if the Board agrees that it is appropriate to further develop the record, the Board may require the use of further appropriate procedures as applicable to hearings conducted pursuant to paragraphs (b) or (c) of this rule.

(4) *Record for decision.* The record upon which the decision will be based will consist of the complaint and answer (after disposition of all objections), the briefs or statements of the parties, and any other documents or material specifically allowed by the Board. A decision will be issued as soon as practicable (whenever possible within 30 days) after all submissions are filed or after the time for filing has expired.

(b) *Method 2: Conference hearing*—(1) *Witness statement.* Within 20 days after the filing and receipt of respondent's answer, each party shall submit a witness statement to the Board, with a copy to the other party. The witness statement must contain a list of anticipated witnesses, with a brief summary of the expected testimony of each, and a description of the testimony's relevance to the specific issues and to the matter in dispute. The statement may also contain a list of questions which the presiding Board member may ask of the other party's witness, or an identification of issue areas in which inquiry by the presiding Board member would be appropriate. The Board may on its own initiative reject unduly repetitious, lengthy or otherwise burdensome questions, and may order a party to include additional witnesses, or to exclude multiple witnesses who would testify on the same matter.

(2) *Response to the witness statement.* Within 15 days after each party receives the other's witness statement, each party may respond by submitting a supplemental statement to the Board, with a copy to the other party. The supplemental statement may add to earlier information, or may present any written objections to the proposed questions or issue areas, or to the proposed witnesses.

(3) *The conference hearing.* (i) As soon as preparations are concluded, the Board will set a date for a hearing, to be held at a time and place determined by the Board to best serve the interests of all concerned. On request by either party, and for good cause, the Board may, in its discretion, change the time and place of the hearing. The parties are responsible for producing witnesses specified in the witness statements at the time and place set for the hearing conference. A transcript or other recording will be made.

(ii) At the conference hearing, each party may make a brief opening statement. The witnesses will be questioned based on their statements; and the Board may inquire further of each witness for information which may or may not be included in the witness' statement. At the end of each witness' testimony, either party may suggest additional questions, which the Board may ask, if no objections thereto have been sustained. The Board may permit or require the parties or their representatives to comment further on issues of fact or law. Brief closing statements will be permitted.

(iii) Except for opening and closing statements, and any questions asked during direct testimony, or as otherwise specifically allowed by the Board, the only oral communications in the record will be those of the Board member and the witnesses. Generally, no documentary evidence will be received at a conference hearing. Although the conference hearing is informal, witnesses will be required to testify under oath.

(4) *Procedures after the hearing.* Upon request, post hearing briefs may be allowed to be submitted within an appropriate time as may be set by the Board. No rebuttal briefs shall be permitted.

(5) *Record for decision.* The record upon which the decision will be based will consist of the complaint and answer (after disposition of the objections), the hearing transcript, briefs of the parties, and any other such documents specifically admitted by the Board into the record. The Board will issue a decision as soon as practicable (whenever possible within 60 days) after all submissions are filed or after the time for filing has expired.

(c) *Method 3: Full evidentiary hearing*—(1) *Special requirement.* If the appellant decides it is appropriate to seek a full evidentiary hearing, its election letter submitted under Rule 2 must specifically indicate this choice. This method may also be used where the disputed matter involves a complex fact situation or would require extensive preparation. In such circumstances, the respondent my request, and the Board may approve, the use of this method. When this method is adopted, the Board may use the Rules of Procedure of the Board of Contract Appeals (10 CFR Part 1023) as may be needed to provide an orderly proceeding.

(2) *Informal conference before the hearing.* Generally, the Board will require the parties to appear at an early prehearing conference (which, at the option of the Board, may be conducted by telephone conference call), to consider any of the following: the possibility of settlement; simplifying and clarifying issues; stipulations and admissions of facts; limitations on evidence and witnesses that will be presented at the hearing; agreement on issues in dispute; and any other matter that may aid in disposing of the appeal. The Board, in its discretion, may record the results of the conference in a document which will be made part of the record, or may have the prehearing conference transcribed.

(3) *Record for decision.* The record upon which the decision will be based by the Board will consist of the complaint and answer, other pleadings, orders, stipulations that resulted from prehearing conferences, the transcript and testimony of any witness, any additional papers or exhibits introduced at the hearing, and the briefs of the parties. The Board will issue a decision as soon as practicable (whenever possible within 12 days) after all briefs are filed or after the time for filing briefs has expired.

Rule 6. Parties to the Appeal

Generally, the only parties to the appeal are the financial assistance recipient which received the final agency decision on which the appeal is based, and the Department. However, upon request the Board may allow a third party to present the case on appeal or appear with a party in the case, when the Board determines that the third party is a real party in interest.

Rule 7. Representation Before the Board

(a) *The appellant.* An appellant may appear before the Board in person or through a representative. The appellant's notice of appeal, or the appellant's election letter submitted pursuant to Rule 2 must specify the name, address and telephone number of the appellant's representative. An attorney representing appellant shall file a written notice of appearance. If represented by someone other than an attorney, appellant shall submit a declaration, signed by a responsible official of the appellant, that the person is authorized to act for the appellant.

(b) *The respondent.* As soon as practicable and no more than 20 days after receiving the notice of appeal under Rule 1, the attorney representing the interest of the respondent shall file a notice of appearance and shall serve the notice on the appellant, or the appellant's attorney.

Rule 8. Dismissal for Failure to Meet Deadlines and Other Requirements

(a) Whenever an appeal record discloses the failure of any party to file documents required by these rules, respond to notices or correspondence from the Board, or otherwise indicates an intention by that party not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be dismissed, or granted, as appropriate. If the offending party does not, or is not able to respond adequately, the Board may take such action as it deems reasonable and proper.

(b) If any party fails or refuses to obey an order issued by the Board, the Board may issue such orders as it considers necessary to permit the just and expeditious conduct of the appeal, including dismissal.

Rule 9. The Board's Powers, Functions, and Responsibilities

The Board has been delegated all powers necessary for the performance of its duties.

including but not limited to the authority to conduct hearings, call witnesses, dismiss appeals with or without prejudice, order the production of documents and other evidence, administer oaths and affirmations, issue subpoenas, order depositions to be taken, take official notice of facts within general knowledge, and decide all questions of fact and law. In discharging its functions, the Board shall provide an expeditious, just, and relatively inexpensive forum for resolving the dispute.

RULE 10. EX PARTE COMMUNICATIONS (COMMUNICATIONS OUTSIDE THE RECORD)

(a) Written or oral communications with a Board member by one party without the participation or notice to the other about the merits of the appeal is not permitted. No member of the Board, or the Board's staff, shall consider, nor shall any person directly or indirectly involved in an appeal, submit any off the record information, whether written or oral, relating to any matter at issue in an appeal.

(b) This rule does not apply to communications among members and staff, nor to communications concerning the Board's administrative functions or procedures.

RULE 11. Notice and Location of Hearings

Hearings will be held at such places and at such times determined by the Board to best serve the interests of the parties and the Board. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. The parties shall be given at least 15 days notice of time and place set for hearings.

RULE 12. CALCULATION OF TIME PERIODS

If a due date for the filing of any paper under these procedures falls on a Sunday, Saturday, or Federal holiday, then it shall be extended to the next calendar working day.

PART 1035—DEBARMENT AND SUSPENSION (PROCUREMENT)

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APPENDIX A—RULES FOR FACT-FINDING CONFERENCES

AUTHORITY: Secs. 307, 644, and 646, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7156, 7254, and 7256); and Federal Acquisition Regulation, 48 CFR Subpart 9.4.

SOURCE: 49 FR 4318, Feb. 3, 1984, unless otherwise noted.

§ 1035.1 Scope of part.

This part—

(a) Prescribes policies and procedures governing the debarment and suspension of organizations and individuals from participating in Department of Energy (DOE) contracts, procurement sales contracts, and real property purchase agreements, and from participating in DOE approved subagreements (including DOE approved subcontracts).

(b) Sets forth the causes, procedures, and requirements for determining the scope, duration, and effect of DOE debarment and suspension actions; and

(c) Implements and supplements 48 CFR Subpart 9.4 with respect to the exclusion of organizations and individuals from procurement contracting and Government approved subcontracting.

[49 FR 4318, Feb. 3, 1984, as amended at 49 FR 18733, May 2, 1984; 53 FR 38940, Oct. 4, 1988]

§ 1035.2 Applicability.

The provisions of this part apply to all procurement debarment and suspension actions initiated by DOE on or after the effective date of this part. Nonprocurement debarment and suspension rules are codified in 10 CFR Part 1036.

[53 FR 38940, Oct. 4, 1988]

§ 1035.3 Policy.

(a) DOE shall not solicit proposals from, award agreements to, or approve or consent to subagreements with, organizations and individuals that are suspended, proposed for debarment, debarred, ineligible, or voluntarily excluded as indicated on the DOE List or that are debarred, suspended, or ineligible as indicated on the GSA List.

(b) Debarment and suspension are serious sanctions which may be imposed only in the public interest, for the Government's protection and not for the purpose of punishment. Debarment and suspension may be imposed only for the causes and only in accordance with the procedures set forth in this part.

(c) Debarment and suspension actions taken under this part shall be based on the administrative record and shall be limited in scope and duration to the minimum necessary to protect the Government's interest.

§ 1035.4 Definitions.

For purposes of this part—

"Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.

"Affiliates." Organizations or individuals are affiliates if, directly or indirectly: (a) Either one controls or can control the other, or (b) a third controls or can control both.

"Agency" means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

"Agreement" means a procurement or sales contract or a real property purchase agreement.

"Awardee" means any organization or individual that: (a) Submits proposals for, or is awarded, or reasonably may be expected to submit proposals for, or be awarded a DOE agreement or subagreement under a DOE agreement; or (b) conducts business with DOE as an agent or representative of an awardee.

"Contractor" means an organization or individual that: (a) Submits proposals for, or is awarded, or reasonably may be expected to submit proposals for, or be awarded, a Government procurement contract or a subcontra under a Government procureme contract; or (b) conducts business wi the Government as an agent or repr sentative of a contractor.

"Conviction" means a judgment conviction of a criminal offense by a court of competent jurisdiction, e tered upon a verdict or plea, includin a plea of nolo contendere, or a pretri diversion agreement wherein respons bility for the commission of a crimin offense is acknowleged.

"Debarment" means action taken b a debarring official under FAR 9.40 and/or this part to exclude an organ zation or individual from receivin Federal procurement contracts an subcontracts or from receiving one more types of agreements or subagree ments for a reasonable, specifie period of time. An individual or orga nization so exluded is "debarred."

"Debarring official" means the hea of an agency or an official authorize by the head of an agency to impose debarment. The DOE debarring officia is the Director, Procurement Assistance Management Directorate.

"Director" means the Director, Procurement Assistance Management Directorate, DOE.

"DOE" means the Department of Energy, including the Federal Energy Regulatory Commission.

"DOE List" means the DOE Consolidated List of Debarred, Suspended, Ineligible and Voluntarily Excluded Awardees maintained by DOE in accordance with § 1035.15 of this part and 10 CFR 1036.610.

"FAR" means 48 CFR Chapter 1.

"GSA" means General Services Administration.

"GSA List" means the Consolidated List of Debarred, Suspended, and Ineligible Contractors maintained and published by GSA in accordance with FAR Subpart 9.4.

"Indictment" means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

"Ineligible" means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

"Legal proceeding" means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term also includes appeals from such proceedings.

"Notice" means a written communication sent by certified mail, return receipt requested, to the last known address of a party, its identified counsel, or agent for service of process. In the case of an organization, such notice may be sent to any partner, principal officer, director, owner or co-owner, or joint venturer. If no return receipt is received within 20 calendar days of mailing, receipt shall be presumed.

"Preponderance of the evidence" means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

"Procurement contract" means an agreement for the acquisition of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease.

"Proposal" means a solicited or unsolicited bid, proposal, application or other offer for a DOE agreement or subagreement.

"Respondent" means an awardee or affiliate who is the subject of a suspension, proposed debarment, debarment, or voluntary exclusion action under this part who has been notified as provided by § 1035.6.

"Subagreement" means an agreement under an agreement (e.g., a subcontract).

"Subcontract" means a procurement contract under a procurement contract.

"Suspending official" means the head of an agency or an official authorized by the head of an agency to impose suspension. The DOE suspending official is the Director, Procurement and Assistance Management Directorate.

"Suspension" means action taken by a suspending official under FAR 9.407 and/or this part to exclude an organization or individual temporarily from receiving Federal contracts and subcontracts or from receiving one or more types of DOE agreements and subagreements. An individual or organization so excluded is "suspended."

[49 FR 18733, May 2, 1984, as amended at 53 FR 38940, Oct. 4, 1988]

§ 1035.5 Causes for debarment and suspension.

(a) The Director may debar an awardee:

(1) For conviction of or civil judgment for—

(i) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public agreement or subagreement;

(ii) Violation of Federal or State antitrust statutes relating to the submission of proposals;

(iii) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(iv) Commission of any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the present responsibility of an awardee.

(2) For violation of an agreement or subagreement so serious as to justify debarment, such as—

(i) Willful failure to perform in accordance with the terms of one or more agreements or subagreements; and

(ii) A history of failure to perform, or of unsatisfactory performance of, one or more agreements or subagreements.

(3) For any other cause of so serious or compelling a nature that it affects the present responsibility of a DOE contractor or awardee. Such cause may include but is not limited to:

(i) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a private agreement or subagreement; and

(ii) Inexcusable, prolonged, or repeated failure to pay a debt (including disallowed costs and overpayments) owed to DOE, provided the awardee has been notified of the determination of indebtedness, and further provided that the time for initiating any administrative or legal action to oppose or appeal the determination of indebtedness has expired or that such action, if initiated, has been concluded.

(4) On the basis of a debarment for any of the causes in paragraphs (a)(1), (a)(2), and (a)(3) of this section by another agency.

(5) On the basis that an individual or organization is an affiliate of a debarred awardee.

(6) For failure to observe the material provisions of a voluntary exclusion (see § 1035.10).

(b) The Director may suspend an organization or individual:

(1) Indicted for or suspected, upon adequate evidence, of the causes described in paragraphs (a)(1) and (a)(3) of this section.

(2) On the basis of a suspension or debarment by another agency for any of the causes in paragraphs (a)(1) and (a)(3) of this section.

(3) On the basis of the causes set forth in paragraphs (a)(3) and (a)(6) of this section.

(4) On the basis that an organization or individual is an affiliate of a suspended or debarred awardee.

(c) Offices responsible for the award and administration of agreements are responsible for reporting to both the Procurement and Assistance Management Directorate and the Inspector General, DOE, information about possible fraud, waste, abuse, or other wrongdoing which may constitute or contribute to a cause(s) for debarment or suspension under this part. Organizations and individuals performing under agreements awarded by DOE shall be required to report such information to the contracting officer and to the Inspector General, DOE.

§ 1035.6 Suspension and proposed debarment notices.

When the Director, after consultation with legal counsel, determines that causes exist to suspend or propose debarment of an awardee or affiliate, the Director shall send the awardee or affiliate a notice containing, as appropriate, the following information:

(a) That a debarment is being proposed and/or a decision to suspend has been made.

(b) The reasons for the suspension and/or proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which the suspension or proposed debarment is based, except that the notice shall omit any information which, if disclosed, would prejudice an ongoing civil or criminal investigation or a pending or contemplated legal proceeding, or would compromise national security.

(c) The cause(s) relied upon under § 1035.5 of this part and, if applicable, under FAR 9.406-2 or FAR 9.407-2 for the suspension and/or proposed debarment.

(d) That within 30 days after receipt of the notice, the respondent may submit, or make a written request for an opportunity to submit, to the Director or designee, information and argument in opposition to the proposed debarment and/or suspension, including any additional specific information that may raise a genuine dispute over the material facts. The submission in opposition may be made in person, in writing, or through a representative.

(e) DOE's procedures governing debarment and/or suspension decision-making (see § 1035.8).

(f) The effects of the suspension and/or proposed debarment and the effects of a final debarment (se § 1035.13). If a notice of proposed debarment is issued to an awardee or affiliate who is not suspended, th notice shall state that, for purposes o affected DOE agreements and subs greements, the proposed debarmen shall have the effect of a suspension.

(g) For suspension notices, that th suspension is effective as of the dat of the notice.

(h) The respondent's name and address have been placed on the DO List.

(i) If the respondent was suspende for one or more causes included

FAR Subpart 9.4, that a copy of the suspension notice was sent to GSA, and that the respondent's name will be added to the GSA List (FAR 9.404(c)(4)).

[49 FR 4318, Feb. 3, 1984, as amended at 49 FR 18734, May 2, 1984]

§ 1035.7 Coordination with Department of Justice.

Whenever a meeting or fact-finding conference is requested, under § 1035.8 (b)(1) or (b)(2), the Director's legal representative shall obtain the advice of appropriate Department of Justice officials concerning the impact disclosure of evidence at the meeting or fact-finding conference could have on any pending civil or criminal investigation or legal proceeding. If such official requests in writing that evidence needed to establish the existence of a cause for suspension not be disclosed to the respondent, the Director shall:

(a) Decline to rely on such evidence and withdraw (without prejudice) the suspension until such time as disclosure of the evidence is authorized; or

(b) Rely on such evidence without disclosing it to the respondent. At the fact-finding conference, the Director shall make such evidence available for *in camera* inspection to the fact-finding panel. Evidence submitted for *in camera* inspection shall be part of the administrative record, but may not be disclosed to the respondent or any member of the public until release is authorized in writing by an appropriate Department of Justice official or until related legal proceedings are concluded, whichever occurs first.

§ 1035.8 Decisionmaking.

(a) *Definitions.* (1) "Fact-finding panel" means a three-member panel appointed by the Director to conduct a fact-finding conference under paragraph (d) of this section. This panel shall consist of an office director within the Procurement and Assistance Management Directorate, a senior attorney nominated by the General Counsel or designee, and a senior official of a program or other office of the Department. (2) For purposes of this section, "timely" means mailed or delivered to the Director not later than 30 days after the date of the notice under § 1035.6 or on or before such later date as may be specified in the notice under § 1035.6. If the postmark date is affixed by a postage meter and DOE receives the document more than five days after the postmark date, the date of receipt shall be used to determine timeliness.

(b) *Written response.* A timely written response to a notice of suspension or proposed debarment may contain any or all of the following:

(1) A request for a meeting with the Director or designee (§ 1035.8(c));

(2) A request for a fact-finding conference (§ 1035.8(d)); and

(3) Information and argument in opposition to the suspension or proposed debarment including identification of disputed material facts. If the respondent fails to submit a timely written response to a notice of suspension or proposed debarment, the Director shall notify the respondent in accordance with § 1035.9 that the awardee remains suspended, or that the awardee is debarred, as applicable.

(c) *Meeting.* Upon receipt of a timely request therefor, the Director shall schedule a meeting with the Director or designee and the respondent, no later than 30 days from the date the request is received. The Director or designee may postpone the date of the meeting if the respondent requests a postponement in writing.

(1) At the meeting, the respondent, appearing personally or through an attorney or other authorized representative, may informally present and explain evidence that causes for suspension or debarment do not exist, evidence of any mitigating factors, and arguments concerning the imposition, scope, duration, or effects of a suspension, proposed debarment, or debarment. The respondent may offer or explain a previous offer to agree to a voluntary exclusion (§ 1035.10) at the meeting.

(2) Any written information or arguments submitted at or in connection with the meeting shall be included in the administrative record. The Director shall not be required to make a transcript of the meeting.

(3) Within two weeks following the date of the meeting, the Director shall

send a notice to the respondent containing the following information:

(i) Names, organizational affiliations, titles, addresses, and telephone numbers of all individuals who attended;

(ii) A brief description of each document submitted by the respondent;

(iii) A summary of the issues discussed; and

(iv) A statement describing the action the Director has taken or proposes to take.

(d) *Fact-finding conference.* The purposes of a fact-finding conference under this section are to provide the respondent an opportunity to dispute material facts and to make arguments related to a suspension or proposed debarment, and to provide the Director with proposed findings of fact based, as applicable, on adequate evidence or on a preponderance of the evidence.

(1) *Appointment of fact-finding panel and notice to respondent.* If the Director determines that a written response or a presentation at the meeting puts material facts in dispute, the Director shall appoint a fact-finding panel. Upon appointment, the panel shall notify the respondent that the case has been referred to the panel and shall schedule a fact-finding conference.

(2) *Appearances.* The Director may be represented at the fact-finding conference by the General Counsel or designee. The respondent may appear personally or through an attorney.

(3) *Scope of the fact-finding conference.* The factual issues considered at the conference shall be limited to those identified in the Director's referral and any amendments thereto filed by the Director.

(4) *Procedures.* The fact-finding conference shall be conducted in accordance with applicable procedural rules adopted by the General Counsel or designee. The procedural rules shall be as informal as practicable, consistent with the principles of fundamental fairness, prompt decisionmaking, and with the evidentiary standards for suspension and debarment.

(5) *Preliminary administrative record.* At least 10 days before the fact-finding conference date, the Director shall file with the fact-finding panel, and mail or deliver to the respondent, a copy of the administrative record as of the date of the transmittal. The copy sent to the respondent shall not include any documents which, as provided in § 1035.7, may not be disclosed; the copy filed with the fact-finding panel shall identify which documents must be sealed and viewed by the fact-finding panel only *in camera*, as provided in § 1035.7.

(6) *Evidence and argument.* The respondent and the Director shall have the opportunity to submit documentary evidence, to examine and cross-examine witnesses, and to present argument. Only evidence which is relevant to the issues referred for the fact-finding conference and which is reliable and probative shall be admissible.

(7) *Transcript.* The fact-finding panel shall make a transcribed record of the fact-finding conference which shall be transmitted to the Director within 20 days after the hearing record is closed. The transcript shall be available at cost to the respondent. The requirement for a transcript may be waived by mutual agreement of the Director and all respondents.

(8) *Fact-finding conference report.* Within 30 days after the conference record is closed, the fact-finding panel shall transmit to the respondent (by notice) and to the Director a written report setting forth proposed findings of fact. The findings shall resolve any disputes over material facts based on a preponderance of the evidence if the case involves a proposal to debar, or on adequate evidence if the case involves a suspension. The respondent shall have 30 days from receipt of the fact-finding panel's report to submit written exceptions to the Director.

(9) *Final decision.* The Director's final decision shall be based on the administrative record, including the fact-finding conference report and any written exceptions submitted by the respondent. The Director may set aside findings of fact in the conference report only if the Director specifically determines the finding(s) to be arbitrary and capricious or clearly erroneous. If the final decision sustains a proposed debarment, the debarment may begin no earlier than ten days after the date of the notice of final de-

cision (§ 1035.9), a copy of which shall be transmitted to the fact-finding panel.

§ 1035.9 Notice of final decision.

(a) Upon deciding to impose debarment or sustain a suspension, the Director shall promptly send each affected respondent a notice with the following information, as appropriate:

(1) The notice of suspension or proposed debarment, the meeting and the fact-finding conference shall be referenced;

(2) The Director's findings of fact and conclusions of law;

(3) The reasons for the debarment or for sustaining a suspension shall be specified;

(4) For debarments, the period of debarment, including effective dates (see § 1035.11) shall be stated; and

(5) The types of agreements and subagreements covered by the debarment or suspension. The decision may limit the debarment or suspension action to affected agreements involving particular commodities, products, services, or forms of energy, or to projects or work performed in specified geographic regions.

(6) A reference to the Director's waiver authority under § 1035.13.

(7) If the respondent has been debarred or suspended for one or more causes included in FAR Subpart 9.4, the notice shall also state that the debarment or suspension is effective throughout the Executive Branch as provided in FAR 9.406-1(c) and 9.407-1(d).

(8) Modifications, if any, of the terms of the suspension.

(9) The names and addresses of the respondents that will be or have been placed on the DOE List.

(10) If the respondent has been debarred for one or more causes included in FAR Subpart 9.4, that a copy of the debarment notice was sent to GSA and that the respondent's name and address will be added to the GSA List.

(11) If less than an entire organization is suspended or debarred, the identity or description of the organizational element(s) or individual(s) included within the scope of the suspension or debarment.

(b) If the Director decides to withdraw a proposed debarment or to terminate a suspension, the Director shall promptly send, using the notice procedure, each affected respondent a copy of the final decision required under this section.

[49 FR 4318, Feb. 3, 1984, as amended at 49 FR 18733, May 2, 1984]

§ 1035.10 Voluntary exclusion.

At any time prior to the issuance of a final decision under § 1035.9, the Director may, in the public interest, agree, in writing, to terminate a suspension or withdraw a proposed debarment on the conditions that the respondent voluntarily refrain from attempting to obtain, and from entering into, one or more types of DOE or other agency agreements or subagreements. Failure to observe such conditions shall be an independent cause for debarment or suspension. The name and address of the respondent who is a party to a voluntary exclusion shall be placed on the DOE List. The Director shall not enter into a voluntary exclusion if the proposed debarment is based on conviction of or civil judgment for any of the causes in § 1035.5(a)(1), or if the suspension was based on an indictment for any of the causes in § 1035.5(a)(1).

§ 1035.11 Period of debarment and suspension.

(a) The duration of a period of debarment imposed under this part shall be commensurate with the seriousness of the cause(s). Generally, a debarment should not exceed three years. If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period. The Director may extend the debarment for an additional period if the Director determines that an extension is necessary to protect the Government's interest. However, the Director may not extend a debarment solely on the basis of the facts and circumstances upon which the initial debarment action was based. the Director shall follow the procedures in §§1035.6 and 1035.8 to extend the debarment.

(b) Suspension shall remain in effect pending completion of investigation and any ensuing legal proceedings, unless sooner terminated by the Director or as provided in this paragraph. If legal proceedings are not initiated within 12 months after the date of the suspension notice, the Director shall terminate the suspension unless the Department of Justice requests an extension, in which case the Director may extend the suspension for an additional six months. If legal proceedings are initiated before the period of suspension expires, the suspension may continue until legal proceedings are concluded. The Director shall notify the Department of Justice of a proposed termination of the suspension at least 30 days before the 12-month period expires to give that agency an opportunity to request an extension.

(c) At any time during a period of suspension, proposed debarment, or debarment, a respondent may submit to the Director a written request for reconsideration of the scope, duration, or effects of the debarment/suspension action because of new information or changed circumstances such as:

(1) Newly discovered material evidence;

(2) Dismissal of the indictment or reversal of the conviction or judgment upon which the suspension/debarment action was based;

(3) Bona fide change in ownership (including dissolution of the business organization) or management;

(4) Elimination of other causes for which the debarment/suspension was imposed; or

(5) Other reasons the Director deems appropriate such as restitution and other actions in mitigation.

In reviewing a request for reconsideration, the Director may, in his or her discretion, utilize any of the procedures (meeting and factfinding conference) set forth in § 1035.8. The Director's final disposition of the reconsideration request shall be in writing and shall set forth the reasons why the request has been granted or denied. A notice transmitting a copy of the final decision shall be sent to the respondent and, if a factfinding conference under § 1035.8 is pending, a copy shall be transmitted to the fact-finding panel.

§ 1035.12 Scope of debarment and suspension.

Debarment or suspension of an awardee or affiliate under this part constitutes debarment or suspension of all divisions or other organizational elements of the awardee or affiliate for all DOE agreements and subagreements, and debarment or suspension of a contractor or affiliate under FAR Subpart 9.4 constitutes debarment or suspension of all divisions or other organizational elements of the contractor or affiliate for all executive branch procurement contracts and subcontracts unless the debarment or suspension decision is limited by its term to one or more specifically identified individuals or organizational elements (§ 1035.9(a)(10)) and/or to specific agreement types (§ 1035.9(a)(11)). For purposes of determining the scope of debarment and suspension, conduct may be imputed as follows:

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an awardee may be imputed to the awardee when the conduct occurred in connection with the individual's performance of duties for or on behalf of the awardee, or with the awardee's knowledge, approval, or acquiescence. The awardee's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of an awardee may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the awardee who participated in, knew of, or had reason to know of the awardee's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one awardee participating in a joint venture or similar arrangement may be imputed to other participating organizations or individuals if the conduct occurred for or on behalf of the joint venture or similar arrangement or with the knowledge, approval, or acquiescence of those organizations or individuals. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

[49 FR 4318, Feb. 3, 1984, as amended at 49 FR 18734, May 2, 1984]

§ 1035.13 Effects of being listed on the DOE and GSA Lists.

The Director may waive the prohibitions of paragraphs (a) through (e) of this section by issuing a written determination setting forth the compelling reasons justifying the waiver.

(a) DOE shall not solicit, or consider, and shall return any proposal submitted by a contractor or awardee on the DOE List or a contractor on the GSA List, to the extent that the solicitation activity or proposal falls within the scope of the suspension, proposed debarment, debarment, ineligibility of voluntary exclusion, as indicated on the DOE or GSA List.

(b) DOE shall not award, extend, or renew any agreement with an awardee on the DOE List or any procurement contract with a contractor on the GSA List, to the extent that the activity falls within the scope of the suspension, proposed debarment, debarment, ineligibility of voluntary exclusion, as indicated on the DOE or GSA List.

(c) DOE shall not approve or consent ot the award, extension, or renewal of a subagreement with a contractor or awardee on the DOE List and shall not approve or consent to the award, extension, or renewal of a subcontract with a contractor on the GSA List, to the extent that the award falls within the scope of the suspension, proposed debarment, debarment, ineligibility or voluntary exclusion.

(d) DOE may disapprove or not consent to the selection (by an awardee) of an individual to serve as a principal investigator, as a project manager, in a position of responsibility for the administration of Federal funds, or in another key personnel position, if the individual is on the DOE or GSA List.

(e) DOE shall not conduct business with an agent or representative of a contractor or awardee if the agent's or representative's name appears on the DOE or GSA List.

(f) DOE shall review existing agreements and may initiate a review of any subagreements with a contractor or awardee on the DOE List or a contractor on the GSA List for the purpose of determining whether termination or other remedial action available under the terms of the agreement, subagreement, or applicable law, is necessary to protect the Government's interest.

(g) DOE shall review the DOE and GSA Lists before conducting a preaward survey or soliciting proposals, awarding agreements, renewing or otherwise extending the duration of existing agreements, or approving or consenting to the award, extension, or renewal of subagreements.

§ 1035.14 Notification of GSA.

Within five working days after debarring or suspending a contractor or affiliate from procurement contracting and subcontracting in accordance with FAR Subpart 9.4 or modifying or rescinding such an action, the Director shall transmit the information set forth in § 1035.15 to GSA.

[49 FR 18734, May 2, 1984]

§ 1035.15 DOE consolidated list of debarred, suspended, ineligible, and voluntarily excluded awardees.

The Director shall compile and maintain a list of awardees and affiliates who are currently suspended, proposed for debarment, debarred, or voluntarily excluded under this part and 10 CFR Part 1036. The DOE List shall contain the following information at a minimum:

(a) The awardee's or affiliate's name and address;

(b) The causes(s) relied upon under this part and, as applicable, under FAR Subpart 9.4 for each action (see § 1035.5);

(c) The effect of each action (see § 1035.13);

(d) The effective date of the action and, in the case of debarment, the expiration date; and

(e) The name and telephone number of the DOE official who can be contacted for additional information about the action.

[49 FR 4318, Feb. 3, 1984, as amended at 53 FR 38940, Oct. 4, 1988]

APPENDIX A—RULES FOR FACT-FINDING CONFERENCES

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PREFACE

1. Scope

These rules are issued pursuant to the Department of Energy rules governing debarment and suspension (the DOE Rules), 10 CFR Part 1035, Debarment and Suspension (Procurement), specifically 1035.8(d)(4) and 10 CFR Part 1036 Debarment and Suspension (Nonprocurement), specifically 1036.600(d)(4). These rules establish procedures for the conduct of factfinding conferences held pursuant to 10 CFR 1035.8 and 1036.600.

2. General Guidelines

(a) These rules for fact-finding conferences are intended to be as informal as practicable, consistent with the principles of fundamental fairness, prompt decisionmaking, and with the evidentiary standards for suspension and debarment.

(b) These rules may be interpreted and applied by the fact-finding panel as necessary to assure fairness and expeditious decisionmaking in suspension and debarment cases. The panel may establish specific procedures as necessary for conferences on a case-by-case basis, provided, however, that such procedures are consistent with the DOE Rules and these rules.

(c) With the exception of Rule 7(d), each specified time is a maximum and need not be fully used if the parties or the fact-finding panel can meet the stated requirements or carry out required actions within a shorter time period.

3. Definitions

(a) The following terms have the same meaning for purposes of these rules as they have in the DOE Rules: Adequate evidence, debarment, Director, DOE, notice, preponderance of the evidence, respondent, and suspension (all defined in § 1035.4 and § 1036.105 of the DOE Rules); and fact-finding panel and timely (defined in § 1035.9(a) and § 1036.600(a) of the DOE Rules).

(b) In addition, the following terms and their meanings are used in these rules:

(1) *Director's counsel:* The General Counsel of the DOE or designee, designated by the Director to represent him or her at the fact-finding conference.

(2) *DOE Rules:* The DOE regulations at 10 CFR Part 1035, Suspension and Debarment (Procurement), and 10 CFR Part 1036, Suspension and Debarment (Nonprocurement). Reference to "§ 1035."or "§ 1036." refers to sections of the DOE Rules.

(3) *In camera:* A meeting of the fact-finding panel, held for the inspection of evidence or the examination of witnesses, from which the respondent and his or her counsel, and the public, are excluded.

(4) *FERC:* The Federal Energy Regulatory Commission.

(5) *General Counsel:* The General Counsel of the DOE or designee.

(6) *The parties:* The respondent and his or her attorney, if one was retained, and the Director's counsel.

(7) *Relevant evidence:* Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(8) *Dispute as to a material fact:* A disagreement between the Director and the respondent as to the accuracy of an assertion in a suspension or a proposed debarment which, if resolved in the respondent's favor, would affect the action taken by the Director.

Rule 1. Request for Fact-Finding Conference

(a) *To whom addressed.* A request for a fact-finding conference pursuant to § 1035.8 or § 1036.600, as applicable, of the DOE Rules should be addressed to the Director, Procurement and Assistance Management Directorate, MA-4, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, D.C. 20585.

(b) *Timing.* A request for a fact-finding conference must be submitted—

(1) No later than 30 days after the date of a notice of suspension or proposed debarment issued under § 1035.6 or § 1036.312, or § 1036.411, as applicable, of the DOE Rules, on or before any later date that may be specified in the notice; or

(2) If a meeting was held pursuant to § 1035.8(c) or § 1036.600(c), as applicable, within two weeks of receipt of the notice provided under § 1035.8(c)(3) or § 1036.600(c)(3), as applicable, identifying the participants, summarizing the meeting and describing the documents submitted and the Director's intended action.

(c) *Content.* A request for a fact-finding conference shall, in addition to the request itself—

(1) Identify the notice of suspension or proposed debarment;

(2) Identify any disputed material facts and specify the evidence that puts those facts into dispute;

(3) Describe any information and argument in opposition to the suspension or proposed debarment upon which the respondent intends to rely;

(4) Describe any mitigating factors the Director is asked to consider and the effect those factors should have on the Director's final decision; and

(5) Be signed by the respondent personally, in the case of an individual; or by an officer of a corporation or a member of a partnership or joint venture; or by the respondent's attorney.

Rule 2. Director's Determination

The Director will review the respondent's written request and, if a meeting was held pursuant to § 1035.8(c) or § 1036.600(c), as applicable, the DOE Rules, any account or notes the Director made of that meeting. The Director may request that additional information be provided, either in writing or at a meeting held in accordance with § 1035.8(c) or § 1036.600(c), as applicable,. Based on this review, the Director will determine whether material facts are in dispute.

(a) If the Director determines that the respondent has not established that material facts are in dispute, the Director will so notify the respondent in the manner prescribed by § 1035.8(c)(3) or § 1036.600(c)(3), as applicable,. The notification will include a statement describing the action the Director has taken or proposes to take.

(b) If the Director determines that material facts are in dispute, he or she will—

(1) Prepare a Notice of Determination that identifies the respondent(s), the material facts determined to be in dispute, and the case number assigned by the Director; and

(2) Appoint and refer the case to a fact-finding panel as described in Rule 3. The entire case or any aspect of it may be referred to a panel for fact-finding.

Rule 3. Fact-Finding Panel: Appointment

The fact-finding panel will be composed of three members appointed by the Director as set forth below. No one may be appointed to the panel who has been involved in any transaction from which the suspension or proposed debarment arose, or who has participated in the decision to impose a suspension or propose a debarment. Upon appointment, the panel members will select a chairperson from among themselves.

(a) *Procurement member.* This member will be an office director within the Procurement and Assistance Management Directorate.

(b) *Legal member.* This member will be a senior attorney of the DOE, nominated by the General Counsel. He or she shall be an attorney of the FERC is the suspension or proposed debarment arose from transaction(s) with the FERC.

(c) *Program or other office member.* This member will be a Senior Executive Service official of a program or other office of the DOE. He or she shall be an official of the FERC is the suspension or proposed debarment arose from transaction(s) with the FERC.

Rule 4. Fact-Finding Panel; Referral

The Director's referral to the fact-finding panel will include the following:

(a) A copy of the notice of suspension or proposed debarment;

(b) The respondent's written response;

(c) If a meeting was held pursuant to § 1035.8(c) or § 1036.600(c), as applicable, a copy of the notice provided to the respondent under § 1035.8(c)(3) or § 1036.600(c)(3), as applicable, and

(d) A copy of the Director's Notice of Determination as described in Rule 2(b)(1).

Rule 5. Fact-Finding Conference; Notice to the Parties

The chairperson of the panel shall promptly notify the respondent in writing that the Director has appointed the fact-finding panel and that a fact-finding conference will be held. This notice will include the following:

(a) The names, titles, and addresses of the panel members, including identification of the chairperson, whose address will be used for all filings by the parties.

(b) The name, title, address, and telephone number of the Director's counsel;

(c) A copy of the Director's Notice of Determination as described in Rule 2(b)(1);

(d) An invitation to propose a date, time, and place for the fact-finding conference;

(e) A statement that any request for discovery to be made pursuant to Rule 10 should be made at the time the conference is scheduled; and

(f) A copy of these rules.

Rule 6. Fact-Finding Conference; Representation

(a) *Director's counsel.* The Director's counsel may be an attorney who has been involved in the transaction(s) from which the suspension or proposed debarment arose, including participation in the decision to impose a suspension or propose debarment. The Director's counsel shall file a written appearance with the fact-finding panel and shall serve a copy on the respondent or the respondent's attorney, in the manner prescribed by Rule 8.

(b) *Respondent.* At the conference, an individual respondent may appear in person, a corporation may be represented by one of its officers, and a partnership or joint venture may be represented by one of its members; or any of these may be represented by an attorney at law duly licensed in any State, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing a respondent shall file a written appearance with the fact-finding panel and serve a copy on the Director's counsel, in the manner prescribed by Rule 8.

Rule 7. Fact-Finding Conference; Date, Time, and Place

The fact-finding conference will be scheduled for a date, time and place agreed upon by the panel, the respondent or respondent's counsel, and the Director's counsel; in the event of a disagreement, the fact-finding panel will have final discretion as to scheduling a conference.

(a) The place will ordinarily be the Washington, D.C., area.

(b) Any request for discovery pursuant to Rule 10 should be made at the time that the fact-finding conference is scheduled. If discovery is permitted, the conference date will be adjusted accordingly.

(c) The panel may reschedule, postpone, extend, or reopen a conference, at its own initiative or at the written request of respondent or respondent's counsel or the Director's counsel, for good cause shown and after consultation with the parties.

(d) The panel will notify the parties in writing at least 15 days in advance of the date, time, and place of the first fact-finding conference session. Changes in scheduling may be made orally, either in person or by telephone, but must be promptly confirmed in writing.

Rule 8. Fact-Finding Panel; Filing and Service of Papers

(a) Documents filed with the panel shall be typed on plain, white, 8½" x 11" paper. If more than one (1) page in length, documents shall be double spaced.

(b) Each document filed with the panel shall begin with a caption identifying the respondent(s) and the case number assigned by the Director, and briefly describing the nature of the document.

(c) An original and three copies of each document shall be filed with the panel to the attention of the chairperson, at the chairperson's address as stated in the notice provided under Rule 5(a).

(d) Except for documents that may not be disclosed to the respondent pursuant to § 1035.7 of the DOE Rules, each document filed with the panel shall be served on the other party or parties and shall be accompanied by a statement, signed by the originating party, of when, how, and to whom a copy was served.

(e) Documents may be served or filed either by hand delivery, by commercial delivery service, or by mail.

Rule 9. Preliminary Administrative Record

At least 10 days before the fact-finding conference date, the Director shall file with the fact-finding panel, serve on the respondent or respondent's counsel, and provide to the Director's counsel a copy of the administrative record as of the date of transmittal. The copy served on the respondent shall not include any documents which, as provided in § 1035.7 or § 1036.605, as applicable, of the DOE Rules, may not be disclosed to the respondent; the copy filed with the fact-finding panel shall identify which documents must be sealed and viewed by the fact-finding panel only *in camera*, as provided in § 1035.7 or § 1036.605, as applicable, of the DOE Rules.

Rule 10. Discovery

(a) *General.* Because the respondent will be provided with a notice, pursuant to §1035.6 of the DOE rules, of the reasons for the suspension or proposed debarment and the causes relied upon by the Director, and a copy of the administrative record, and in the interest of keeping the procedures as informal as possible, discovery will generally not be permitted.

(b) *Exceptions.* Depositions or interrogatories will be permitted, in the sole discretion of the fact-finding panel—

(1) Upon a showing satisfactory to the fact-finding panel that the person from whom a deposition or interrogatory is sought will not be available in person for the fact-finding conference; or

(2) Upon a written showing by either party that discovery is absolutely essential to presentation of the case and would produce information or evidence that is relevant, is not otherwise available, and that, if admitted, could change the outcome of the case.

(c) Discovery, if permitted, will be subject to the terms and conditions set by the fact-finding panel.

Rule 11. Preconference Memoranda

Five days before the fact-finding conference, the Director's counsel and the respondent or his or her counsel shall file with the fact-finding panel and serve on each other memoranda outlining the evidence they will present, identifying any witnesses they will call at the fact-finding conference, and summarizing the testimony each witness will present. No request for discovery will be granted after the date preconference memoranda are due. Requests for discovery based on changed circumstances shall be treated as requests for reconsideration under § 1035.11(c) of the DOE Rules and Rule 24.

Rule 12. Fact-Finding Conference

(a) *Purpose.* The purposes of a fact-finding conference are to—

(1) Provide the respondent an opportunity to dispute material facts within scope of the Director's referral, and to make arguments related to a suspension or proposed debarment; and

(2) Provide the Director with proposed findings of fact based on adequate evidence in the case of a suspension, and on a preponderance of the evidence in the case of a proposed debarment.

(b) *Scope.* The factual issues considered at the fact-finding conference shall be limited to those identified in the Director's referral and any amendments thereto filed by the Director. The panel may consider questions of law only to the extent necessary to resolve the questions of fact that were referred to it.

13. Unexcused Absence of Parties

The unexcused absence of either party or its representative at the time and place set for the fact-finding conference will not be occasion for delay. If either party is absent without excuse, the fact-finding panel will proceed to review the case on the basis of the administrative record and the written submission(s) under Rule 11.

Rule 14. Requirement for Presence of a Quorum of the Fact-Finding Panel

(a) A quorum consisting of two of the three members of the fact-finding panel must be present at the fact-finding conference if a transcript is being made pursuant to §1035.8 (d)(7) or § 1036.600(d)(7), as applicable, and Rule 15(e).

(b) If no transcript is being made, all three members must be present.

(c) If the requisite number of members is not present the chairperson of the panel shall reschedule the conference, giving due consideration to the nature of the case and the views of the parties.

Rule 15. Fact-Finding Conference; Nature and Standards of Evidence

(a) *Nature.* The fact-finding conference shall be as informal as is reasonable and appropriate under the circumstances.

(b) *Admissibility of evidence.* (1) The parties may offer such relevant evidence, within the scope of the Director's referral, as they consider appropriate, reliable, and probative. Admission of evidence will be in the sound discretion of the fact-finding panel, and, as provided in § 1035.8(d)(6) or § 1036.600(d)(6) as applicable, only evidence that is relevant to the issues referred to the panel and that is reliable and probative shall be admissible.

(2) The fact-finding panel may require a party to answer questions, admit or deny facts, or produce evidence in addition to that offered by the parties, before, during, or after the conference, until the record is closed.

(c) *Stipulated testimony, affidavits, depositions, and answers to interrogatories.* The parties may stipulate the testimony that would be given by a witness if the witness were present. Affidavits and, if discovery were permitted pursuant to Rule 10(b), depositions and answers to interrogatories, may be used to supplement the testimony presented at the conference; *provided, however,* that affidavits, depositions, and answers to interrogatories shall not be considered unless received into evidence.

(d) *In camera evidence.* Evidence that is to be withheld from the respondent pursuant to § 1035.7 or § 1036.605, as applicable, of the DOE Rules may be presented by the Director's counsel at any point in the fact-finding conference. When the Director's counsel wishes to present such evidence, he or she will inform the panel, who will direct that everyone except the panel, the Director's counsel, and the transcriber, if any, leave the conference room while the evidence is presented. Evidence presented *in camera* will be included in the record, but, as provided in paragraph (e) of this Rule, will not be made available to the respondent.

(e) *Transcript.* The fact-finding panel shall make a transcribed record of the fact-finding conference, unless the Director and the respondent agree to waive the requirement for a transcript as provided for in § 1035.8(d)(7) and § 1036.600(d)(7). The transcript will be made available at cost to the respondent after the conference; *provided, however,* that any *in camera* testimony or evidence will be excised from the transcript and not provided to the respondent.

Rule 16. Fact-Finding Conference: Examination of Witnesses

(a) Witnesses at the fact-finding conference will not be examined under oath or affirmation, but will be advised by the fact-finding panel that their statements are made subject to 18 U.S.C. 287 and 1001 and any other provision of law imposing penalties for knowingly making false representations in any matter within the jurisdiction of any department or agency of the United States.

(b) Both direct and cross-examination of witnesses by the parties will be permitted. Members of the fact-finding panel may question each witness during or after their direct or cross examination.

Rule 17. Fact-Finding Conference: Voluntary Cooperation

Each party is expected—

(a) To cooperate and make available witnesses and evidence under its control as requested by the other party or by the fact-finding panel; and

(b) To secure voluntary production of desired books, papers, documents, or other tangible things in the custody of third parties (unless the third party is a law enforcement official) whenever possible. Failure by either party to cooperate, and the effect of that failure on the panel's ability to carry out its work, will be noted by the fact-finding panel in its report to the Director.

Rule 18. Copies of Papers

When books, records, papers, or documents have been received in evidence, a true copy of the whole or the relevant part may be substituted, either at the conference or at the conclusion of the conference. Parties may stipulate to the authenticity of original documents and to copies, and to the truth of matters stated therein.

Rule 19. Post-Conference Briefs

Twenty days after the conference, the parties shall file with the fact-finding panel and serve on each other post-conference briefs stating their respective positions on the factual and legal merits of the case and setting forth purposed findings of fact. The length of post-conference briefs will be determined by the fact-finding panel, giving due consideration to the nature and scope of the evidence and arguments in the fact-finding conference record. The conference shall be closed at the deadline for post-conference briefs.

Rule 20. Settling the Record

(a) The record on which the fact-finding panel will base its report to the Director will consist of the administrative record as provided to the respondent pursuant to Rule 9; the preconference memoranda filed with the fact-finding panel pursuant to Rule 11; the documents, papers, and exhibits admitted in evidence; the transcript of the conference; and the post-conference briefs submitted pursuant to Rule 16.

(b) The fact-finding panel shall exercise sound discretion in determining the weight to be attached to any evidence of record.

(c) Generally, no additional evidence will be admitted after the conference record has been closed. A request for the submission and consideration of additional evidence will be treated as a request for reconsideration under § 1035.11(c) or § 1036.320 or § 1036.415, as applicable of the DOE Rules and Rule 24. Accordingly, such a request must be submitted to the Director.

Rule 21. Ex Parte Communications

No member of the panel shall receive, nor shall the Director or any party or person directly or indirectly involved in the fact-finding conference submit to the panel any off-the-record evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue. This prohibition does not apply to consultation among panel members, to communications concerning the panel's administrative functions or procedures, or to the panel's receipt and consideration of *in camera* evidence received pursuant to Rule 15(d). Panel members shall make a written report for the record of any attempted or completed *ex parte* communication. A copy of the report shall be transmitted immediately to the parties and to the Director.

Rule 22. Fact-Finding Panel's Report to the Director

(a) Within 30 days after the conference record is closed, the fact-finding panel shall transmit to the respondent, by notice, to the Director's counsel, and to the Director a written report setting forth proposed findings of fact. The report shall include the following:

(1) A caption identifying the respondent(s) and the case number;

(2) A procedural history of the case, including—

(i) The date and basis of the Director's initial suspension or proposed debarment of the respondent;

(ii) A summary of the respondent's written response;

(iii) A summary of the meeting, if one was held pursuant to § 1035.8(c) or § 1036.600(c), as applicable, of the DOE rules; and

(iv) A summary of the respondent's request for a fact-finding conference.

(3) Identification of the parties and their counsel;

(4) The material facts determined by the Director to have been in dispute;

(5) The versions of the disputed material facts asserted by the respondent and by the Director's counsel;

(6) The names and addresses of each party's witnesses;

(7) A description of the testimony, exhibits, and other evidence admitted by the panel;

(8) A description of any *in camera* evidence presented pursuant to § 1035.7 or § 1036.605, as applicable and Rules 9 and 15(d); this portion of the report shall be excised from the copy provided to the respondent;

(9) Any legal arguments made by the parties;

(10) A discussion of any legal issues that were addressed by the panel in the course of its fact-finding;

(11) The fact-finding panel's proposed findings of fact; and

(12) The signature of each member of the fact-finding panel who agrees with the report's findings.

(b) Any member of the panel may write and submit to the Director and the parties a separate report either dissenting from the majority report or concurring but expressing differing views. Separate reports shall be signed by their authors or proponents.

Rule 23. Parties' Review of the Report; Exceptions

(a) The parties shall have 20 days from receipt of the fact-finding panel's report to submit to the Director written exceptions to the panel's report, including any separate reports. Each party shall serve a copy of its exceptions, if any, on the other.

(b) Exceptions shall be filed with the Director in the form and manner specified by Rule 8 (a), (c), and (d).

(c) The basis for any exceptions shall be set forth specifically, and proposed alternative language shall be provided. The parties may take exception to any aspect of either the panel's majority report or any separate report, or to the panel's exclusion of evidence at the fact-finding conference.

Rule 24. Request for Reconsideration

As provided in § 1035.11(c) or § 1036.320(c), as applicable, of the DOE Rules, the respondent may submit to the Director at any time a request for reconsideration of the scope, duration, or effects of a suspension or debarment because of new information or changed circumstances. The Director will review the request and make a determination as provided in § 1035.11(c) or § 1036.320(c), as applicable.

(a) If the conference has not been closed, the Director will transmit the determination to the panel, which will alter the scope and schedule of the conference accordingly.

(b) If a request is submitted after the conference record has been closed but before the Director's final decision, the Director will transmit the determination to the panel, with instructions to the panel to reopen the conference or revise its report as appropriate.

(c) Requests for discovery made after the filing of preconference memoranda and requests for the introduction of additional evidence after the conference record has closed shall be made and will be addressed under this Rule 24.

[49 FR 41234, Oct. 22, 1984, as amended at 53 FR 38940, Oct. 4, 1988]

PART 1036—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

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APPENDIX A TO PART 1036—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS
APPENDIX B TO PART 1036—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS
APPENDIX C TO PART 1036—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

AUTHORITY: E.O. 12549; Sec. 5151-5160 of the Drug-Free Workplace Act of 1988(Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 et seq.); Secs. 644 and 646, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7254 and 7256); Pub. L. 97-258, 98 Stat. 1003-1005(31 U.S.C.) 6301-6308.

SOURCE: 53 FR 19204, May 26, 1988, unless otherwise noted.

EDITORIAL NOTE 1: Nomenclature changes affecting this part appear at 53 FR 19204, May 26, 1988.

EDITORIAL NOTE 2: For additional information, see related documents published at 52 FR 20360, May 29, 1987, 53 FR 19160, May 26, 1988, 53 FR 34474, September 6, 1988 and 55 FR 21688, May 25, 1990.

Subpart A—General

§ 1036.100 Purpose.

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of Executive Order 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the Executive Order by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of "ineligible" in § 1036.105(i)), and participants who have voluntarily excluded themselves from participation in covered transactions

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

§ 1036.105 Definitions.

(a) *Adequate evidence.* Information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliate.* Persons are affiliates of each another if, directly or indirectly, either one controls or has the power to control the other, *or,* a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

(c) *Agency.* Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

(d) *Civil judgment.* The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

(e) *Conviction.* A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

(f) *Debarment.* An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is "debarred."

(g) *Debarring official.* An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) The DOE debarring official is the Director, Procurement and Assistance Management Directorate.

(h) *Indictment.* Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

(i) *Ineligible.* Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations, for exemple, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

(j) *Legal proceedings.* Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State of local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

(k) *Nonprocurement List.* The portion of the *List of Parties Excluded from Federal Procurement or Nonprocurement Programs* complied, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(l) *Notice.* A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

(m) *Participant.* Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

(n) *Person.* Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

(o) *Preponderance of the evidence.* Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(p) *Principal.* Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

(q) *Proposal.* A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

(r) *Respondent.* A person against whom a debarment or suspension action has been initiated.

(s) *State.* Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

(t) *Suspending official.* An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) The DOE suspending official is the Director, Procurement and Assistance Management Directorate.

(u) *Suspension.* An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

(v) *Voluntary exclusion or voluntarily excluded.* A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

(w) *Awardee.* Any organization or individual that:

(1) Submits proposals for, or is awarded, or reasonably may be expected to submit proposals for, or be awarded a DOE agreement; or

(2) Conducts business with DOE as an agent or representative of an awardee.

(x) *Director.* The Director, Procurement and Assistance Management Directorate, DOE.

(y) *DOE.* The Department of Energy, including the Federal Energy Regulatory Commission.

(z) *DOE List.* The DOE Consolidated List of Debarred, Suspended, Ineligible and Voluntarily Excluded Awardees maintained by DOE in accordance with § 1036.610 of this part and 10 CFR 1035.15.

[53 FR 19204, May 26, 1988, as amended at 53 FR 19172, May 26, 1988]

§ 1036.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as "covered transactions."

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(*1*) Principal investigators.

(*2*) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action,"

§ 1036.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in § 1036.110(a). Sections 1036.325, "Scope of debarment," and 1036.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* Debarment and suspension of Federal procurement contractors and subcontractors under Federal procurement contracts are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4.

(1) Debarment and suspension of DOE procurement contractors is covered by the rules in 10 CFR Part 1035.

[53 FR 19204, May 26, 1988 as amended at 53 FR 19173, May 26, 1988]

§ 1036.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

Subpart B—Effect of Action

§ 1036.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the executive branch of the Federal Government for the period of their debarment or suspension. Accordingly, no agency shall enter into primary covered transactions with such debarred or suspended persons during such period, except as permitted pursuant to § 1036.215.

(b) *Loser tier covered transactions.* Except to the extent prohibited by law, persons who have been debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see § 1036.110(a)(1)(ii)) for the period of their debarment or suspension.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for:

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

§ 1036.205 Ineligible persons.

Persons who are ineligible, as defined in § 1036.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§ 1036.210 Voluntary exclusion.

Persons who accept voluntary exclusions under § 1036.315 are excluded in accordance with the terms of their settlements. DOE shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§ 1036.215 Exception provision.

DOE may grant an exception permitting a debarred, suspended, or voluntarily excluded person to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and § 1036.200 of this rule. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with § 1036.505(a).

(a) The DOE authorized designee is the Director, Procurement and Assistance Management Directorate.

[53 FR 19204, May 26, 1988 as amended at 53 FR 19173, May 26, 1988]

§ 1036.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible, or voluntarily excluded, except as provided in § 1036.215.

§ 1036.225 Failure to adhere to restrictions.

Except as permitted under § 1036.215 or § 1036.220 of these regulations, a participant shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. Violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies, as appropriate. A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction (see Appendix B), unless it knows that the certification is erroneous. An agency has the burden of proof that such participant did knowingly do business with such a person.

Subpart C—Debarment

§ 1036.300 General.

The debarring official may debar a person for any of the causes in § 1036.305, using procedures established in §§ 1036.310 through 1036.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§ 1036.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 1036.300 through 1036.314 for:

(a) Conviction of or civil judgment for:

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(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 1036.215 or § 1036.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 1036.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of Subpart F of this part, relating to providing a drug-free workplace, as set forth in § 1036.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[53 FR 19204, May 26, 1988, as amended at 54 FR 4950 and 4952, Jan. 31, 1989]

§ 1036.310 Procedures.

DOE shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§ 1036.311 through 1036.314.

§ 1036.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

§ 1036.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(1) The notice shall omit any information which, if disclosed, would prejudice an ongoing civil or criminal investigation or a pending or contemplated legal proceeding, or would compromise national security;

(c) Of the cause(s) relied upon under § 1036.305 for proposing debarment;

(d) Of the provisions of § 1036.311 through § 1036.314, and any other DOE procedures, if applicable, governing debarment decisionmaking; and

(1) The notice shall cite the DOE procedures in § 1036.600; and

(e) Of the potential effect of a debarment.

(1) If a notice of proposed debarment is issued to a person or affiliate who is not suspended, the notice shall state that, for purposes of affected DOE agreements and subagreements, the proposed debarment shall have the effect of a suspension for DOE only.

(f) That within 30 days after receipt of the notice, the respondent may submit, or make a written request for an opportunity to submit, to the Director or designee, information and argument in opposition to the proposed debarment, including any additional specific information that may raise a genuine dispute over the material facts. The submission in opposition may be made in person, in writing or through a representative; and

(g) That the respondent's name and address have been placed on the DOE List.

[53 FR 19204, May 26, 1988 as amended at 53 FR 19173, May 26, 1988]

§ 1036.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(1) A request for a meeting should be sent to the Director. (See § 1036.600(c).)

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

[53 FR 19204, May 26, 1988 as amended at 53 FR 19173, May 26, 1988]

§ 1036.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in § 1036.215.

(v) Advising whether the decision limits the debarment or suspension action to affected covered transactions involving particular commodities, products, services, or forms of energy, or to projects or work performed in specified geographic regions;

(vi) Stating the names and addresses of the respondents that will be placed on the DOE List;

(vii) Stating that a copy of the debarment notice was sent to GSA and that the respondent's name and address will be added to the Nonprocurement List; and

(viii) Advising that if less than an entire organization is debarred, the identity or description of the organizational element(s) included within the scope of the debarment.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

[53 FR 19204, May 26, 1988 as amended at 53 FR 19173, May 26, 1988]

§ 1036.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, DOE may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see Subpart E).

(c) At any time prior to the issuance of a final decision under § 1036.314, the Director may, in the public interest, agree, in writing, to terminate a suspension or withdraw a proposed debarment on the conditions that the respondent voluntarily refrain from attempting to obtain, and from entering into, one or more types of DOE or other Federal covered transactions. Failure to observe such conditions shall be an independent cause for debarment or suspension. The name and address of the respondent who is a party to a voluntary exclusion shall be placed on the DOE List and the GSA List. The Director shall not enter into a voluntary exclusion if the proposed debarment is based on conviction of or civil judgment for any of the causes in § 1036.305(a), or if the suspension was based on an indictment for any of the causes in § 1036.305(a).

[53 FR 19204, May 26, 1988 as amended at 53 FR 19173, May 26, 1988]

§ 1036.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of Subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of Subpart F of this part (see 1036.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§ 1036.311 through 1036.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

[53 FR 19204, May 26, 1988, as amended at 54 FR 4950 and 4953, Jan. 31, 1989]

§ 1036.325 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§ 1036.311 through 1036.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Subpart D—Suspension

§ 1036.400 General.

(a) The suspending official may suspend a person for any of the causes in § 1036.405 using procedures established in §§ 1036.410 through 1036.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in § 1036.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§ 1036.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 1036.400 through 1036.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 1036.305(a); or

(2) That a cause for debarment under § 1036.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 1036.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* DOE shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in § 1036.411 through § 1036.413.

§ 1036.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(1) That the notice shall omit any information which, if disclosed, would prejudice an ongoing civil or criminal investigation or a pending or contemplated legal proceeding, or would compromise national security;

(d) Of the cause(s) relied upon under § 1036.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of § 1036.411 through § 1036.413 and any other [DOE] procedures, if applicable, governing suspension decisionmaking; and

(1) The notice shall cite the DOE procedures in § 1036.600; and

(g) Of the effect of the suspension.

(h) That within 30 days after receipt of the notice, the respondent may submit, or make a written request for an opportunity to submit, to the Director or designee, information and argument in opposition to the suspension, including any additional specific information that may raise a genuine dispute over the material facts. The submission in opposition may be made in person, in writing, or through a representative.

(i) That the suspension is effective as of the date of the notice.

(j) That the respondent's name and address have been placed on the DOE List.

[53 FR 19204, May 26, 1988 as amended at 53 FR 19173, May 26, 1988]

§ 1036.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(1) A request for a meeting should be sent to the Director. (See § 1036.600(c)).

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the re-

spondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

[53 FR 19204, May 26, 1988 as amended at 53 FR 19173, May 26, 1988]

§ 1036.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 1036.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

§ 1036.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 1036.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 1036.325), except that the procedures of §§ 1036.410 through 1036.413 shall be used in imposing a suspension.

Subpart E—Responsibilities of GSA, Agency and Participants

§ 1036.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross references

when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§ 1036.505 DOE responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which DOE has granted exceptions under § 1036.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in § 1036.500(b) and of the exceptions granted under § 36.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§ 1036.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in Appendix A to this Part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this Part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligiblity of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to DOE if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

Subpart F—Drug-Free Workplace Requirements (Grants)

SOURCE: 55 FR 21688 and 21691, May 25, 1990, unless otherwise noted.

§ 1036.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 1036.605 Definitions.

(a) Except as amended in this section, the definitions of § 1036.105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All "direct charge" employees;

(ii) All "indirect charge" employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management governmentwide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of

higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ 1036.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 1036.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under § 1036.630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of subparagraphs (A.) (a)-(g) and/or (B.) of the certification (Alternate I to appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ 1036.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 1036.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § 1036.320(a)(2) of this part).

§ 1036.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 1036.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace

certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§ 1036.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(Approved by the Office of Management and Budget under control number 0991-0002.)

Subpart G—Additional DOE Procedures for Debarment and Suspension

Source: 53 FR 19173, May 26, 1988, unless otherwise noted. Redesignated at 54 FR 4953, Jan. 31, 1989.

§ 1036.700 Decisionmaking.

(a) *Definitions.* (1) "Fact-finding panel" means a three-member panel appointed by the Director to conduct a fact-finding conference under paragraph (d) of this section. This panel shall consist of an office director within the Procurement and Assistance Management Directorate, a senior attorney nominated by the General Counsel or designee, and senior official of a program or other office of the Department.

(2) For purposes of this section, "timely" means mailed or delivered to the Director not later than 30 days after the date of the notice under § 1036.310(b)(1) or § 1036.410(b)(1) or on or before such later date as may be specified in the notice. If the postmark date is affixed by a postage meter and DOE receives the document more than five days after the postmark date, the date of receipt shall be used to determine timeliness.

(b) *Written response.* A timely written response to a notice of suspension or proposed debarment may contain any or all of the following:

(1) A request for a meeting with the Director or designee (§ 1036.700(c));

(2) A request for a fact-finding conference (§ 1036.700(d)); and

(3) Information and argument in opposition to the suspension or proposed debarment including identification of disputed material facts. If the respondent fails to submit a timely written response to notice of suspension or proposed debarment, the Director shall notify the respondent in accordance with § 1036.310(b)(6) or § 1036.410(b)(5) that the awardee remains suspended, or that the awardee is debarred, as applicable.

(c) *Meeting.* Upon receipt of a timely request therefore, the Director shall schedule a meeting with the Director or designee and the respondent, no later than 30 days from the date the request is received. The Director or designee may postpone the date of the meeting if the respondent requests a postponement in writing.

(1) At the meeting, the respondent, appearing personally or through an attorney or other authorized representative, may informally present and explain evidence that causes for suspension or debarment do not exist, evidence of any mitigating factors, and arguments concerning the imposition, scope, duration, or effects of a suspension, proposed debarment, or debarment. The respondent may offer or explain a previous offer to agree to a voluntary exlcusion (§ 1036.210) at the meeting.

(2) Any written information or arguments submitted at or in connection with the meeting shall be included in the administrative record. The Director shall not be required to make a transcript of the meeting unless there are disputed material facts.

(3) Within two weeks following the date of the meeting, the Director shall send a notice to the respondent containing the following information:

(i) Names, organizational affiliations, titles, addresses, and telephone numbers of all individuals who attended;

(ii) A brief description of each document submitted by the respondent;

(iii) A summary of the issues discussed; and

(iv) A statement describing the action the Director has taken or proposes to take.

(d) *Fact-finding conference.* The purposes of a fact-finding conference under this section are to provide the respondent an opportunity to dispute material facts and to make arguments related to a suspension or proposed debarment, and to provide the Director with proposed findings of fact based, as applicable, on adequate evidence or on a preponderance of the evidence.

(1) *Appointment of fact-finding panel and notice to respondent.* If the Director determines that a written response or a presentation at the meeting puts material facts in dispute, the Director shall appoint a fact-finding panel. (See § 1036.313(b)). Upon appointment, the panel shall notify the respondent that the case has been referred to the panel and shall schedule a fact-finding conference.

(2) *Appearances.* The Director may be represented at the fact-finding conference by the General Counsel or designee.

(3) *Scope of the fact-finding conference.* The factual issues considered at the conference shall be limited to those identified in the Director's referral and any amendments thereto filed by the Director.

(4) *Procedures.* The fact-finding conference shall be conducted in accordance with applicable procedural rules adopted by the General Counsel or designee. The procedural rules shall be as informal as practicable, consistent with the principles of fundamental fairness, prompt decisionmaking, and with the evidentiary standards for suspension and debarment. (See 10 CFR Part 1035, Appendix A—Rules for Fact-Finding Conferences.)

(5) *Preliminary administrative record.* At least 10 days before the fact-finding conference date, the Director shall file with the fact-finding panel, and mail or deliver to the respondent, a copy of the administrative record as of the date of the transmittal. The copy sent to the respondent shall not include any documents which, as provided in § 1035.7, may not be disclosed; the copy filed with the fact-finding panel shall identify which documents must be sealed and viewed by the fact-finding panel only in camera, as provided in § 1036.705.

(6) *Evidence and argument.* The respondent and the Director shall have the opportunity to submit documentary evidence, to examine and cross-examine witnesses, and to present argument. Only evidence which is relevant to the issues referred for the fact-finding conference and which is reliable and probative shall be admissible.

(7) *Transcript.* The fact-finding panel shall make a transcribed record of the fact-finding conference which shall be transmitted to the Director within 20 days after the hearing record is closed.

(8) *Fact-finding conference report.* Within 30 days after the conference record is closed, the fact-finding panel shall transmit to the respondent (by notice) and to the Director a written report setting forth proposed findings of fact. The findings shall resolve any disputes over material facts based on a preponderance of the evidence if the case involves a proposal to debar, or on adequate evidence if the case involves a suspension. The respondent shall have 30 days from receipt of the fact-finding panel's report to submit written exceptions to the Director.

(9) *Final decision.* If the final decision sustains a proposed debarment, the debarment may begin no earlier than ten days after the date of the notice of final decision a copy of which shall be transmitted to the fact-finding panel.

§ 1036.705 Coordination with Department of Justice.

Whenever a meeting or fact-finding conference is requested, under § 1036.700(b)(1) or (b)(2), the Director's legal representative shall obtain the advice of appropriate Department of Justice officials concerning the impact disclosure of evidence at the meeting or fact-finding conference could have on any pending civil or criminal investigation or legal proceeding. If such official requests in writing that evidence needed to establish the existence of a cause for suspension or proposed debarment not be disclosed to the respondent, the Director shall:

(a) Decline to rely on such evidence and withdraw (without prejudice) the suspension or proposed debarment until such time as disclosure of the evidence is authorized; or

(b) Rely on such evidence without disclosing it to the respondent. At the fact-finding conference, the Director shall make such evidence available for in-camera inspection to the fact-finding panel. Evidence submitted for in-camera inspection shall be part of the administrative record, but may not be disclosed to the respondent or any member of the public until release is authorized in writing by an appropriate Department of Justice official or until related legal proceedings are concluded, whichever occurs first.

§ 1036.710 DOE consolidated list of debarred, suspended, ineligible, and voluntarily excluded awardees.

The Director shall compile and maintain a list of persons and affiliates who are currently suspended, proposed for debarment, debarred, inelgible or voluntarily excluded under this part and 10 CFR Part 1035. The DOE List shall contain the following information at a minimum:

(a) The person's name and address;

(b) The cause(s) relied upon under this part;

(c) The effect on each action;

(d) The effective date of the action and, in the case of debarment, the expiration date; and

(e) The name and telephone number of the DOE official who can be contacted for additional information about the action.

§ 1036.715 Effects of being listed on the DOE and the nonprocurement lists.

The Director may grant an exception to the prohibitions of paragraphs (a) through (e) of this section by issuing a written determination setting forth the compelling reasons justifying the waiver in accordance with § 1036.215.

(a) DOE shall not solicit, or consider, and shall return any proposal submitted by a contractor, awardee, or person on the DOE List or a person on the Nonprocurement List, to the extent that the solicitation activity or proposal falls within the scope of the suspension, proposed debarment, debarment, ineligibility of voluntary exclusion, as indicated on the DOE List or Nonprocurement List.

(b) DOE shall not award, extend, renew any agreement or primary covered transaction with an awardee or person on the DOE List or on the Nonprocurement List, to the extent that the activity falls within the scope of the suspension, proposed debarment, debarment, ineligibility or voluntary exclusion, as indicated on the DOE List or Nonprocurement List.

(c) DOE shall not approve or consent to any new, continuation, renewal award or extension of a subagreement or lower tier covered transaction with a contractor, awardee, or person on the DOE List and shall not approve or consent to any new, continuation, renewal award or extension of a subagreement or lower tier covered transaction with a person on the Nonprocurement List, to the extent that the award falls within the scope of the suspension proposed debarment, debarment, ineligibility or voluntary exclusion.

(d) DOE shall disapprove or not consent to the selection (by an awardee or participant) or a individual or principal to serve as a principal investigator, as a project manager, in a position of responsibility for the administration of Federal funds, or in another key personnel position, if the individual is on the DOE List or the Nonprocurement List.

(e) DOE shall not conduct business with an agent or representative whose name appears on the DOE List or the Nonprocurement List.

(f) DOE shall review existing agreements and may initiate a review of any subagreements with a contractor, awardee or person on the DOE List or on the Nonprocurement List for the purpose of determining whether termination or other remedial action, available under the terms of the agreement, subagreement, or applicable law, is necessary to protect the Government's interest.

(g) DOE shall review the DOE List and the Nonprocurement List before conducting a preaward survey or soliciting proposals, making new, continuation, or renewal awards or otherwise extending the duration of existing agreements, or approving or consenting to the award, extension, or renewal of subagreements.

(h) DOE participants shall not award, extend, renew any agreement or lower tier covered transaction with an awardee or person that fails to complete the certification required by § 1036.510(b), or that the participant knows that the certification is false.

APPENDIX A TO PART 1036—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.

4. The prospective primary participant shall privide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State of local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Appendix B to Part 1036—Certification Regarding Debarment, Suspension, Ineligibilty and Voluntary Exclusion—Lower Tier Covered Transactions

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debar-

ment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

APPENDIX C TO PART 1036—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

"Controlled substance" means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

"Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

"Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

"Employee" means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All "direct charge" employees; (ii) all "indirect charge" employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

____

____

____

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

[55 FR 21690 and 21691, May 25, 1990]

PART 1039—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

Authority: Section 213, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, 84 Stat. 1894 (42 U.S.C. 4601) as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Title IV of Pub. L. 100-17, 101 Stat. 246-256 (42 U.S.C. 4601 note).

§ 1039.1 Uniform relocation assistance and real property acquisition.

Regulations and procedures for complying with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91-646, 84 Stat. 1894, 42 U.S.C. 4601), as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Title IV of Pub. L. 100-17, 101 Stat. 246-255, 42 U.S.C. 4601 note) are set forth in 49 CFR Part 24.

[52 FR 48017, Dec. 17, 1987 and 54 FR 8912 and 8913, Mar. 2, 1989]

PART 1040—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

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Authority: 20 U.S.C. 1681-1686; 29 U.S.C. 794; 42 U.S.C. 2000d to 2000d-4a, 3601-3631, 5891, 6101-6107, 6870, 7101 *et seq.*

Source: 45 FR 40515, June 13, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 1040.1 Purpose.

The purpose of this part is to implement Title VI of the Civil Rights Act of 1964, Pub. L. 88-352; section 16 of the Federal Energy Administration Act of 1974, as amended, Pub. L. 93-275; section 401 of the Energy Reorganization Act of 1974, Pub. L. 93-438; Title IX of the Education Amendments of 1972, as amended, Pub. L. 92-318, Pub. L. 93-568 and Pub. L. 94-482; section 504 of the Rehabilitation Act of 1973, as amended, Pub. L. 93-112; the Age Discrimination Act of 1975, Pub. L. 94-135; Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284; and civil rights provisions of statutes administered pursuant to authority under the DOE Organization Act, Pub. L. 95-91, so no person shall, on the ground of race, color, national origin, sex (when covered by section 16 and section 401), handicap, or age, be excluded from participation in, be denied the benefits of, be subjected to discrimination under, or be denied employment, where a primary purpose of the program or activity is to provide employment or when the delivery of program services is affected by the recipient's employment practices (under section 504, all grantee and subgrantee employment practices are covered regardless of the purpose of the program), in connection with any program or activity receiving Federal financial assistance from the Department of Energy (after this referred to as DOE or the Department). Employment coverage may be broader in scope when section 16, section 401, or Title IX are applicable.

§ 1040.2 Application.

(a) The application of this part is to any program or activity for which Federal financial assistance is authorized under laws administered by DOE. Programs to which this part applies are listed in Appendix A of this part. Appendix A is to be revised from time to time by notice published in the Federal Register. This part applies to money paid, property transferred, or other Federal financial assistance including cooperative agreements extended under any program or activity, by way of grant, loan, or contract by DOE, or grants awarded in the performance of a contract with DOE by an authorized contractor or subcontractor, the terms of which require compliance with this part. If any statutes implemented by this part are otherwise applicable, the failure to list a program in Appendix A does not mean the program is not covered by this part.

(b) This part does not apply to:

(1) Contracts of insurance or guaranty;

(2) Employment practices under any program or activity except as provided in §§ 1040.12, 1040.14, 1040.41, 1040.47 and 1040.66; or

(3) Procurement contracts under Title 41 CFR Part 1 or Part 9.

§ 1040.3 Definitions—General.

(a) "Academic institution" includes any school, academy, college, university, institute, or other association, organization, or agency conducting or administering any program, project, or facility designed to educate or train individuals.

(b) "Administrative law judge" means a person appointed by the reviewing authority to preside over a hearing held under this part.

(c) "Agency" or "Federal agency" refers to any Federal department or agency which extends Federal financial assistance.

(d) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a primary recipient as a condition to becoming eligible for Federal financial assistance.

(e) "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

(f) "Director, FAPD" refers to the Director, Federally Assisted Programs Division, Office of Equal Opportunity, DOE.

(g) "Compliance Review" means an analysis of a recipient's selected employment practices or delivery of services for adherence to provisions of any of the subparts of this part.

(h) "Department" means the Department of Energy (DOE).

(i) "FERC" means the Federal Energy Regulatory Commission, DOE.

(j) Where designation of persons by race, color, or national origin is required, the following designations are to be used:

(1) *Black*, not of Hispanic origin. A person having origins in any of the black racial groups of Africa.

(2) *Hispanic*. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race.

(3) *Asian or Pacific Islander*. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This includes, for example, China, India, Japan, Korea, the Philippine Islands, Hawaiian Islands, and Samoa.

(4) *American Indian or Alaskan Native*. A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition.

(5) *White, not of Hispanic origin*. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Additional subcategories based on national origin or primary language spoken may be used where appropriate on either a national or a regional basis. Paragraphs (j) (1) through (5), inclusive, set forth in this section are in conformity with Directive No. 15 of the Office of Federal Statistical Policy and Standards. To the extent that these designations are modified, paragraphs (j) (1) through (5), inclusive, set forth in this section are to be interpreted to conform with those modifications.

(k) "Director" means the Director, Office of Equal Opportunity, DOE.

(l) "Disposition" means any treatment, handling, decision, sentencing, confinement, or other proscription of conduct.

(m) "Employment practices," see individual section headings.

(n) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration, or acquisition of facilities.

(o) "Federal financial assistance" includes:

(1) Grants and loans of Federal funds,

(2) The grant or donation of Federal property and interest in property,

(3) The detail of or provision of services by Federal personnel,

(4) The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property, the furnishing of services without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by the sale, lease, or furnishing of services to the recipient, and

(5) Any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(p) "General Counsel" mean the Office of the General Counsel Department of Energy.

(q) "Government organization" means the political subdivision for a prescribed geographical area.

(r) "Investigations" include fact-finding efforts and attempts to secure voluntary resolution of complaints.

(s) "Noncompliance" means the failure of a recipient or subrecipient to comply with any subpart of this part.

(t) "Primary recipient" means any person, group, organization, state, or local unit of government which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(u) "Program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, health, welfare, rehabilitation, housing, or other services, whether provided through an employee of the grantee or provided by others through contracts or other arrangements with the grantee, and including work opportunities and cash or loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid, or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal resources or such non-Federal resources.

(v) "Responsible Departmental or DOE Official" means the official of the Department of Energy that has been assigned the principal responsibility for administration of the law extending Federal financial assistance.

(w) "Reviewing authority" means the component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(x) "Secretary" means the Secretary of the Department of Energy.

(y) The term "United States" includes the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Island, American Samoa, Guam, Wake Island, the Canal Zone, and all other territories and possessions of the United States, and the term "State" includes any one of the foregoing.

(z) "Headquarters" means DOE offices located in Washington, D.C.

§ 1040.4 Assurances required and preaward review.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance on a form specified by the Director that the program or activity will be operated in compliance with applicable subparts. Such assurances are to include provisions which give the United States a right to seek judicial enforcement.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structure on the property, the assurance obligates the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance obligates the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases, the assurance obligates the recipient to all terms and conditions contained in the certificate of assurance for the period during which Federal financial assistance is extended.

(c) *Covenants.* Where Federal financial assistance is provided in the form of real property, structures, improvements on or interests in the property, or in the case where Federal financial assistance is provided in the form of a transfer of real property or interest in the property from the Department:

(1) The instrument effecting or recording this transfer is to contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits; or

(2) Where no transfer of property is involved or imposed with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (c)(1) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant is to also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a material breach of the covenant. If a transferee of real property manages to mortgage or otherwise encumber the real property as security for financing construction of new or improvement of existing facilities on the property for the purpose for which the property was transferred, the Director may, upon request of the transferee and, if necessary to accomplish such financing and upon such conditions, as he or she deems appropriate, agree to forbear the exercise of the right to revert title for so long as the lien of the mortgage or other encumbrance remains effective.

(d) *Assurances from government agencies.* In the case of any application from any department, agency or office of any State or local government for Federal financial assistance for any specified purpose, the assurance required by this section is to extend to any other department, agency, or office of the same governmental unit if the policies of such other department, agency, or office will substantially affect the project for which Federal financial assistance is requested. That requirement may be waived by the responsible Department official if the applicant establishes, to the satisfaction of the responsible Department official, that the practices in other agencies or parts of programs of the governmental unit will in no way affect:

(1) Its practices in the program for which Federal financial assistance is sought;

(2) The beneficiaries of or participants in or persons affected by such program; or

(3) Full compliance with the subpart as respects such program.

(e) *Assurance from academic and other institutions.* (1) In the case of any application for Federal financial assistance for any purpose to an academic institution, the assurance required by this section is to extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an academic institution, detention or correctional facility, or any other institution or facility, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, wards, inmates, persons subject to control, or clients of

the institution or facility or to the opportunity to participate in the provision of services, disposition, treatment, or benefits to such individuals, shall be applicable to the entire institution or facility.

(f) *Continuing State programs.* Any State or State agency administering a program which receives continuing Federal financial assistance subject to this part shall, as a condition for the extension of such assistance:

(1) Provide a statement that the program is (or, in the case of a new program, will be) conducted in compliance with applicable subparts; and

(2) Provide for such methods of administration as are found by the Director or a designee to give reasonable assurance that the primary recipient and all other recipients of Federal financial assistance under such program will comply with this part.

(g) *Assistance for construction.* Where the assistance is sought for the construction of a facility, or a part of a facility, the assurance is to extend to the entire facility. If a facility to be constructed is part of a larger system, the assurance is to extend to the larger system.

(h) *Pre-award review.* Prior to and as a condition of approval, all applications for Federal financial assistance are to be reviewed by the appropriate Civil Rights Department official who is to make a written determination of the applicant's compliance with this part. The basis for such a determination is to be the submission of the assurance of compliance as specified in paragraph (a) and a review of data to be submitted by the applicant as specified by the Director. For purposes of this subsection, the appropriate departmental official at headquarters level is the Director, FAPD, Office of Equal Opportunity, and at the regional level it is to be the Civil Rights Officer delegated by the Director as having review authority for determining compliance with requirements of this part. Where a determination of compliance cannot be made from this data, DOE may require the applicant to submit necessary additional information and may take other steps necessary to make the determination of compliance. Such other steps may include, for example, communicating with local government officials or protected class organizations and field reviews. Any agreement to achieve voluntary compliance as a result of a preaward review shall be in writing. In the case of Title VI, the Director will notify the Assistant Attorney General of instances of probable noncompliance determined as the result of application reviews. The opportunity for a hearing as provided under § 1040.113 is applicable to this section.

§ 1040.5 Designation of responsible employee.

(a) Designation of responsible employee. Each recipient shall designate at least one employee to coordinate its efforts to carry outs its responsibilities under this part. The recipient shall publish the name, office address and telephone number of the employee or employees appointed under this paragraph.

(b) A recipient shall display prominently, in reasonable numbers and places, posters which state that the recipient operates a program or programs subject to the nondiscrimination provisions of applicable subparts, summarize those requirements, note availability of information regarding this part from the recipient and DOE, and explain briefly the procedures for filing a complaint. Information on requirements of this part, complaint procedures and the rights of beneficiaries are to be included in handbooks, manuals, pamphlets, and other materials which are ordinarily distributed to the public to describe the federally assisted programs and the requirements for participation by recipients and beneficiaries. To the extent that recipients are required by law or regulation to publish or broadcast program information in the news media, the recipient shall insure that such publications and broadcasts state that the program in question is an equal opportunity program or otherwise indicate that discrimination in the program is prohibited by Federal law.

(c) Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program requires service or information in a language other than English in order to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and size and concentration of such population, to provide information in appropriate languages (including braille) to such persons. This requirement applies to written material of the type which is ordinarily distributed to the public. The Department may require a recipient to take additional steps to carry out the intent of this subsection.

§ 1040.6 Notice.

(a) A recipient shall take appropriate, initial and continuing steps to notify participants, beneficiaries, applicants and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of race, color, national origin, sex (where sec. 16 or sec. 401 apply), handicap, or age. The notification is to state, where appropriate, that the recipient does not discriminate in admission or access to, and treatment of, or employment in its programs and activities and inform employees of their rights under this part. The notification is to include an identification of the responsible employee designated under § 1040.5. A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publications, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

(c) The provisions of § 1040.5(c) to provide information in appropriate languages (including braille), apply to this section.

§ 1040.7 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Director finds that a recipient has discriminated against persons on the basis of race, color, national origin, sex, handicap, or age in any program or activity receiving Federal financial assistance, the recipient shall take remedial action as the Director considers necessary to overcome the effects of the discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of race, color, national origin, sex, handicap, or age in any program or activity, a recipient may continue a program that will encourage participation by all persons regardless of race, color, national origin, sex, handicap, or age.

(c) *Self-evaluation.* Each recipient shall, within one year of the effective date of this part:

(1) Whenever possible, evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(2) Modify any policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of discrimination which resulted or may have resulted from adherence to these questionable policies and practices.

(d) Availability of self-evaluation and related materials. Recipient shall maintain on file, for at least three years following its completion, the evaluation required under paragraph (c) of this section, and shall provide to the Director, upon request, a description of any modifications made under paragraph (c)(2) of this section and of any remedial steps taken under paragraph (c)(3) of this section.

§ 1040.8 Effect of employment opportunity.

Due to limited opportunities in the past, certain protected groups may be underrepresented in some occupations or professions. A recipient's obligation to comply with this part is not alleviated by use of statistical information which reflects limited opportunities in those occupations or professions.

Subpart B—Title VI of the Civil Rights Act of 1964; Section 16 of the Federal Energy Administration Act of 1974, as Amended; and Section 401 of the Energy Reorganization Act of 1974

§ 1040.11 Purpose and application.

(a) The purpose of this subpart is to implement Title VI of the Civil Rights Act of 1964 (Title VI) and the pertinent regulations of DOE so that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving Federal financial assistance of the type subject to Title VI. This subpart also implements section 16 of the Federal Energy Administration Act of 1974, as amended (section 16) and section 401 of the Energy Reorganization of 1974 (section 401) so that no person shall be excluded on the ground of sex from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance subject to section 16 or 401. The coverage of employment practices is explained in § 1040.14.

(b) The application of this subpart is to delivery of services by and the covered employment practices of recipients and subrecipients administering, participating in, or substantially benefiting from any program or activity receiving Federal financial assistance under laws administered by DOE covered by Title VI. In addition to services and employment practices, this subpart applies to any activities of recipients or subrecipients receiving Federal financial assistance subject to section 16 and section 401.

§ 1040.12 Definitions.

(a) "Covered employment" means employment practices covered by Title VI, section 16 and section 401.

(1) Under Title VI, such practices are those which:

(i) Exist in a program where a primary objective of the Federal financial assistance is to provide employment; or

(ii) Cause discrimination on the basis of race, color, or national origin with respect to beneficiaries or potential beneficiaries of the assisted program.

(2) Under section 16 and section 401, such practices include, but are not limited to, employment practices covered by Title VI when alleging discrimination on the basis of sex. All employment practices of a recipient or subrecipient of Federal financial assistance subject to section 16 and section 401 are covered employment practices.

(b) "Title VI" refers to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* which prohibits discrimination on the ground of race, color or national origin in programs and activities receiving Federal financial assistance. The definitions set forth in § 1040.3 of Subpart A to the extent not inconsistent with this subpart, are applicable to and incorporated into this subpart.

§ 1040.13 Discrimination prohibited.

(a) *General.* No person in the United States shall be excluded on the ground of race, color, national origin, or sex (when covered by section 16 or section 401), from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this subpart applies.

(b) *Specific discriminatory action prohibited.* A recipient under any program to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, national origin or sex (when covered by section 16 or section 401):

(1) Deny any individual any disposition, service, financial aid, or benefit provided under the program;

(2) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(3) Subject an individual to segregation or separate treatment in any matter related to his/her receipt of any disposition, service, financial aid, or benefit under the program;

(4) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(5) Treat an individual differently from others in determining whether such individual satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program;

(6) Deny an individual an opportunity to participate in the program through the provision of services or otherwise afford such individual an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in § 1040.14 of this subpart); or

(7) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(c) A recipient, in determining the type of Federal financial assistance (i.e., disposition, services, financial aid, benefits, or facilities) which will be provided under any program, or the class of individuals to whom, or the situations in which the assistance will be provided, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex (when covered by section 16 and section 401) or have the effect of defeating or substantially impairing accomplishment of the program objectives with respect to individuals of a particular race, color, national origin, or sex (when covered by section 16 or section 401).

(d) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination because of race, color, national origin, or sex (when covered by section 16 or 401) or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of Title VI or this subpart.

(e) For the purpose of this section, the disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance include any portion of any program, function, or activity conducted by a recipient of Federal financial assistance in which the program, function, or activity is directly or indirectly improved, enhanced, enlarged, or benefited by the Federal financial assistance or by which the recipient makes use of any facility, equipment or property provided with the aid of Federal financial assistance.

(f) The enumeration of specific forms of prohibited discrimination in this paragraph and in § 1040.14 of this subpart does not limit the generality of the prohibition in paragraph (a) of this section.

(g) *Exemptions.* Exclusion from programs for protected groups. An individual is not to be considered subjected to discrimination by reason of his/her exclusion from the benefits of a program limited to individuals of a particular race, color, national origin or sex different from his/hers when the exclusion is provided for or required by Federal law, for example, programs funded exclusively to serve on-reservation Indians.

§ 1040.14 Covered employment.

(a) *Employment practices.* (1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies is to provide employment, a recipient of the assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the grounds of race, color, national origin, or sex (when covered by section 16 and section 401) in its employment practices under the program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion or transfer, training, participation in upward mobility programs, rates of pay or other forms of compensation, and use of facilities). This prohibition also applies to programs where the primary objective of the Federal financial assistance is:

(i) To assist individuals through employment to meet expenses incident to the commencement or continuation of their education or training;

(ii) To provide work experience which contributes to the education or training of the individuals involved;

(iii) To reduce the unemployment of individuals or to help them through employment to meet subsistence needs; or

(iv) To provide employment to individuals who, because of handicaps, cannot be readily absorbed in the competitive labor market. The requirements applicable to construction under any such program are to be those specified in or under Part III of Executive Order 11246, as amended, or any Executive Order which supersedes it.

(2) In regard to Federal financial assistance which does not have provision of employment as a primary objective, the provisions of paragraph (a)(1) of this section apply to the employment practices of the recipient if discrimination on the ground of race, color, national origin, or sex (when covered by section 16 or section 401) in such employment practices tends to exclude persons from participation in, deny them the benefits of, or subject them to discrimination under the program receiving Federal financial assistance. In any such case, the provisions of paragraph (a)(1) of this section apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

(3) Paragraph (a)(1) also applies to covered employment as defined in § 1040.12(a)(2).

(b) Enforcement of Title VI compliance with respect to covered employment practices is not to be superseded by State or local merit systems relating to the employment practices of the same recipient.

Subpart C—Nondiscrimination on the Basis of Sex—Title IX of the Education Amendments of 1972, as Amended

§ 1040.21 Purpose.

The purpose of this subpart is to implement Title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by Pub. L. 93-568, and Pub. L. 94-482, which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not the program or activity is offered or sponsored by an educational institution as defined in this subpart.

§ 1040.22 Application.

Except as provided in §§ 1040.25, 1040.26, and 1040.27, this subpart applies to every recipient and to each education program or activity operated by the recipient which receives or benefits from Federal financial assistance.

§ 1040.23 Definitions.

(a) "Title IX" means Title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by sec. 3 of Pub. L. 93-568, 88 Stat. 1855, (except secs. 904 and 906 of the Amendments), 20 U.S.C. 1681, 1682, 1683, 1685, and 1686.

(b) "Educational Institution" means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a pre-school, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraphs (c), (d), (e), or (f) of this section.

(c) "Institution of graduate higher education" means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in the field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(d) "Institution of undergraduate higher education" means:

(1) An institution offering at least two, but less than four years of college study beyond the high school level leading to a diploma or an associate degree or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(e) "Institution of professional education" means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(f) "Institution of vocational education" means a school or institution (except an institution of professional, graduate, or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full time study.

(g) "Administratively separate unit" means a school, department, or college of an educational institution (other than a local educational agency), admission to which is independent of admission to any other component of the institution.

(h) "Admission" means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(i) "Student" means a person who has gained admission.

(j) "Transition plan" means a plan subject to the approval of the United States Commissioner of Education under sec. 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination. The definitions set forth in § 1040.3 of Subpart A of this part, to the extent not inconsistent with this subpart, are made applicable to and incorporated into this subpart.

§ 1040.24 Effects of other requirements.

(a) Effect of other Federal provisions. The obligations imposed by this subpart are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); Executive Order 11246, as amended; Sec. 799A and Sec. 845 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); the Equal Pay Act (29 U.S.C. 206 and 206(d); and any other Act of Congress or Federal regulation.

(b) Effect of state or local law or other requirements. The obligation to comply with this subpart is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) Effect of rules or regulations of private organizations. The obligation to comply with this subpart is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league or association, which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

§ 1040.25 Educational institutions controlled by religious organizations.

(a) *Application.* This subpart does not apply to an educational institution which is controlled by a religious organization to the extent that application of this subpart would not be consistent with the religious tenets of such an organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section is to do so by submitting, in writing, to the Director a statement by the highest ranking official of the institution identifying the provisions of this subpart which conflict with a specific tenet of the religious organization.

§ 1040.26 Military and merchant marine educational institutions.

This subpart does not apply to an educational institution whose primary purpose is the training of individuals for military service of the United States or for the merchant marine.

§ 1040.27 Membership practices of certain organizations.

(a) Social fraternities and sororities. This subpart does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under Sec. 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) Y.M.C.A., Y.W.C.A., Girl Scouts, Boy Scouts, and Camp Fire Girls. This subpart does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts, and the Camp Fire Girls.

(c) Voluntary youth service organizations. This subpart does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under Sec. 501(a) of the Internal Revenue Code of 1954, the membership of which ha been traditionally limited to member of one sex and principally to person of less than nineteen years of age.

§ 1040.28 Admissions.

(a) Admission to education institutions prior to June 24, 1973 are no covered by this subpart.

(b) *Administratively separate unit* For the purposes, only, of this section §§ 1040.28 and 1040.29, each administratively separate unit shall be deeme to be an educational institution.

(c) *Application of §§ 1040.31 throug 1040.33.* Except as provided in paragraphs (c) and (d) of this section §§ 1040.31 through 1040.33 apply t each recipient. A recipient to whic §§ 1040.31 through 1040.33 apply shal not discriminate on the basis of sex i admission or recruitment in violatio of those sections.

(d) *Educational institutions.* Excep as provided in paragraph (e) of thi section as to recipients which are educational institutions, §§ 1040.3 through 1040.33 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Section 1040.31 through 1040.33 do not appl to any public institutions of undergraduate higher education which, traditionally and continually from its establishment, has had a policy of admitting only students of one sex.

§ 1040.29 Educational institutions eligib to submit transition plans.

(a) *Application.* This section applies to each educational institution t which §§ 1040.31 through 1040.3 apply which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but after that admitted as regular students individuals of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plan* An educational institution to which this section applies is not to discriminate on the basis of sex in admission or recruitment in violation of §§ 1040.31 through 1040.33 unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 1040.30, which plan provides for the elimination of discrimination by the earliest practicable date but in no event later than 90 days following final publication of this regulation.

§ 1040.30 Transition plans.

(a) *Submission of plans.* Any institution to which § 1040.28 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all units or separate transition plans applicable to each unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan is to:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting the plan, the administratively separate units to which the plan is applicable, the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe, with respect to the educational institution or administratively separate unit, any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle indentified and indicate the schedule for taking these steps and the individual responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 1040.29 applies is to result in treatment of applicants to, or students of, the recipient in violation of §§ 1040.31 through 1040.33 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 1040.29 applies is to include in its transition plan and implement specific steps designed to encourage individuals of the previously excluded sex to apply for admission to the institution. The steps are to include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

§ 1040.31 Discrimination on the basis of sex in admission and recruitment prohibited: admission.

(a) *General.* No person shall, on the basis of sex, be denied admission or be subjected to discrimination in admission by any recipient to which §§ 1040.31, 1040.32, and 1040.33 apply, except as provided in §§ 1040.29 and 1040.30.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 1040.31, 1040.32, and 1040.33 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on that basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Deny an equal opportunity for admission on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionate adverse effect on persons on the basis of sex unless the use of the

test or criterion is shown to predict validly success in the education program or activity and alternative tests or criteria which do not have a disproportionate adverse affect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 1040.31, 1040.32, and 1040.33 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any persons on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; or

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission but only if the inquiry is made equally of applicants of both sexes and if the results of the inquiry are not used in connection with discrimination prohibited by this subpart.

§ 1040.32 Preference in admission.

A recipient to which §§ 1040.31, 1040.32, and 1040.33 apply shall not give preference to applicants for admission on the basis of attendance at any educational institution or other school or entity which admits as students or predominantly members of one sex if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ 1040.31, 1040.32, and 1040.33.

§ 1040.33 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 1040.31, 1040.32, and 1040.33 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action under § 1040.7(a) and may choose to undertake these efforts as affirmative action under § 1040.7(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 1040.31, 1040.32, and 1040.33 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities which admit as students only or predominantly members of one sex, if these actions have the effect of discriminating on the basis of sex in violation of §§ 1040.31, 1040.32, and 1040.33.

§ 1040.34 Education programs and activities.

(a) *General.* Except as provided elsewhere in this subpart, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of—

(1) A recipient to which §§ 1040.31, 1040.32, and 1040.33 do not apply; or

(2) An entity, not a recipient, to which §§ 1040.31, 1040.32, and 1040.33 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§ 1040.34 through 1040.45, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether the person satisfies any requirement or condition for the provision of the aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution. A recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex must provide, or otherwise make available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to recipients which require participation by any applicant or student in any education program or activity not operated wholly by the recipient, or which facilitates, permits, or considers participation in educational consortia and cooperative employment and student-teaching assignments.

(2) The recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of the recipient which this subpart would prohibit the recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider participation if such action occurs.

§ 1040.35 Housing.

(a) *General.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by the recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take reasonable action as may be necessary to assure itself that housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity; and

(ii) Comparable in quality and cost to the student. A recipient may render this assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

§ 1040.36 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but the facilities provided for students of one sex are to be comparable to the facilities provided for students of the other sex.

§ 1040.37 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation by any of its students on that basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as asessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports, the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have that effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

§ 1040.38 Access to schools operated by LEAs.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by the recipient; or

(b) Any other school or educational unit operated by the recipient, unless the recipient otherwise makes available to a person, under the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through the schools.

§ 1040.39 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on the basis of sex unless the different materials cover the same occupations and interest areas and use of the different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take action to assure itself that the disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take action to assure itself that the disproportion is not the result of discrimination on the basis of sex in counseling, appraisal materials, or by counselors.

§ 1040.40 Financial assistance.

(a) *General.* Except as provided in paragraphs (b), (c), and (d) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of assistance, limit eligibility for assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of the recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for assistance which treats persons of one sex different from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which require that awards be made to members of a particular sex specified in those documents provided that the overall effect of the award of such sex-restricted scholarships, fellowships and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(a)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it shall provide reasonable opportunities for the awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams of members of each sex to the extent consistent with this section and § 1040.44 of this subpart.

§ 1040.41 Employment assistant to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students—

(1) Shall assure itself that the employment is made available without discrimination on the basis of sex; and

(2) Shall not render services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall assure itself that all employment is made available without discrimination on the basis of sex.

§ 1040.42 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex. This section is not to prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

§ 1040.43 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extra-curricular activity, on the basis of the student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require the student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as the certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its educational program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy which the recipient administers, operates, offers or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for a period of time considered medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

§ 1040.44 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by the recipient, and no recipient shall provide any athletics separately on the basis of sex.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex shall be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this subpart, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports, the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the Director, FAPD, is to consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services; and

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams, will not constitute noncompliance with this section, but the Director, FAPD, may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary, secondary or post-secondary school level shall comply fully with this section as expeditiously as possible, but in no event later than one year from the effective date of this regulation.

§ 1040.45 Textbooks and curricular material.

Nothing in this regulation is to be interpreted as requiring, prohibiting, or abridging, in any way, the use of particular textbooks or curricular materials.

§ 1040.46 Procedures.

The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are adopted and incorporated in this section by reference. These procedures may be found in Subparts G and H of this part.

EMPLOYMENT PRACTICES

§ 1040.47 Employment.

(a) *General.* (1) No person shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in recruitment, employment consideration, or selection, whether for full-time or part-time employment, under any educational program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any education institution or entity which admits as students only or predominantly members of one sex, if giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart appply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for an award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 1040.48 Employment criteria.

A recipient shall not administer or operate any text or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§ 1040.49 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

§ 1040.50 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

§ 1040.51 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 1040.57.

§ 1040.52 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service for employment not subject to the provision of § 1040.50.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different op-

tional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

§ 1040.53 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time. At the conclusion of the leave of absence, the employee shall be reinstated to the status which she held when the leave began or to a comparable position without decrease in rate of compensation or loss of promotional opportunities or any other right or privilege of employment.

§ 1040.54 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any state or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

§ 1040.55 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona-fide occupational qualification for the particular job in question.

§ 1040.56 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

§ 1040.57 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Subpart D—Nondiscrimination on the Basis of Handicap—Section 504 of the Rehabilitation Act of 1973, as Amended

GENERAL PROVISIONS

§ 1040.61 Purpose and application.

(a) The purpose of this subpart is to implement sec. 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

(b) This subpart applies to each recipient or subrecipient of Federal financial assistance from DOE and to each program or activity that receives or benefits from assistance.

§ 1040.62 Definitions.

(a) "Executive Order" means Executive Order 11914, titled "Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs" issued on April 28, 1976.

(b) "Section 504" means sec. 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(c) "Handicapped person" means any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.

(d) As used in paragraph (c) of this section, the phrase:

(1) "Physical or mental impairment" means—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and drug addiction and alcoholism, when current use of drugs and/or alcohol is not detrimental to or interferes with the employee's performance, nor constitutes a direct threat to property or safety of others.

(2) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraphs (d)(1) (i) and (ii) of this section, but is treated by a recipient as having such an impairment.

(e) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult education services, a handicapped person:

(i) Of an age during which nonhandicapped persons are provided such services;

(ii) Of any age during which it is mandatory under state law to provide such services to handicapped persons; or

(iii) To whom a state is required to provide a free appropriate public education under sec. 612 of the Education for All Handicapped Children Act of 1975, Pub. L. 94-142.

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity; and

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(f) "Handicap" means condition or characteristic that renders a person a handicapped person as defined in paragraph (c) of this section.

(g) "Historic properties" means those architecturally, historically or culturally significant properties listed in or eligible for listing in the National Register of Historic Places or such properties designated under a statute of the appropriate State or local governmental body.

(h) "Building alterations" means those changes to the existing conditions and equipment of a building which do not involve any structural changes, but which typically improve and upgrade a building, such as alterations to stairways, doors, toilets, elevators, and site improvements.

(i) "Structural changes" means those changes which alter the structure of a historic building including, but not limited to, its bearing walls and all types of post and beam systems in wood, steel, iron or concrete.

The definitions set forth in § 1040.3 of this part, to the extent not inconsistent with this subpart, are made applicable to and incorporated into this subpart.

§ 1040.63 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance from DOE.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified person the opportunity to participate in or benefit from the aid, benefit or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless the action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or services to beneficiaries of the recipient's program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of permissible separate or different programs or

activities, a recipient may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that:

(i) Have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap;

(ii) Have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons; or

(iii) Perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(5) In determining the site of a facility, an applicant for assistance or a recipient may not make selections that—

(i) Have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance from DOE; or

(ii) Have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefitting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of non-handicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) Recipients shall take appropriate steps to ensure that communications with their applicants, employees and handicapped persons participating in federally assisted programs of activities or receiving aids, benefits or services, are available to persons with impaired vision and hearing.

(e) The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

§ 1040.64 Effect of State or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for non-handicapped persons.

(c) *Effect of other regulations.* All regulations, orders, or similar directions issued by any officer of DOE which impose requirements designed to prohibit discrimination against individuals on the grounds of race, color, national origin, sex, age or handicap under any program to which this part applies, and which authorize the suspension, termination or refusal to grant or to continue Federal financial assistance under any program for failure to comply with these requirements, are superseded to the extent that discrimination is prohibited by this part. Nothing in this part is to relieve any person of the obligation assumed or imposed under any superseded regulation, order, instruction, or similar direction prior to the effective date of this part. Nothing in this part is to supersede the effective date of this part. Nothing in this part is to supersede Executive Orders 10925, 11114, 11063, 11246, and regulations issued under these authorities, or supersede any other regulations or instructions which prohibit discrimination on the ground of race, color, national origin, sex, age, or handicap in any program or activity to which this part does not apply.

§ 1040.65 Procedures.

The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are adopted and incorporated in this section by reference. These procedures may be found in Subparts G and H of this part.

EMPLOYMENT PRACTICES

§ 1040.66 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination employment under any program or activity to which this subpart applies.

(2) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick or otherwise;

(6) Fringe benefits available by virtue of employment, whether administered by the recipient or not;

(7) Selection and provision of financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 1040.67 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include:

(1) Making facilities used by employees readily accessible to and usable by handicapped persons; and

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining, under paragraph (a) of this section, whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 1040.68 Employment criteria.

(a) A recipient may not use any employment test or other selection criterion that screens out or tends to screen out handicapped persons unless the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question.

(b) A recipient shall select and administer tests concerning employment to best ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude or other factors the test purports to measure except where those skills are the factors that the test purports to measure.

§ 1040.69 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a pre-employment medical examination or may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make pre-employment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination, under § 1040.7 of this part, or is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity under § 1040.7 of Subpart A of this part, or when a recipient is taking affirmative action under Sec. 503 of the Rehabilitation Act of 1973, amended, the recipient may invite plicants for employment to indica whether, and to what extent, they handicapped *Provided that*:

(1) The recipient states clearly any written questionnaire used this purpose or makes clear orally, no written questionnaire is used, th the information requested is intende for use solely in connection with its medial action obligations or its volun tary or affirmative action efforts; an

(2) The recipient states clearly tha the information is requested on a vol untary basis, that it will be kept confi dential as provided in paragraph (d) o this section, that refusal to provide i will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this subpart.

(c) Nothing in this section is to prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty provided that all entering employees are subjected to the examination regardless of handicap or absence of handicap and results of the examination are used only in accordance with the requirements of this subpart.

(d) Information obtained in accordance with this section concerning the medical condition or history of the applicant is to be collected and maintained on separate forms that are to be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with Sec. 504 of the Rehabilitation Act of 1973, as amended, shall be provided relevant information upon request.

PROGRAM ACCESSIBILITY

§ 1040.71 Discrimination prohibited.

No handicapped person shall, because a recipient's facilities are inaccessible to or unuseable by handicapped persons, be denied the benefits of, be excluded from participation in, or be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance from DOE.

§ 1040.72 Existing facilities.

(a) *Program accessibility.* A recipient shall operate any program or activity to which this subpart applies so that the program or activity, when viewed in its entirety, is readily accessible and useable by handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and useable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aids to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 1040.73 or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within 60 days of the effective date of this subpart except that where structural changes in facilities are necessary, the changes are to be made as expeditiously as possible, but in no event later than three years after the effective date of this subpart.

(d) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within 6 months of the effective date of this subpart, a transition plan setting forth the steps necessary to complete the changes. The plan is to be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, and the plan is to meet with the approval of the Director, Federally Assisted Programs Division, Office of Equal Opportunity, DOE. A copy of the transition plan is to be made available for public inspection. At a minimum, the plan is to:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility to and usability by handicapped persons of its program or activity.

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period or the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(e) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information concerning the existence and location of services, activities, and facilities that are accessible to, and useable by, handicapped persons.

§ 1040.73 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient is to be designed and constructed in a manner that the facility or part of the facility is readily accessible to, and useable by, handicapped persons, if the construction was commenced after the effective date of this subpart.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this subpart in a manner that affects or could affect the usability of the facility or part of the facility is, to the maximum extent feasible, to be altered in a manner that the altered portion of the facility is readily accessible to and useable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (USAF) (appendix A to 41 CFR subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[45 FR 40515, June 13, 1980, as amended at 55 FR 52138 and 52140, Dec. 19, 1990]

EFFECTIVE DATE NOTE: At 55 FR 52138 and 52140, Dec. 19, 1990, § 1040.73(c) was revised effective January 18, 1991. For the convenience of the user, the superseded text is set forth as follows:

1040.73 New construction.

* * * * *

(c) American National Standards Institute, Incorporated, accessibility standards. Design, construction, or alteration of facilities in conformance with the "American National Standard Specification for Making Buildings and Facilities Accessible to, and Useable by, the Physically Handicapped," published by the American National Standards Institute, Incorporated [ANSI A117.1-1961 (R1971)]; The standard has been approved by the Director, Office of the Federal Register, January 17, 1979. A copy of the standard is on file in the FEDERAL REGISTER library] which is incorporated by reference in this subpart, are to constitute compliance with paragraphs (a) and (b) of this section. Departures from the particular requirements of those standards by the use of other methods are to be permitted with the concurrence of the Director, FAPD, when it is clearly evident that equivalent accessibility and usability of the facility are provided.

§ 1040.74 Program accessibility in historic properties.

(a) *Methods to accomplish program accessibility.* In the case of historic properties, program accessibility shall mean that when programs are viewed in their entirety, they are accessible to and usable by handicapped persons. The recipient shall exhaust Subsection (b)(1) (methods to accomplish program accessibility without building alterations or structural changes) before proceeding to Subsection (b)(2) (methods to accomplish program accessibility resulting in building alterations). The recipient shall exhaust Subsection (b)(2) (methods to accomplish program accessibility resulting in building alterations) before proceeding to Subsection (b)(3) (methods to accomplish program accessibility resulting in structural changes).

(1) *Methods to accomplish program accessibility without building alterations or structural changes.* The recipient shall investigate compliance methods which do not alter the historic character or architectural integrity of the property and shall utilize such methods unless such methods are ineffective in achieving accessibility. Such methods may include, but are not limited to:

(i) Reassigning programs to accessible locations within the facility.

(ii) Assigning persons to aid handicapped persons into or through an otherwise inaccessible facility.

(iii) Delivering programs or activities at alternative accessible sites operated by or available for such use by the recipient.

(iv) Adopting other innovative methods which make programs accessible to the handicapped.

(2) *Methods to accomplish program accessibility resulting in building alterations.* The recipient shall determine that program accessibility cannot feasibly be accomplished by Methods to Accomplish Program Accessibility without Building Alterations or Structural Changes, Subsection (b)(1) prior to utilizing building alteration as a method of accomplishing program accessibility. Alterations must comply with the accessibility standards adopted in these regulations. Building alterations shall be undertaken so as not to alter or destroy historically, architecturally, or culturally significant elements or features.

(3) *Methods to accomplish program accessibility resulting in structural changes.* The recipient shall determine that program accessibility cannot feasibly be accomplished by Methods to Accomplish Program Accessibility without Building Alterations or Structural Changes, Subsection (b)(2) before considering structural changes as a method of accomplishing program accessibility. Structural changes must comply with the accessibility standards adopted in these regulations. Structural changes shall be undertaken so as not to alter or destroy historically, architecturally or culturally significant elements or features.

(b) *Modification or waiver of accessibility standards.* The applicability of the accessibility standards set forth in these regulations may be modified or waived on a case-by-case basis, upon application to the Director, FAPD, where the recipient can demonstrate that, because of the nature of the activity, the provision of access would be infeasible or would substantially impair the historic, architectural or cultural integrity of the historic property.

(National Historic Preservation Act of 1966, Pub. L. 89-665, 80 Stat 915, 16 U.S.C. 470; 11593, 3 CFR 1971 Comp., p. 154; 36 CFR Part 800)

Subpart E—Nondiscrimination on the Basis of Age—Age Discrimination Act of 1975, as Amended

AUTHORITY: Age Discrimination Act of 1975, as amended, Pub. L. 94-135, November 28, 1975 (43 U.S.C. 6101) et seq.; 45 CFR Part 90.

SOURCE: 50 FR 8089, Feb. 27, 1985, unless otherwise noted.

GENERAL PROVISIONS

§ 1040.81 Purpose.

The purpose of these regulations is to implement the Age Discrimination Act of 1975, as Amended, which prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. In accordance with the Age Discrimination Act, federally assisted programs and activities and recipients of Federal funds may continue to use age distinctions and factors other than age which meet the requirements of the Act and these regulations.

§ 1040.82 Application.

(a) These regulations apply to each program or activity which receives or benefits from Federal financial assistance provided by DOE.

(b) These regulations do not apply to—

(1) An age distinction contained in that part of a Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body which:

(i) Provides any benefits or assistance to persons based on age; or

(ii) Establishes criteria for participation in age-related terms; or

(iii) Describes intended beneficiaries or target groups in age-related terms.

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program.

§ 1040.83 Definitions.

(a) "Act" means the Age Discrimination Act of 1975 as amended Title III of Pub. L. 94-135, 42 U.S.C. 6101 et seq.

(b) "Action" means any act, activity, policy, rule, standard or method of administration; or the use of any policy, rule, standard, or method of administration.

(c) "Age" means how old a person is or the number of years from the date of a person's birth.

(d) "Age distinction" means any action using age or an age-related term (for example, "18 or over").

(e) "Age-related term" means a word or words which necessarily imply a particular age or range of ages (for example, "children", "adult", "older persons", but not "student").

(f) "Days" mean calendar days.

(g) "Discrimination" means unlawful treatment based on age.

(h) "FERC" means the Federal Energy Regulatory Commission.

(i) "Field Civil Rights Officer" means the official in each DOE field office with responsibility for administering DOE's Civil Rights Program related to nondiscrimination in Federally assisted programs and activities.

(j) "Recipient" means any State or its political subdivision, instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes an individual who is the ultimate beneficiary of the assistance.

(k) "Secretary" means the Secretary, Department of Energy.

STANDARDS FOR DETERMINING AGE DISCRIMINATION

§ 1040.84 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in § 1040.86 and of these regulations.

(a) *General rule.* No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

(b) *Specific rules.* A recipient ma not, in any program or activity recei ing Federal financial assistance, direc ly or through contractual, licensing, other arrangements use age distin tions or take any other actions whic have the effect, on the basis of age,

(1) Excluding individuals from, den ing them the benefits of, or subjectin them to discrimination under, a pr gram or activity receiving Federal nancial assistance; or

(2) Denying or limiting individuals their opportunity to participate in an program or activity receiving Feder financial assistance.

(3) The specific forms of age discrim ination listed in paragraph (b) of th section do not necessarily constitute complete list.

§ 1040.85 Definitions of "Normal Ope ation" and "Statutory Objective".

For purpose of §§ 1040.86 an 1040.87, the terms "normal operation and "statutory objective" shall hav the following meanings:

(a) "Normal operation" means th operation of a program or activit without significant changes tha would impair its ability to meet its ob jectives.

(b) "Statutory objective" means an purpose of a program or activity ex pressly stated in any Federal, State, o local statute or ordinance adopted b an elected, general purpose legislativ body.

§ 1040.86 Exceptions to the rules agains age discrimination. Normal operatio or statutory objective of any progra or activity.

A recipient is permitted to take a action, otherwise prohibited b § 1040.84, if the action reasonabl takes into account age as a factor nec essary to the normal operation or th achievement of any statutory objec tive of a program or activity. An actio reasonably takes into account age as factor necessary to the normal operation of a program or activity if:

(a) Age is used as a measure or ap proximation of one or more othe characteristics;

(b) The other characteristic(s) mus be measured or approximated in orde for the normal operation of the program or activity to continue or to achieve any statutory objective of the program or activity;

(c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(d) The other characteristic(s) are impractical to measure directly on an individual basis.

§ 1040.87 Exceptions to the rules against age discrimination. Reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by § 1040.84 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

§ 1040.88 Remedial and affirmative action by recipients.

(a) Where a recipient is found to have discriminated on the basis of age, the recipient shall take such remedial action as the Director, Office of Equal Opportunity (OEO), considers necessary to overcome the effects of the discrimination.

(b) Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(c) If a recipient operating a program which serves the elderly or children, in addition to persons of other ages, provides special benefits to the elderly or to children, the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from participation in the program.

§ 1040.89 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 1040.86 and 1040.87 is on the recipient of Federal financial assistance.

RESPONSIBILITIES OF DOE RECIPIENTS

§ 1040.89-1 General responsibilities.

Each DOE recipient has primary responsibility to ensure that its programs and activities are in compliance with the Act and these regulations. A recipient also has responsibility to maintain records, provide information, and afford access to its records to DOE, to the extent required to determine whether it is in compliance with the Act and these regulations.

§ 1040.89-2 Notice to subrecipients.

Where a recipient awards Federal financial assistance from DOE to its subrecipients, the recipient shall provide the subrecipients written notice of their obligations under these regulations.

§ 1040.89-3 Information requirements.

Each recipient shall: (a) Upon request make available to DOE information necessary to determine whether the recipient is complying with the Act and these regulations.

(b) Permit reasonable access by DOE, upon request, to the books, records, accounts, and other recipient facilities and sources of information to the extent necessary to determine whether the recipient is in compliance with the Act and these regulations.

INVESTIGATION, CONCILIATION AND ENFORCEMENT PROCEDURES

§ 1040.89-4 Compliance reviews.

(a) DOE may conduct preaward and postaward compliance reviews of recipients as prescribed in this part or use other similar procedures that will permit it to investigate and correct violations of the Act and these regulations. DOE may conduct these reviews even in the absence of a complaint against a recipient. The review may be as comprehensive as necessary to determine whether a violation of these regulations has occurred.

(b) If a compliance review indicates a violation of the Act or these regulations, DOE will attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, DOE will arrange for enforcement as described in § 1040.89-10.

§ 1040.89-5 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a written complaint with DOE alleging discrimination prohibited by the Act or these regulations. A complainant must file a complaint within 180 days from the date he/she first had knowledge of the alleged act of discrimination. For good cause shown, however, the Director, Office of Equal Opportunity (OEO), may extend the time limit for filing a complaint. Complaints may be submitted to Field Civil Rights Officers located in DOE's field offices or to the Director, OEO, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585.

(b) The Director, OEO, will attempt to facilitate the filing of complaints wherever possible, including taking the following measures:

(1) Accepting as a sufficient complaint any written statement which identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant.

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint.

(3) Widely disseminating information regarding the obligations of recipients under the Act and these regulations.

(4) Notifying the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure.

(5) Notifying the complainant and the recipient (or their representatives) of their right to contact DOE for information and assistance regarding the complaint resolution process.

(c) The Director, OEO, will refer any complaint outside the jurisdiction of DOE to the proper Federal department or agency and will also notify the complainant and the recipient of the referral. The notification will contain an explanation for the referra and the name, telephone number, an address of the Federal department o agency office having jurisdiction ove the matter complained.

§ 1040.89-6 Mediation.

(a) Referral of complaints for mediation. DOE will refer to the Federal Mediation and Conciliation Service, in accordance with 45 CFR 90.43(c)(3), all complaints that:

(1) Fall within the jurisdiction of the Act and these regulations; and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or make an informed judgment that an agreement is not possible. There must be at least one meeting with the mediator before the Director, OEO, will accept a judgment that an agreement is not possible. However, the recipient and the complainant need not meet with the mediator at the same time.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and the recipient sign it. The mediator shall send a copy of the agreement to the Director, OEO, DOE. DOE will take no further action on the complaint unless the complainant or the recipient fails to comply with the agreement.

(d) DOE will use the mediation process for a maximum of 60 days after referring a complaint to mediation. Mediation ends if:

(1) 60 days elapse from the time the mediation agency receives the complaint; or

(2) Prior to the end of the 60 day mediation period, an agreement is reached; or

(3) Prior to the end of that 60 day mediation period, the mediator determines that an agreement cannot be reached.

(e) The mediator shall return unresolved complaints to the Director, OEO, DOE.

§ 1040.89-7 Investigation.

(a) *Informal Investigation.* (1) The Director, OEO, will review complaints that are unresolved after mediation or are reopened because of a violation of a mediation agreement.

(2) As part of this review, Field Civil Rights Officers will use informal fact finding methods, including joint or separate discussions with the complainant and recipient, to establish the facts and, if possible, settle the complaint on terms that are mutually agreeable to the parties.

(3) If the complaint is resolved during the informal investigation, DOE will put the agreement in writing and have it signed by the parties and the Director, OEO.

(4) The settlement shall not affect the operation of any other enforcement effort of DOE, including compliance reviews and investigation of other complaints which may involve the recipient.

(5) The settlement is not a finding of discrimination against a recipient.

(b) *Formal Investigation.* If Field Civil Rights Officers cannot resolve the complaint through informal inquiry, the Director, OEO, will assign an Investigator to conduct a formal investigation of the complaint. If the investigation indicates a violation of the Act or these regulations, DOE will attempt to obtain voluntary compliance. If DOE cannot obtain voluntary compliance, it will begin enforcement as described in § 1040.89-10 and 10 CFR Part 1040, Subpart H, § 1040.111.

§ 1040.89-8 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by the Act or these regulations; or

(b) Cooperates in any mediation, investigation, hearing, or other part of DOE's investigation, conciliation, and enforcement process.

§ 1040.89-9 Compliance procedure.

(a) DOE may enforce the Act and these regulations through procedures precribed in Subpart H of DOE regulation 10 CFR Part 1040—Nondiscrimination in Federally Assisted Programs, which calls for—

(1) Termination of a recipient's Federal financial assistance from DOE under the program or activity involved where the recipient has violated the Act or these regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before the Federal Energy Regulatory Commission (FERC). Therefore, cases which are settled in mediation, or prior to a hearing, will not involve termination of a recipient's Federal financial assistance from DOE under this section.

(2) Any other means authorized by law including, but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or these regulations, or under the terms of the Federal financial assistance.

(ii) Use of any requirement of, or referral to, any Federal, State, or local government agency that will have the effect of correcting a violation of the Act of these regulations.

(b) DOE will limit any termination under § 1040.89-9(a)(1) to the particular recipient and particular program or activity DOE finds in violation of these regulations. DOE will not base any part of a termination on a finding with respect to any program or activity of the recipient which does not receive Federal financial assistance from DOE.

(c) DOE will take no action under paragraph (a) until:

(1) The Director, OEO, has advised the recipient of its failure to comply with the Act, these regulations, or the terms of the Federal financial assistance and has determined that voluntary compliance cannot be obtained.

(2) Thirty (30) days have elapsed after the Secretary or the Secretary's designee has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the Federal program or activity involved. The Secretary will file a report whenever any action is taken under paragraph (a) of this section.

(d) DOE also may defer granting new Federal financial assistance to a recipient when a hearing under § 1040.89-10 is initiated.

(1) New Federal financial assistance from DOE includes all assistance for which DOE requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities during the deferral period. New Federal financial assistance from DOE does not include increases in funding as a result of changes, computation of formula awards, or assistance awarded prior to the beginning of a hearing under § 1040.89-10.

(2) DOE will not defer new assistance until the recipient has received a notice of an opportunity for a hearing under § 1040.89-10. DOE will not continue a deferral for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and FERC. DOE will not continue a deferral for more than 30 days after the close of the hearing, unless the hearing resulted in a finding against the recipient.

§ 1040.89-10 Hearings, decisions, post-termination proceedings.

DOE procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to DOE enforcement of these regulations. They are 10 CFR Subpart H §§ 1040.121 through 1040.124.

§ 1040.89-11 Remedial action by recipients.

Where the Director, OEO, finds a recipient has discriminated on the basis of age, the recipient shall take such remedial action as the Director, OEO, may require to end the discrminatory practice or policy and/or to overcome the effects of the discrimination.

§ 1040.89-12 Alternate funds disbursal procedure.

(a) When DOE withholds funds from a recipient under these regulations, the Secretary or designee may disburse the withheld funds directly to an alternate recipient(s), any public or private organization or agency, or State or political subdivision of the State.

(b) The Secretary or designee will require any alternate recipient to demonstrate:

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the program or activity.

§ 1040.89-13 Exhaustion of administrative remedies.

(a) A complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if:

(1) One hundred eighty (180) days have elapsed since the complainant filed the complaint and DOE has made no findings with regard to the complainant; or

(2) DOE issues any findings in favor of the recipient.

(b) If DOE fails to make a finding within 180 days or issues a finding in favor of the recipient, the Director, OEO, will:

(1) Promptly advise the complainant of this fact; and

(2) Advise the complainant of his or her right to bring a civil action for injunctive relief; and

(3) Inform the complainant:

(i) That the complainant may bring a civil action only in a United States District Court for the district in which the recipient is located or transacts business;

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney fees, but that the complainant must demand these costs in the complaint;

(iii) That, before commencing the action, the complainant shall give 30 days notice, by registered mail, to the Secretary of DOE, the Secretary of the Department of Health and Human Services, the Attorney General of the United States, and the recipient;

(iv) That the notice must state: the alleged violation of the Act and these regulations; the relief requested; the court in which the complainant is bringing the action; and whether or not attorney fees are demanded in the event the complainant prevails; and

(v) That the complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

APPENDIX A—DOE FEDERALLY ASSISTED PROGRAMS CONTAINING AGE DISTINCTIONS

Statute, Name, Public Law, and U.S. Code	Section and age distinction	Use of age/age related team			Popular name or program	CFDA No.
		Conditions benefits or assistance	Establishes criteria for participation	Describes beneficiaries or target groups		
Energy Conservation and Production Act, Title IV, Part A, Public Law 94-385, 42 U.S.C. 6861-6870	Section 413(a). The Administrator shall develop and conduct, in accordance with the purpose and provisions of this part, a weatherization program. In developing and conducting such program, the Administrator may, in accordance with this part and regulations promulgated under this part, make grants (1) to States, and (2) in accordance with the provisions of subsection (d), to Indian tribal organizations to serve Native Americans. Such grants shall be made for the purpose of providing financial assistance with regard to projects designed to provide for the weatherization of dwelling units, particularly those where elderly or handicapped low-income persons reside, in which the head of the household is a low-income person.			x	Weatherization Assistance Program for Low-Income Persons	81.042
Interagency Agreement between the United States Department of Energy and the United States Department of Labor, Interagency Agreement No. 99-9-1656-07-11; Authority: Comprehensive Employment and Training Act of 1978 (CETA) (Pub. L. 95-524, October 27, 1978, 92 Stat. 1909; 29 U.S.C. 801), the Energy Reorganization Act of 1974, as amended (Pub. L. 93-438, October 11, 1974; 88 Stat. 1233), and the Department of Energy Organization Act (DOE Act) (Pub. L. 95-91, August 4, 1977); 91 Stat. 565; 42 U.S.C. 7101).	Interagency Agreement, Section 1, Purpose: "The purpose of this agreement is to provide for a transfer of funds from the Department of Labor, Employment and Training Administration (ETA), Office of Youth Programs (OYP) to the Department of Energy, Directorate of Administration (AD), Office of Industrial Relations (OIR), to fund the Summer Science Student Program (SSSP). The SSSP will grant monies from DOL through DOE/OIR to DOE contractors to fund 480 participant slots for economically disadvantaged youths in an integrated program of career motivation and basic academic skill enrichment. The program is designed to motivate economically disadvantaged and academically talented youths to continue their education and to pursue energy-related careers upon graduation from high school.			x	Summer Science Student Program	N/A
Executive Office of the President, Office of Science and Technology Policy, Memorandum, Subject: Research Apprenticeships for Minority High Schoolers, dated October 23, 1979	Quotation from October 23, 1979 memorandum, paragraph 2. "The objectives are to stimulate broader interest in the minority communities in careers in science and engineering and to establish individual working relationships of high school students with active researchers who may become helpful mentors when students need advice on college and careers and need letters of recommendation."			x	Summer Research Apprenticeship Program	N/A

Subpart F—Nondiscrimination Under Title VIII of the Civil Rights Act of 1968, as Amended [Reserved]

Subpart G—Program Monitoring

§ 1040.101 Compliance reviews.

(a) The Director shall periodically conduct compliance reviews of selected recipients of DOE Federal financial assistance.

(b) The Director shall seek to review those recipients which have the most serious equal opportunity problems which cause the greatest disparity in delivery of services on a nondiscriminatory basis. Selection for review is to be made on the basis of the following criteria, among others:

(1) The relative disparity between the percentage of minorities, women, or handicapped persons, in the relevant labor market, and the percentage of minorities, women, or handicapped persons, employed by the recipient if employment practices are covered by this part;

(2) The percentage of individuals covered by the Age Discrimination Act of 1975, minorities, women and handicapped persons in the population receiving program benefits.

(3) The number and nature of discrimination complaints filed against a recipient with DOE or other Federal agencies;

(4) The scope of the problems revealed by an investigation commenced on the basis of a complaint filed with DOE against a recipient; and

(5) The amount of assistance provided to the recipient.

(c) After selection of a recipient for review, the Director Federally Assisted Programs Division or the Director's designee, shall inform the recipient of the selection. The notice shall be in writing and posted thirty days prior to the scheduled review. The letter will ordinarily request data pertinent to the review and advise the recipient of:

(1) The practices to be reviewed;

(2) The programs or activities affected by the review;

(3) The opportunity to make, at any time prior to receipt of DOE's finding, a written submission responding to DOE which explains, validates, or otherwise addresses the practices under review; and

(4) The schedule under which the review will be conducted and a determination of compliance or noncompliance made.

(d) Within 90 days of arriving on-site to conduct the review, the Director, FAPD, shall advise the recipient, in writing, of:

(1) Preliminary findings;

(2) Where appropriate, recommendations for achieving voluntary compliance; and

(3) The opportunity to request DOE to engage in voluntary compliance negotiations prior to the Director's final determination of compliance or noncompliance. The Director or the Director's designee shall notify the Assistant Attorney General at the same time the recipient is notified of any matter where recommendations for achieving voluntary compliance are made.

(e) If, within 45 days of the recipient's notification under paragraph (d) of this section, the Director's (FAPD) recommendations for compliance are not met, or voluntary compliance is not secured, or the preliminary findings are not shown to be false, the matter will be forwarded to the Director for a determination of compliance or noncompliance. The determination is to be made no later than 60 days after the recipient has been notified of the preliminary findings. If the Director makes a determination of noncompliance, the Department shall institute actions specified in Subparts G and H.

(f) Where the Director makes a formal determination of noncompliance, the recipient and the Assistant Attorney General shall be immediately advised, in writing, of the determination and of the fact that the recipient has an additional 10 days in which to come into voluntary compliance. If voluntary compliance has not been achieved within the 10 days, the Director shall institute proceedings under Subpart H.

(g) All agreements to come into voluntary compliance shall be in writing and signed by the Director and an official who has authority to legally bind the recipient.

§ 1040.102 Compliance information.

(a) *Cooperation and assistance.* Each responsible Departmental official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep reports and submit to the responsible Department official or his/her designee, timely, complete, and accurate compliance reports at the times, in such form, and containing information as the responsible Department official or the designee may determine to be necessary to enable him/her to ascertain whether the recipient has complied or is complying with this part. In general, recipients should have available for DOE data on program participants, identified by race, color, national origin, sex, age and handicap status. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient or subcontracts with any other person or group, such other recipient shall also submit compliance reports to the primary recipient which will enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his/her designee during normal business hours to books, records, personnel records, accounts, other sources of information, and its facilities, which are pertinent to ascertain compliance with this part. The requirement for access to sources of information shall be contained in the certificate of assurance and agreed to by the recipient as a condition to award. Whenever any information required of a recipient is in the exclusive possession of any other agency, institution, or person and that agency, institution, or person fails or refuses to furnish that information, the recipient shall certify this in its report and set forth the efforts which it has made to obtain the information. The sub-recipient in such case shall be subject to proceedings described under Subpart H of this part.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons information regarding the provisions of this section and its applicability to the program under which the recipient receives Federal financial assistance. Information is to be made available to beneficiaries, participants, and other interested persons in a manner which the responsible Department officials find necessary to inform such persons of the protections against discrimination assured them by this part and the statutes to which this part applies.

§ 1040.103 [Reserved]

§ 1040.104 Complaint investigation.

(a) The Director, FAPD, shall investigate complaints of discrimination that allege a violation of—

(1) Title VI of the Civil Rights Act of 1964, Sec. 16 of the Federal Energy Administration Act of 1974, as amended, or Sec. 401 of the Energy Reorganization Act of 1974;

(2) Title IX of the Education Amendments of 1972, as amended;

(3) Section 504 of the Rehabilitation Act of 1973, as amended;

(4) Age Discrimination Act of 1975, as amended, (reserved in this part);

(5) Title VIII of the Civil Rights Act of 1968, as amended, (reserved in this part);

(6) This part; and

(7) Civil rights provisions of statutes administered pursuant to the DOE Organization Act, Pub. L. 95-91.

(b) No complaint will be investigated if it is received by an appropriate Departmental official more than 180 days after the date of the alleged discrimination, unless the time for filing is extended by the Director, FAPD, for good cause shown. Where a complaint is accepted for investigation, the Director, FAPD, will initiate a DOE investigation. The Director, FAPD, who is responsible for the investigation, shall notify the complainant, in writing, if the complaint has been accepted or rejected.

(c) The Director, FAPD, or his/her designee shall conduct investigations of complaints as follows:

(1) Within 35 days of receipt of a complaint, the Director, FAPD, shall:

(i) determine whether DOE has jurisdiction under paragraphs (a) and (b) of this section;

(ii) If jurisdiction is not found, wherever possible, refer the complaint to the Federal agency with such jurisdiction and advise the complainant;

(iii) If jurisdiction is found, notify the recipient alleged to be discriminating of receipt of the complaint; and

(iv) Initiate the investigation.

(2) The investigation will ordinarily be initiated by a letter requesting data pertinent to the complaint and advising the recipient of:

(i) The nature of the complaint and, with the written consent of the complainant, the identity of the complainant. The identity of the complainant may be revealed by the Director, FAPD, OEO, without the complainant's written consent if the Director, FAPD, OEO, determines that such action is necessary for resolution of the complaint;

(ii) The program or activities affected by the complaint;

(iii) The opportunity to make, at any time prior to receipt of DOE's findings, a documentary submission responding to, rebutting, or denying the allegations made in the complaint; and

(iv) The schedule under which the complaint will be investigated and a determination of compliance made.

(3) Within 90 days of initiating the investigation, the Director, FAPD, shall advise the recipient, in writing of:

(i) Preliminary findings;

(ii) Where appropriate, recommendations for achieving voluntary compliance; and

(iii) The opportunity to request DOE to engage in voluntary compliance negotiations prior to the Director's final determination of compliance or noncompliance. The Director or the Director's designee shall notify the Assistant Attorney General and the recipient of any matter where recommendations for achieving voluntary compliance are made.

(4) If, within 45 days of the recipient's notification under paragraph (c)(3) of this section, the Director's (FAPD) recommendations for compliance are not met, or voluntary compliance is not secured, or the preliminary findings are not shown to be false, the matter will be forwarded to the Director, OEO, for a determination of compliance or noncompliance. The determination is to be made no later than 60 days after the recipient has been notified of the preliminary findings. If the Director makes a determination of noncompliance, the Department shall institute actions specified in Subpart H.

(5) Where the Director makes a formal determination of noncompliance, the recipient and the Assistant Attorney General shall be immediately advised, in writing, of the determination and of the fact that the recipient has an additional 10 days in which to come into voluntary compliance. If voluntary compliance has not been achieved within the 10 days, the Director shall institute proceedings under Subpart H. All agreements to come into voluntary compliance shall be in writing and signed by the Director, OEO, and an official who has authority to legally bind the recipient. The complainant shall also be notified of any action taken including the closing of the complaint or achievement of voluntary compliance.

(6) If the complainant or party other than the Attorney General has filed suit in Federal or State court alleging the same discrimination alleged in a complaint to DOE, and if during DOE's investigation, the trial of that suit would be in progress, DOE will consult with the Assistant Attorney General and court records to determine the need to continue or suspend the investigation and will monitor the litigation through the court docket and contacts with the complainant. Upon receipt of notice that the court has made a finding of discrimination against a recipient that would constitute a violation of this part, the DOE may institute administrative proceedings as specified in Subpart H after DOE has advised the recipient, in writing, of an opportunity to request voluntary compliance under this section.

All agreements to come into voluntary compliance shall be in writing and signed by the Director and an official who has authority to legally bind the recipient.

(7) The time limits listed in paragraphs (c)(1) through (c)(6) of this section shall be appropriately adjusted where DOE requests another Federal agency to act on the complaint. DOE is to monitor the progress of the matter through liaison with the other agency. Where the request to act does not result in timely resolution of the matter, DOE is to institute appropriate proceedings as required by this part.

(d) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws implemented in this part or because the complainant has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subpart. The identity of complainants is to be kept confidential except as determined by the Director, FAPD, to be necessary to carry out the purpose of this subpart, including investigations, hearings, or judicial proceedings arising thereunder.

Subpart H—Enforcement

MEANS OF EFFECTING COMPLIANCE

§ 1040.111 Means available.

If there appears to be a failure or threatened failure to comply with any of the provisions of this part, and if the noncompliance or threatened noncompliance cannot be corrected by voluntary means, compliance with this part may be effected by the suspension, termination of, or refusal to grant or to continue Federal financial assistance, or by any other means authorized by law. Such other means may include, but are not limited to:

(a) Referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law including the Civil Rights Act of 1964, other statutes to which this part applies, or any assurance or other contractual undertaking; and

(b) Any applicable proceeding under State or local law.

§ 1040.112 Noncompliance with assurances.

If an applicant fails or refuses to furnish an assurance required under § 1040.4 of Subpart A of this part, or otherwise fails or refuses to comply with a requirement imposed by this part, such as § 1040.102(c), Subpart G of this part, action to refuse Federal financial assistance shall be taken in accordance with procedures of § 1040.114 of this subpart.

§ 1040.113 Deferral.

DOE may defer action on pending applications for assistance in such a case during pendency of administrative proceedings under § 1040.114 of this subpart.

§ 1040.114 Termination of or refusal to grant or to continue Federal financial assistance.

No order suspending, terminating, or refusing to grant or continue Federal financial assistance is to become effective until:

(a) Informational notice of the proposed order is given to the Executive Assistant to the Secretary, if the action is contemplated against a State or local government;

(b) The Director has advised the applicant or recipient of his/her failure to comply and has determined that compliance cannot be secured by voluntary means. (It will be determined by the Director that compliance cannot be secured by voluntary means if it has not been secured within the time periods specifically set forth by this part.)

(c) There has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with the requirement imposed by or under this part;

(d) The FERC has notified the Secretary of its finding of noncompliance; and

(e) The expiration of 30 days after the Secretary or a designee has filed with the committee of the House of Representatives and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend, terminate, or to refuse to grant or to continue Federal financial assistance is to be limited to the particular political entity or part of that entity or other applicant or recipient to whom the finding has been made and shall be limited in its effect to the particular program or part of the program in which the noncompliance has been found.

§ 1040.115 Other means authorized by law.

No action to effect compliance by any other means authorized by law is to be taken until—

(a) The Director has determined that compliance cannot be secured by voluntary means;

(b) The recipient or other person has been notified by the Director, in writing, that it has been found in formal noncompliance and that it has 10 days before formal enforcement proceedings begin in which to enter into a written voluntary compliance agreement.

(c) The expiration of at least ten (10) days from the mailing of the notice to the recipient or other person.

OPPORTUNITY FOR HEARING

§ 1040.121 Notice of opportunity for hearing.

(a) Whenever an opportunity for hearing is required by § 1040.113, the Director, OEO, or his/her designee shall serve on the applicant or recipient, by registered, certified mail, or return receipt requested, a notice of opportunity for hearing which will:

(1) Inform the applicant or recipient of the action proposed to be taken and of his/her right within twenty (20) days of the date of the notice of opportunity for hearing, or another period which may be specified in the notice, to request a hearing;

(2) Set forth the alleged item or items of noncompliance with this part;

(3) Specify the issues;

(4) State that compliance with this part may be effected by an order providing for the termination of or refusal to grant or to continue assistance, as appropriate, under the program involved; and

(5) Provide that the applicant or recipient may file a written answer with the Director, OEO, to the notice of opportunity for hearing under oath or affirmation within twenty (20) days of its date, or another period which may be specified in the notice.

(b) An applicant or recipient may file an answer, and waive or fail to request a hearing, without waiving the requirement for findings of fact and conclusions of law or the right to seek review by the FERC in accordance with the provisions established by the FERC. At the time an answer is filed, the applicant or recipient may also submit written information or argument for the record if he/she does not request a hearing.

(c) An answer or stipulation may consent to the entry of an order in substantially the form set forth in the notice of opportunity for hearing. The order may be entered by the General Counsel or his/her designee. The consent of the applicant or recipient to the entry of an order shall constitute a waiver by him/her of a right to:

(1) A hearing under Sec. 902 of Title IX of the Education Amendments of 1972, Section 602 of Title VI of the Civil Rights Act of 1964, Section 16, Section 401 and § 1040.113;

(2) Findings of fact and conclusions of law; and

(3) Seek review by the FERC.

(d) The failure of an applicant or recipient to file an answer within the period prescribed or, if the applicant or recipient requests a hearing, his failure to appear at the hearing shall constitute a waiver by him/her of a right to:

(1) A hearing under Section 902 of Title IX of the Education Amendments of 1972, Section 602 of Title VI of the Civil Rights Act of 1964, Section 16, Section 401, and § 1040.113;

(2) Conclusions of law; and

(3) Seek review by the FERC.

In the event of such a waiver, the Secretary or a designee may find the facts on the basis of the record available and enter an order in substantially the form set forth in the notice of opportunity for hearing.

(e) An order entered in accordance with paragraph (c) or (d) of this section shall constitute the final decision of DOE unless the FERC, within forty-five (45) days after entry of the order, issues a subsequent decision which shall then constitute the final decision of DOE.

(f) A copy of an order entered by the FERC official shall be mailed to the applicant or recipient and to the complainant, if any.

§ 1040.122 Request for hearing or review.

Whenever an applicant or recipient requests a hearing or review in accordance with § 1040.121(a)(1) or (b), the DOE General Counsel or his/her designee shall submit such request along with other appropriate documents to the FERC.

§ 1040.123 Consolidated or joint hearings.

In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more programs to which this part applies or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued to implement the requirements of the laws cited in this part, the Secretary or a designee, in coordination with FERC may, by agreement with other departments or agencies, where applicable, provide for the conduct of consolidated or joint hearings and for the application to such hearings of rules of procedure not inconsistent with this part. Final decision in such cases, insofar as programs subject to this part are concerned, shall be made in accordance with procedures established by the FERC.

§ 1040.124 Responsibility of the Federal Energy Regulatory Commission.

The FERC has authority under section 402(b) of the DOE Organization Act, Pub. L. 95-91, to promulgate regulations regarding the conduct of hearings to deny or terminate Federal financial assistance. Rules for conduct of hearings will be published by the FERC and will be placed in title 18 CFR.

JUDICIAL REVIEW

§ 1040.131 Judicial review.

Final DOE actions taken under this part to withhold or terminate Federal financial assistance are subject to judicial review under the following laws:

(a) Title VI—Section 603 of the Civil Rights Act of 1964;

(b) Title IX—Section 903 of the Education Amendments of 1972;

(c) Section 16, Section 401, Section 504—Pub. L. 89-554, 5 U.S.C. 702;

(d) Section 419 and Section 420 of the Energy Conservation and Production Act of 1976, as amended.

APPENDIX A—FEDERAL FINANCIAL ASSISTANCE OF THE DEPARTMENT OF ENERGY TO WHICH THIS PART APPLIES

1. *Access permits.* Atomic Energy Act of 1954, as amended, Sections 1, 2, 3 and 161(i), Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2011-13, 2201; and Title I Section 104(c) of the Energy Reorganization Act of 1974, Public Law 93-438; 88 Stat. 1237; 42 U.S.C. 5814; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

2. *Motion pictures film libraries.* Atomic Energy Act of 1954, as amended, Public Law 83-703, Sections 3 and 141(b), (68 Stat. 919), 42 U.S.C. 2013 and 2161; the Energy Reorganization Act of 1974, Public Law 93-438, Title I, Sections 103 and 107, (88 Stat. 1240), 42 U.S.C. 5817; Department of Energy Organization Act, Public Law 95-91, Title I, Section 102, and Title III, Section 301, (19 Stat. 565), 42 U.S.C. 7101; the National Energy Extension Service Act, Title V, Public Law 95-39, (91 Stat. 191), 42 U.S.C. 7001.

3. *Granting of patent licenses.* Atomic Energy Act of 1954, as amended, Sections 156 and 161(g); Public Law 83-703; 68 Stat. 919, 42 U.S.C. 2186 and 2201; Federal Nonnuclear Energy Research and Development Act of 1974; Section 9(f)(g)(h); Public Law 93-577; 88 Stat. 1887; 42 U.S.C. 5908(f)(g)(h); Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

4. *University Laboratory Cooperative Program.* Atomic Energy Act of 1954, as amended, Section 31 (a) and (b); Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy

Organization Act, 42 U.S.C. 7101; Public Law 95-91.

5. *Facility training institutes, short courses, and workshops on energy and environmental subjects.* Atomic Energy Act of 1954, as amended, Section 31 (a) and (b); Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; 42 U.S.C. 7101; Public Law 93-438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

6. *Reactor sharing and fuel assistance.* Atomic Energy Act of 1954, as amended, Section 31 (a) and (b), Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438, 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

7. *Traineeships for graduate students in energy related fields.* Atomic Energy Act of 1954, as amended, Sections 31 (a) (b); Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-458; 88 Stat. 1240; 42 U.S.C. 5817; Public Law 93-409, Section 12(a); Public Law 94-163, Section 337; Public Law 93-577, Section 4(d); Public Law 93-275, Section 5; Public Law 95-39, Title V, Section 502(7); Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

8. *Energy related laboratory equipment grants.* Atomic Energy Act of 1954, as amended, Section 31 (a) and (b); Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

9. *Information services exhibits, public speakers publications, reference and analysis.* Atomic Energy Act of 1954, as amended, Section 3 and 141b; Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2013 and 2161; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

10. *Payments in lieu of property taxes.* Atomic Energy Act of 1954, as amended, Section 168; Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2208; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act; 42 U.S.C. 7101; Public Law 95-91.

11. *Radiological emergency assistance.* Atomic Energy Act of 1954, as amended, Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2011 et seq.; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

12. *Nuclear industry seminars.* Atomic Energy Act of 1954, as amended, Section 141(b); Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2161, and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438, 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

13. *Work experience.* Atomic Energy Act of 1954, as amended, Section 3, Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2013; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act; 42 U.S.C. 7101; Public Law 95-91.

14. *Citizens' Workshops.* Atomic Energy Act of 1954, as amended, Public Law 83-703, Section 3 and 141(b), 68 Stat. 919; 42 U.S.C. 2013 and 2161; the Energy Reorganization Act of 1974; Public Law 93-438, Title I, Section 103 and 107, 88 Stat. 1240; 42 U.S.C. 5817, Department of Energy Organization Act, Public Law 95-91, Title I, Section 102, and Title III, Section 301, 91 Stat. 565; 42 U.S.C. 7101; the National Energy Extension Service Act, Title V, Public Law 95-39, 91 Stat. 191; 42 U.S.C. 7001.

15. *Research and development in energy conservation.* Atomic Energy Act of 1954, as amended, Section 31; Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438; 88 Stat. 1240; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

16. *Energy related inventions.* Section 14 of the Federal Non-Nuclear Energy Research and Development Act of 1974; Public Law 93-577; 68 Stat. 1894; 42 U.S.C. 5913; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

17. *Research and development fission, fossil, solar, geothermal, electric and storage systems, magnetic fusion.* Amendments to the Energy Reorganization Act of 1974 and the Atomic Energy Act of 1954; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

18. *Energy Information Administration Clearinghouse (EIAC).* Department of Energy Organization Act, Section 205; Public Law 95-91.

19. *National Energy Information Center (NEIC).* Federal Energy Administration Act of 1974, as amended, Section 20(a)(4); Public Law 93-175; 15 U.S.C. 779; Department of Energy Organization Act, Section 301; Public Law 95-91.

20. *Grants for Offices of Consumer Services.* Title II, Section 205 of the Energy Conservation and Production Act, Public Law 94-385; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

21. *State Energy Conservation Program.* Title III, Sections 361-366, Part C of the Energy Policy and Conservation Act, Public Law 94-163; 42 U.S.C. 6321-6326; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

22. *Weatherization Assistance Program for low income persons.* Title IV, Part A of the Energy Conservation and Production Act, Public Law 94-385; 42 U.S.C. 6861-6870; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

23. *Supplemental State Energy Conservation Program.* Title IV, Section 432(a), Part B of the Energy Conservation and Production Act of 1976, Public Law 94-385; 42 U.S.C. 6801 *et seq.*; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

24. *Public education in energy.* Atomic Energy Act of 1954, as amended, Sections 31(a) and 31(b); Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107 of the Energy Reorganization Act of 1974; Public Law 93-458; 88 Stat. 1240; 42 U.S.C. 5817; Public Law 93-409, Section 12(a); Public Law 94-163, Section 337; Public Law 93-577, Section 4(d); Public Law 93-275, Section 5; Public Law 95-39, Title V, Section 502(7); Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

25. *Special studies and projects in energy education and training.* Atomic Energy Act of 1954, as amended, Sections 31(a) and 31(b); Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107 of the Energy Reorganization Act of 1974; Public Law 93-458; 88 Stat. 1240; 42 U.S.C. 5817; Public Law 93-409, Section 12(a); Public Law 93-163, Section 337; Public Law 93-577, Section 4(d); Public Law 93-275, Section 5; Public Law 95-39, Title V, Section 502(7).

26. *Research and development in biomedical and environmental sciences.* Atomic Energy Act of 1954, as amended, Section 31; Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; Title I, Section 107, of the Energy Reorganization Act of 1974; Public Law 93-438; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, 42 U.S.C. 7101; Public Law 95-91.

27. *Preface (Pre-Freshman and Cooperative Education for Minorities In Engineering).* Atomic Energy Act of 1954, as amended, Sections 31(a) and 31(b); Public Law 83-703; 68 Stat. 919; 42 U.S.C. 2051; and Title I, Section 107 of the Energy Reorganization Act of 1974; Public Law 93-458; 88 Stat. 1240; 42 U.S.C. 5817; Department of Energy Organization Act, Public Law 95-91, Sections 102 and 203; Public Law 93-409, Section 12(a); Public Law 94-163, Section 337; Public Law 93-577, Section 4(d); Public Law 93-275, Section 5; Public Law 95-39, Title V, Section 502(7).

28. *Materials allocation.* Section 104, Energy Policy and Conservation Act (EPCA), Section 101(c) Defense Productio Act of 1950, as amended (DPA), 50 U.S.C 2071(c), Section 7, Executive Order 1191 April 13, 1976, Defense Mobilization Orde No. 13, September 22, 1976, 41 FR 4372 Department of Commerce, Bureau of D mestic Commerce, Delegation 4, 41 F 52331, MA Regulations 10 CFR 216; Depar ment of Energy Organization Act, 42 U.S.C 7101; Public Law 95-91.

29. *Basic energy sciences, high energy an nuclear physics, and advanced technolog and assessment projects.* Atomic Energy Ac of 1954, as amended, Section 31; Public La 83-703; 68 Stat. 919; 42 U.S.C. 2051; an Title I, Section 107, of the Energy Reorgani zation Act of 1974; Public Law 93-438; 8 Stat. 1240; 42 U.S.C. 5817; Department o Energy Organization Act; 42 U.S.C. 7101 Public Law 95-91.

30. *Energy Extension Service.* Nationa Energy Extension Service Act; Title V, Public Law 95-39; Department of Energ Organization Act, 42 U.S.C. 7101; Public Law 95-91.

PART 1041—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF ENERGY

Sec.

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AUTHORITY: 29 U.S.C. 794.

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§ 1041.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 1041.102 Application.

This part applies to all programs or activities conducted by the agency.

§ 1041.103 Definitions.

For purposes of this part, the term—

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Handicapped person" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addition and alcholism.

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified handicapped person" means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) "Qualified handicapped person" is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 1041.140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

[51 FR 4574, Feb. 5, 1986; 51 FR 7543, MAr. 5, 1986. Redesignated at 52 FR 1902, Jan. 16, 1987]

§§ 1041.104—1041.109 [Reserved]

§ 1041.110 Self-evaluation.

(a) The agency shall, by April 9, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspections:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 1041.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 1041.112—1041.129 [Reserved]

§ 1041.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualfied handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 1041.131—1041.139 [Reserved]

§ 1041.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§§ 1041.141—1041.148 [Reserved]

§ 1041.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 1041.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 1041.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative

burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1041.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is nor required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by June 6, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by April 7, 1989, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by October 7, 1986, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

[51 FR 4574, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986. Redesignated at 52 FR 1902, Jan. 16, 1987]

§ 1041.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

§§ 1041.152—1041.159 [Reserved]

§ 1041.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1041.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 1041.161—1041.169 [Reserved]

§ 1041.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Manager of Federally Assisted Programs shall be responsible for coordinating implementing of this section. Complaints may be sent to Director of Equal Opportunity, U.S. Department of Energy, Room 4B-112, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-2218.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 1041.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 4574, Feb. 5, 1986. Redesignated and amended at 52 FR 1902, Jan. 16, 1987]

§§ 1041.171—1041.999 [Reserved]

PART 1045—NATIONAL SECURITY INFORMATION

Subpart A—Classification and Declassification

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1045.1 Purpose.
1045.2 Scope.
1045.3 Definitions.
1045.4 Responsibilities and authorities.
1045.5 Policy.
1045.6 Mandatory review for declassification.
1045.7 Suggestions or complaints.

Authority: E.O. 12356 (47 FR 14874 April 6, 1982; Information Security Oversight Office Directive No. 1 (47 FR 27836 June 25, 1982.

Source: 49 FR 27738, July 6, 1984, unless otherwise noted.

Subpart A—Classification and Declassification

§ 1045.1 Purpose.

This part establishes policy and procedures to be followed within the Department of Energy (DOE) for the classification and declassification of National Security Information (NSI) to the extent that they affect members of the public. Procedures are established for the submission of mandatory declassification review requests to the DOE made pursuant to section 3.4 of Executive Order (E.O.) 12356, "National Security Information," April 2, 1982. Instructions for submitting suggestions or complaints regarding the DOE's information security program are given.

§ 1045.2 Scope.

This part applies to the original classification and declassification of NSI and the derivative classification and declassification of documents or other material containing or revealing NSI within the DOE and its contractor and subcontractor organizations. Accordingly, Restricted Data and Formerly Restricted Data classified pursuant to the Atomic Energy Act of 1954, as amended, are outside the scope of this part.

§ 1045.3 Definitions.

(a) "Declassification" means a determination that previously classified information, documents, or other material that contain or reveal such information no longer require protection against unauthorized disclosure in the interest of national security.

(b) "Document" means any recorded information regardless of its physical form or characteristics.

(c) "Information" means any knowledge or facts, distinct from its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.

(d) "Material" means any product or substance on or in which information is embodied.

(e) "National Security Information" (NSI) means information that has been determined pursuant to E.O. 12356 or any predecessor order to require protection against unauthorized disclosure and that is so designated.

(f) "Original classification" means an initial determination that information requires, in the interest of national security, protection against unauthorized disclosure, together with a classification designation signifying the level of protection required.

§ 1045.4 Responsibilities and authorities.

(a) The Assistant Secretary for Defense Programs is responsible for making final determinations on appeals submitted by individuals who have been denied all or part of documents or other material containing or revealing NSI requested under the Mandatory Review for Declassification provisions of this regulation.

(b) The Director of Classification is designated as the Senior Agency Official to direct and administer the Department's information security program, as required by section 5.3(a) of E.O. 12356. In addition, the Director of Classification is responsible for making initial denials of requests submitted by eligible individuals for documents or other material containing or revealing NSI requested under the Mandatory Review for Declassification provisions of this regulation.

§ 1045.5 Policy.

(a) It is DOE policy to classify as NSI, in accordance with the provisions of E.O. 12356, information concerning the national defense and foreign relations of the United States which, in the interests of the United States and its citizens, must be protected against unauthorized disclosure.

(b) It is DOE policy that only individuals specifically authorized to do so by the Secretary of Energy or his designee may originally classify or declassify information or derivatively classify or declassify documents or other material. Those who possess such authority must ensure that their determinations are made upon proper authority, are in compliance with E.O. 12356 and its implementing directives, appropriate statutes, and Departmental regulations, and are consistent with approved classification policy and guidance.

§ 1045.6 Mandatory review for declassification.

(a) Except as provided in section 3.4(b) of E.O. 12356, all information classified under E.O. 12356 or its predecessor orders (i.e., National Security Information) is subject to a review for declassification by the originating agency, if the request:

(1) Is made by a United States citizen or permanent resident alien, a Federal agency, or a State or local government;

(2) Describes the document or material containing or revealing the NSI in question with sufficient specificity to enable it to be located with a reasonable effort; and

(3) Is sent to the Director of Classification, U.S. Department of Energy, Washington, DC 20545.

(b) Requests for mandatory declassification reviews will be processed as follows:

(1) *Invalid requests.* The requester will be notified promptly by the Office of Classification when his or her request is not valid. This notification letter will contain the reasons why the request cannot be processed and, if applicable, what additional information is needed to allow processing of the request.

(2) *Valid requests.* Upon receipt of a valid request for mandatory declassification review, the Office of Classification shall do the following:

(i) Contact all appropriate organizations within the Department requesting that their files be searched for documents and material responsive to the request.

(ii) Based on the results of the above search, determine if estimated review and coordination time required to process the request precludes a prompt declassification determination, and if so, inform the requester of the additional time needed to process the request.

(iii) Review the documents or other material responsive to the request and determine whether or not the NSI under the purview of the Department contained in or revealed by the documents or other material can be declassified.

(iv) Coordinate with other agencies the review of documents or other material originated by the Department that are responsive to the request and that contain information under the purview of those agencies.

(v) After deletion of all NSI under the purview of the Department, forward a copy of any documents or other material originated by another agency to that agency for further processing and direct response to the requester, including a copy of the request together with recommendations for action and, after consultation with the originating agency, inform the requester of the referral.

(vi) Transmit to the requester the final determination of the Director of Classification as to whether all or part of any documents or other material responsive to the request may be released to the requester. This determination must be made within one year from the date of receipt of the request except in unusual circumstances (e. g., delays caused by coordination of the review of responsive documents or other material originated by the Department with agencies having purview over information contained in or revealed by the documents or other material).

(vii) In those cases where a fee (see 10 CFR 1004.9 for schedule of fees charged for documents or material provided to requesters) is to be charged, notify the requester of the estimated amount of the fee and await confirmation by the requester of willingness to pay the fee.

(viii) In those cases where no fee is to be charged, or where the requester has agreed to pay the fee, and consistent with other applicable law, send the requester copies of declassified documents or other material or declassified portions of classified documents or other material that constitute coherent segments.

(ix) In those cases where all or part of documents or other material responsive to a request cannot be declassified, notify the requester that he or she has the right to administratively appeal the denial within 60 days of receipt of the denial letter. The requester should be notified that the appeal shall specify why the requester believes that the information in question does not warrant classification and, if possible, should include copies of the initial request letter and the denial letter from the Director of Classification. The appeal should be sent to the Assistant Secretary for Defense Programs, U.S. Department of Energy, Washington, DC 20545.

(c) Appeals of denials of mandatory declassification review requests.

(1) Immediately upon receipt of an appeal request, an ad hoc committee will be assembled and headed by a representative from the Office of the Assistant Secretary for Defense Programs and made up or representatives from any Department organizations that have an interest in the subject of the appeal.

(2) The Office of Classification will provide the committee all information, documents, and any other assistance pertinent to the appeal, and will advise the committee with regard to the classification of the information involved.

(3) The committee will review the basis for the denial and transmit its findings and recommendations to the Assistant Secretary for Defense Programs within 15 working days following receipt of the appeal.

(4) Based on the committee report, the Assistant Secretary for Defense

Programs shall make a final determination on the appeal within 25 working days following receipt of the appeal. The head of the committee then shall notify the requester, within 30 working days following receipt of the appeal, in writing, of the final determination. Based on this determination and consistent with other applicable law, copies of declassified documents or other material or declassified portions of classified documents or other material responsive to the request will be released to the requester, upon payment of any required fees, and/or the requester will be given a statement as to why some or all of the documents or other material cannot be declassified.

§ 1045.7 Suggestions or complaints.

Any individual who has suggestions or complaints regarding the Department's information security program may direct them in writing to the Director of Classification, U.S. Department of Energy, Washington, DC 20545. Such letters should include a description of the issue or problem, the suggestion or complaint, all applicable background information, and an address to which a response may be sent. The Office of Classification will review such submissions and will respond to the originator of the suggestion or complaint letter.

PART 1046—PHYSICAL PROTECTION OF SECURITY INTERESTS

Subpart A—General

Sec.
1046.1 Purpose.
1046.2 Scope.
1046.3 Definitions.

Subpart B—Protective Force Personnel

1046.11 Medical and Physical Fitness Qualification Standards.
1046.12 Physical Fitness Training Program.
1046.13 Medical certification.
Appendix A to Subpart B, Part 1046—Medical and Physical Fitness Qualification Standards.

Authority: Sec. 2201, Pub. L. 83-703, 68 Stat. 919 (42 U.S.C. 2011 et seq.); sec. 7151, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.)

Source: 49 FR 46101, Nov. 23, 1984, unless otherwise noted.

Subpart A—General

§ 1046.1 Purpose.

The purpose of this part is to set forth Department of Energy, hereinafter "DOE," security policies and procedures regarding the physical protection of security interests.

§ 1046.2 Scope.

This part applies to DOE contractor employees at Government-owned facilities, whether or not privately operated.

§ 1046.3 Definitions.

For the purposes of this part:

Contractor. The term "contractor" includes subcontractors at all terms.

Defensive Combative Personnel. Security inspectors other than offensive combative personnel.

Designated Physician. An occupational medical physician who is recommended by the designated management supervisory official of the local DOE field office and authorized by the Medical Director, Office of Operational and Environmental Safety, Headquarters, to determine the medical and physical condition of protective force personnel. When an occupational medical physician is not available, physicians who are not board-certified in occupational medicine may be recommended and authorized by the Medical Director as designated physicians for the purpose of this part. Designated physicians need not be employed full-time, but contractually shall be responsible to DOE for performance of the medical functions required by this part.

Facility. An educational institution, manufacturing plant, laboratory, office building or other area utilized by the DOE or its contractors or subcontractors for the performance of work under DOE jurisdiction.

Field Organization. Any organizational component of the DOE located outside the Washington, D.C. metropolitan area.

Guard. An unarmed individual who is employed for, and charged with, the protection of classified matter or Government property.

Medical Condition. General health, physical condition, and emotional and mental stability.

Offensive Combative Personnel. Security inspectors assigned to response force duties including pursuit and assault functions.

Protective Force Personnel. Guards and security inspectors assigned to protective details, who are employed to protect DOE security interests.

Security Inspector. A uniformed person who is authorized under section 161.k of the Atomic Energy Act of 1954, as amended, or other statutory authority, to carry firearms and to make arrests without warrants and who is employed for, and charged with, the protection of classified matter, special nuclear material, or other Government property.

Subpart B—Protective Force Personnel

§ 1046.11 Medical and Physical Fitness Qualification Standards.

(a) Except as provided in subparagraph (b) DOE contractors shall not employ as protective force personnel any individual who fails to meet the applicable medical and physical fitness qualification standards as set forth in Appendix A, to this subpart, "Medical and Physical Fitness Qualification Standards."

(b)(1) Incumbent security inspectors have until (insert date 12 months from effective date of regulation) to meet the applicable physical fitness qualification standards.

(2) Current waivers to the medical qualification standards remain in effect and future waivers are permitted.

(c) Each security inspector shall meet the applicable medical and physical fitness qualification standards every twelve months after the initial qualification. Each guard shall meet the applicable medical standards every two (2) years after the initial qualification.

§ 1046.12 Physical Fitness Training Program.

(a) Beginning January 24, 1985, each incumbent security inspector, who has not met the applicable physical fitness qualification standard, shall participate in a DOE approved physical fitness training program. Once an incumbent security inspector has begun a physical fitness training program, it must be completed before the security inspector may take the applicable physical fitness qualification standards test. Once a physical fitness training program is completed, an incumbent security inspector has thirty (30) days to meet the applicable physical fitness qualification standards.

(b) An incumbent security inspector who fails to qualify within thirty (30) days of completing a physical fitness training program shall participate in an additional training program. Upon completion of the additional physical fitness training program the security inspector has thirty (30) days to meet the applicable physical fitness qualification standard. No additional training or time extension to meet the standards is permitted except for unusual circumstances as set forth in the Appendix, Paragraph G(2).

(c) A security inspector who fails to requalify within thirty (30) days after his or her yearly anniversary date of the initial qualification shall participate in a physical fitness training program. Security inspectors have a maximum of six (6) months from the anniversary date to requalify.

(d) After his or her initial qualification, each incumbent security inspector shall participate in a DOE-approved physical fitness training program on a continuing basis. This training is for the purpose of ensuring that security inspectors maintain the requisite physical fitness for effective job performance and to enable the individual security inspector to pass the applicable annual physical fitness requalification test without suffering any undue physical injury.

[49 FR 46101, Nov. 23, 1984, as amended at 51 FR 7248, Mar. 3, 1986]

§ 1046.13 Medical certification.

Each individual shall have a medical examination within thirty (30) days preceding participation in a physical fitness training program and the physical fitness qualification standards test, and a determination and written certification by a designated physician that there are no foreseeable medical risks as disclosed by the medical examination to the individual's participation in a physical fitness training program and the physical fitness qualification standards test.

APPENDIX A TO SUBPART B OF PART 1046—MEDICAL AND PHYSICAL FITNESS QUALIFICATION STANDARDS

A. *Applicability.* This Appendix A to Subpart B of Part 1046 provides the minimum medical and physical fitness qualifications, criteria, and guides to be used by designated physicians and management supervisory officials in advising responsible DOE officials whether the medical and physical condition of protective force personnel to be employed by DOE contractors reasonably assures that they can effectively perform their normal and emergency duties without undue hazard to themselves, fellow employees, the plant site and the general public.

B. *Application of Medical and Physical Fitness Qualification Standards.*

(1) The standards in this Appendix are the minimum necessary to determine the medical and physical capability of protective force personnel to perform all normal and emergency duties effectively and safely.

(2) Security inspector applicants shall meet the applicable medical and physical fitness standards in this Appendix prior to assignment to security inspector duties.

(3) Incumbent security inspectors shall meet the applicable physical fitness standards in this Appendix within one year of the effective date of these standards and once every twelve months thereafter or shall be relieved of security inspector duties subject to the provisions in paragraph G below.

(4) Incumbent security inspectors shall meet the applicable medical standards prior to assignment to security inspector duties and annually thereafter, subject to the provisions of paragraph G below.

(5) Guards shall meet the applicable standards in this Appendix prior to assignment to guard duties and biennially thereafter, subject to the provisions of paragraph J below.

(6) The determination of whether or not the examinee meets the medical standards in this Appendix shall be made by a designated physician.

(7) The determination of whether or not the examinee meets the physical fitness standards in this Appendix shall be made by a designated management supervisory official in coordination with a designated physician.

(8) When a designated physician determines that special medical evaluations and practical performance tests are necessary in order for an examinee to demonstrate the examinee's abilities to perform all normal and emergency duties, a determination of the adequacy of performance shall be made by a designated physician.

(9) For those facilities where it is necessary to determine the medical qualification of security inspectors or security inspector applicants to perform special assignment security inspector duties which might require exposure to unusually high levels of stress or physical exertion, field office managers may develop more stringent medical qualification requirements or additional medical or physical tests as necessary for such determinations. All such additional qualification requirements shall be forwarded, with justification, for the approval of the Director of Safeguards and Security, Headquarters, prior to application and if approved, shall be implemented in the same manner that these qualification standards have been implemented.

(10) The provisions of DOE 5480.1A, ENVIRONMENTAL PROTECTION, SAFETY, AND HEALTH PROTECTION PROGRAM FOR DOE OPERATIONS, of 8-13-81, Chapter VIII, Part 4 apply for return to work after recovery from a temporarily disqualifying medical or surgical condition.

C. *Administrative Procedures and Requirements.*

(1) *Medical Confidentiality and Retention of Medical Reports.*

(a) The medical information and data on each employee or applicant shall be maintained as confidential, privileged medical information and shall not be released by a designated physician without the written consent and release of the employee or applicant, except as permitted or required by law.

(b) When an individual has been examined by a designated physician, all available history and test results should be retained by the responsible DOE or DOE contractor medical department, in accordance with DOE 5480.1A, Chapter VIII, Part 4, whether or not the individual completes the examination, and whether or not potentially disqualifying defects are recorded.

(2) *Change of Health Status of Protective Force Personnel.*

(a) It is the specific responsibility of protective force employees to report immediately to their supervisor any known or suspected change in their health which might impair their capacity for duty or the safe and effective performance of assigned job duties.

(b) Supervisory personnel have the responsibility to make a timely report to a designated physician on any behavorial and health changes and deterioration in work performance that is observed in protective force personnel under their jurisdiction. Examples of areas that may indicate medical and emotional problems include: incidents of ineptness, poor judgment, lack of physical or emotional stamina, social incompatibility, excessive absence, lateness, and a tendency to become accident prone.

(3) *Use of Corrective Devices.*

(a) When the use of corrective devices, such as eyeglasses and hearing aids, is required to enable an examinee to meet successfully medical qualification requirements, a determination shall be made by a designated line supervisory authority that the use of all such devices is compatible with all emergency and protective equipment that the examinee may be required to wear or use while performing his or her assigned job duties.

(b) It is incumbent upon cognizant field office management to exercise all reasonable and practicable effort to accommodate required emergency and protective equipment to the use of corrective devices, including the provision of equally effective alternate equipment if such is available.

(c) If eyeglasses are used, they shall be of the safety glass type.

D. *Security Inspector Medical Qualification Standards.*

(1) *General Qualifications.*

The examinee shall possess mental, sensorial, and motor skills as required to perform safely and effectively all assigned job duties. Such qualifications include:

(a) Mental alertness and reliable judgment;

(b) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals; and,

(c) Motor power, range of motion, neuromuscular coordination and dexterity.

(2) *Specific Minimum Qualifications.*

(a) *Head, Face, Neck, Scalp.* Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(b) *Nose.* Ability to detect odor of products of combustion and of tracer and marker gases.

(c) *Mouth and Throat.* Capacity for clear and audible speech as required for effective communication on the job.

(d) *Ears.* Hearing loss in the better ear not to exceed 30 db average at 500, 1000, 2000 Hz with no level greater than 40 db in any of these frequencies (by ISO 1964 and ANSI 1969 audiometry). If a hearing aid is necessary, suitable testing procedures shall be used to assure auditory acuity equivalent to the above requirement.

(e) *Eyes. 1 Distant Visual Acuity.*

(*a*) Uncorrected acuity of no less than 20/200 in the better eye.

(*b*) Corrected acuity of at least 20/30 in the better eye and 20/40 in the other eye.

(*c*) If uncorrected distant vision in the better eye is not at least 20/40, security inspectors shall carry an extra pair of corrective lenses.

2 Near Visual Acuity. Corrected or uncorrected vision of at least 20/40 (14/28 Snellen) in the better eye.

3 Color Vision. Ability to distinguish red, green, and yellow. Special color vision testing and certification shall be required where fine color discrimination is critical to the safe or effective performance of assigned job tasks.

4 Peripheral Vision. Field of vision in the horizontal meridian shall not be less than a total of 140 degrees.

5 Depth Perception. Adequate depth perception as measured by stereopsis or demonstration in a practical operational test.

(f) *Cardiorespiratory.*

1 Respiratory. Capacity and reserve to perform physical exertion in emergencies at least equal to the demands of the job assignment, and ability to utilize respiratory protective filters and air supply masks when this emergency equipment is required by assigned job requirements.

2 Cardiovascular. Normal configuration and function. Capacity for exertion during emergencies. Normal resting pulse; regular pulse. Full symmetrical pulses in extremities and neck. Normotensive, with tolerance to rapid postural changes. If an examination reveals significant cardiac arrhythmia, murmur, enlargement, hypertension, hypotention, or other evidence of cardiovascular abnormality, an evaluation by a specialist in internal medicine or cardiology may be required and evaluated by a designated physician.

(g) *Abdomen and Viscera.* No clinically significant abnormalities.

(h) *Musculo-Skeletal.* Normal symmetrical structure, range of motion, and power.

(i) *Skin.* No significant abnormal intolerance to chemical, mechanical and other physical agents. Capability to tolerate use of personal protective covering and decontamination procedures when required by assigned job duties.

(j) *Endocrine/Nutritional/Metabolic.* Endocrine/nutritional/metabolic status adequate to meet the stresses and demands of assigned normal and emergency job duties. Ability to accommodate to changing work and meal schedules without potential or actual incapacity.

(k) *Hematopoietic.* Normal function.

(l) *Lymphatic.* Normal.

(m) *Neurological.* Normal central and peripheral nervous system function.

(n) *Mental and Emotional.* Normal mental status and an absence of neurotic or psychotic conditions which would affect adversely an ability to handle firearms safely or to act safely and effectively under normal and emergency conditions.

(o) *Laboratory.*

1 Hemogram. Freedom from clinically significant abnormalities of the formed elements of the blood that could reasonably be expected to affect the safe and effective performance of assigned duties.

2 Urinalysis. Absence of proteinuria and glycosuria unless the absence of a disqualifying systemic or genitourinary condition and the absence of significant microscopic abnormality has been demonstrated.

3 Other Studies. Any other medical investigative procedure, including electrocardiogram and chest x-ray, which a designated physician considers necessary for adequate medical evaluation.

E. *Security Inspector Medical Disqualification Standards.*

(1) *Freedom from Incapacity.* The examinee shall be free of any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

(2) *Conditions for Medical Disqualification.* The presence of any of the following conditions shall disqualify the examinee from employment as a security inspector.

(a) *Respiratory.* Significant pulmonary pathology or decrease in pulmonary function which could interfere with the safe and effective performance of assigned job duties.

(b) *Cardiovascular*

1. Ischemic Heart Disease

2. Myocardial Infarction

3. Coronary Insufficiency

4. Angina Pectoris

5. Heart Failure

6. Significant Arrhythmia

7. Arterial Aneurysm

8. Significant Peripheral Vascular Insufficiency

9. Corrective Heart Surgery

10. Corrective Arterial or Great Vessel Surgery

11. Prosthetic Valve

12. Artificial Pacemaker

(c) *Endocrine/Nutritional/Metabolic.*

1 Any endocrine, nutritional, or metabolic condition that would not allow the examinee adequately to meet the stresses and demands of assigned normal or emergency job duties.

2 Inability to accommodate to changing work schedules or to a delay in meals without potential or actual incapacity.

3 Inability to tolerate prolonged use of wearing of protective garments such as respirator masks, air masks, or bullet-resistant garments.

4 Diabetes mellitus requiring the use of insulin. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous 2 years.

5 Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency job duties.

(d) *Skin.* Recurrent severe dermatitis or hypersensitivity to irritants or sensitizers sufficient to interfere with wearing required personal protective equipment or likely to be aggravated by or interfere with established or required decontamination procedures.

(e) *Hematopoietic Dysfunction.* Clinically significant hematopoietic disorders which may interfere with the safe and effective performance of assigned job duties.

(f) *Malignant Neoplasms.* Malignant neoplastic disease.

(g) *Neurological.*

1 History of epilepsy or other convulsive disorder.

2 History of any disturbance of consciousness or neurological disease or any other presently existing condition that may interfere with the safe and effective performance of assigned job duties.

(h) *Eyes.* Total blindness in one or both eyes.

(i) *Mental and Emotional.* An established history or clinical diagnosis of any of the following:

1 Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability. A history of clinically significant emotiional or behavioral problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

2 Attempted suicide or an expressed threat of suicide.

3 A condition in which a person's intake of alcohol is sufficient to damage his or her physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his or her daily functioning.

4 A condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

5 The use of prescribed or otherwise legally obtainable medication taken in such a dosage that a temporary delay in taking such medication might result in unacceptable incapacity. Examples of such medications are certain dosages or requirements for steroids, anticoagulants, antiarrhythmics, sedatives, and tranquilizers.

F. *Physical Fitness Standards for Security Inspectors.*

All persons authorized to carry firearms must meet a minimum standard of physical fitness. There are two categories for such person: Offensive Combative and Defensive Combative. Persons not authorized to carry firearms are exempt from these physical fitness standards.

(1) *Offensive Combative Standard* must be met by all security inspectors assigned to response force duties. The standard is a one (1) mile run with a maximum qualifying time of 8 minutes 30 seconds and a 40 yard prone-to-running dash with a maximum qualifying time of 8.0 seconds.

(2) *Defensive Combative Standard* must be met by all other seurity inspectors authorized to carry firearms. The standard is a one-half (0.5) mile run with a maximum qualifying time of 4 minutes 40 seconds and a 40 yard prone-to-running dash with a maximum qualifying time of 8.5 seconds.

(3) *Qualification* in the appropriate combative standard must be accomplished once every twelve months and under the supervision of the protective force training officer or other individual designated by the responsible DOE field office.

(4) *Medical Certification*. (a) Each individual who participates in a physical fitness training program to prepare to meet the physical fitness standards set forth in this Appendix shall first be certified by a designated physician that he or she is medically fit to participate in the program. This certification shall be obtained not more than 30 days prior to each individual entering the physical fitness training program.

(b) Before any individual takes the physical fitness standards test he or she shall first be certified by a designated physician that he or she is medically fit to take the physical fitness qualification test. This certification shall be obtained not more than 30 days before taking the physical fitness qualification test.

(c) Individuals who require less than 30 days training prior to actual testing to meet the physical fitness standards need only obtain a single medical certification.

(5) *Initial Qualification Time Limit*. Individuals authorized to carry firearms shall meet the applicable physical fitness standard by (insert date 12 months from date this rule is effective) and annually thereafter using the date of initial qualification as the anniversary date.

(6) *New Employees*. Individuals authorized to carry firearms who are employed after the effective date of this rule shall meet the applicable physical fitness standard prior to his or her initial assignment to duties which requires such individual to carry firearms.

(7) *Training Program*. Beginning January 23, 1985, incumbent security inspectors shall participate in a physical fitness training program.

(8) *Retesting*. During each testing period, security inspector shall be permitted a maximum of six (6) and a minimum of two (2) opportunities to qualify or requalify before such security inspector must enter a training program or is removed from a security inspector position.

G. *Waiver of Security Inspector Medical Standards and Time Extension to Meet Physical Fitness Standards*.

(1) Waivers of elements of the medical standards of this Appendix may be granted for certain otherwise disqualifying medical or physical deficiencies by the cognizant field office management provided that:

(a) The DOE field organization authority in consultation with a designated physician determ..ies that a certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards to assure that all security inspectors are capable of safely and effectively performing all normal and emergency duties.

(b) The individual demonstrates by medical examination and/or practical test, as determined necessary by a designated physician, the ability to perform effectively and safely all routine and emergency duties.

(c) A statement of demonstrated ability must be prepared by a designated physician and must clearly (1) identify the individual, (2) state the nature and degree of the specific medical or physical defect, and (3) record the satisfactory medical evaluation and/or performance of the practical test required by a designated physician.

(d) Waivers shall be reviewed, revalidated and reissued at intervals not to exceed one (1) year.

(e) Individuals who have been adversely affected by application of the standards may appeal the denial of waiver to the cognizant DOE safeguard and security field office for review within 60 days after the adverse action. Further evidence may be offered relating solely to the medical or physical fitness of the individual involved. Such individual may select a representative of his or her own choice to assist and/or appear in the individual's behalf in any appeal. After findings and a determination have been made at the field office level, such individual has a right to petition the Director of Safeguards and Security, DOE Headquarters, within 30 days of the field office's determination for a final determination based upon his or her review of the record of the case.

(2) There will be no waivers granted from the physical fitness standards set forth in Paragraph F above. However, time extensions not to exceed 6 months may be granted on a case-by-case basis for those individuals who, because of a temporary medical or physical condition as certified by a designat-

ed physician, are unable to satisfy the physical fitness standards within the required time period without suffering undue physical harm.

H. *Guard Medical Qualification Standards.*

(1) *General Qualifications.* The examinee shall possess mental, sensory, and motor skills as required to perform safely and effectively all assigned job duties. Such qualifications include:

(a) Mental alertness and reliable judgment.

(b) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals.

(c) Motor power, range of motion, neuromuscular coordination, and dexterity.

(2) *Specific Minimum Qualifications.*

(a) *Head, Face, Neck, and Scalp.* Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(b) *Nose.* Ability to detect odor of products of combustion and of tracer or marker gases.

(c) *Mouth and Throat.* Capacity for clear and audible speech as required for effective communication on the job.

(d) *Ears.* Hearing loss not to exceed 50 db average at 500, 1000, and 2000 Hz in one ear (by ISO 1964 or ANSI 1969 audiometry).

(e) *Eyes.* Near and distant visual acuity, with or without correction of at least 20/40 in the better eye. One-eyed individuals may qualify.

I. *Guard Medical Disqualification Standards.*

(1) *Freedom from Incapacity.* The examinee shall be free of any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

(2) *Conditions for Medical Disqualification.* The presence of any of the following conditions normally shall disqualify the examinee from employment as a guard:

(a) *Respiratory.* Significant pulmonary pathology or decrease in pulmonary function which could interfere with the safe and effective performance of assigned job duties.

(b) *Cardiovascular.*

1. Ischemic Heart Disease

2. Myocardial Infarction

3. Coronary Insufficiency

4. Angina Pectoris

5. Heart Failure

6. Significant Arrhythmia

7. Arterial Aneurysm

8. Significant Peripheral Vascular Insufficiency

(c) *Endocrine/Nutritional/Metabolic.*

1. Diabetes Mellitus. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous two years.

2. Obesity. Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency job duties.

(d) *Hematopoietic Dysfunction.* Clinically significant hematopoietic disorders which may interfere with the safe and effective performance of assigned job duties.

(e) *Malignant Neoplasms.* Malignant neoplastic disease.

(f) *Neurological.*

1. History of epilepsy or other convulsive disorder.

2. History of any disturbance of consciousness or neurological disease or any other presently existing condition that may interfere with the safe and effective performance of assigned job duties.

(g) *Mental and Emotional.* An established history or clinical diagnosis of any of the following:

1. Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability. A history of clinically significant emotional or behavioral problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

2. Attempted suicide or an expressed threat of suicide.

3. A condition in which a person's intake of alcohol is sufficient to damage his or her physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his or her daily functioning.

4. A condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

5. The use of prescribed or otherwise legally obtainable medication taken in such a dosage that a temporary delay in taking such medication might result in unacceptable incapacity. For example, certain dosages or requirements for steroids, anticoagulants, antiarryhythmics, sedatives, tranquilizers, etc.

J. *Waiver of Guard Medical Standards.*

Waivers of elements of the medical standards of this Appendix may be granted for certain otherwise disqualifying medical or physical deficiencies by the cognizant field office management provided that:

(1) The DOE field organization authority, in consultation with a designated physician, determines that a certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards to assure that all guards are capable of safely and effectively performing all normal and emergency duties.

(2) The individual demonstrates by medical examination and/or practical test, as determined necessary by a designated physi-

cian, the ability to perform effectively and safely all routine and emergency duties.

(3) A statement of demonstrated ability must be prepared by a designated physician and must clearly (1) identify the individual, (2) state the nature and degree of the specific medical or physical defect, and (3) record the satisfactory medical evaluation and/or of performance of the practical test required by a designated physician.

(4) Waivers shall be reviewed, revalidated, and reissued at intervals not to exceed two (2) years.

(5) Individuals who have been adversely affected by application of these medical standards may appeal the denial of waiver to the cognizant DOE safeguard and security field office for review within 60 days after the adverse action. Further evidence may be offered relating solely to the medical or physical fitness of the individual involved. Such individual may select a representative of his or her own choice to assist and appear in the individual's behalf in any appeal. After findings and a determination have been made at the field office level, such individual has a right to petition the Director of Safeguards and Security, DOE Headquarters within 30 days of the field office's determination, for a final determination based upon his or her review of the record of the case.

[49 FR 46101, Nov. 23, 1984, as amended at 51 FR 7248, Mar. 3, 1986]

PART 1047—LIMITED ARREST AUTHORITY AND USE OF FORCE BY PROTECTIVE FORCE OFFICERS

GENERAL PROVISIONS

Sec.

1047.1 Purpose.
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1047.7 Use of deadly force.

AUTHORITY: Sec. 2201, Pub. L. 83-703, 68 Stat. 919 (42 U.S.C. 2011 et seq.); Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 et seq.).

SOURCE: 50 FR 30929, July 31, 1985, unless otherwise noted.

General Provisions

§ 1047.1 Purpose.

The purpose of this part is to set forth Department of Energy (hereinafter "DOE") policy and procedu
on the exercise of arrest authority a
use of force by protective force perso
nel.

§ 1047.2 Scope.

This part applies to DOE and DO
contractor protective force personn
armed pursuant to section 161.k.
the Atomic Energy Act of 1954 (
U.S.C. 2011 et seq.) to protect nucle
weapons, special nuclear material, cl
sified matter, nuclear facilities, and r
lated property.

§ 1047.3 Definitions.

(a) "Act" means section 161.k. of th
Atomic Energy Act of 1954, as amen
ed, (42 U.S.C. 2201.k.).

(b) "Arrest" means any act, inclu
ing taking, seizing or detaining of
person, that indicates an intention t
take a person into custody and tha
subjects the person to the control o
the person making the arrest.

(c) "Citizen's Arrest" means tha
type of arrest which can be made b
citizens in general and which is defined in the statutory and case law o
each state.

(d) "Contractor" means contractors and subcontractors at all tiers.

(e) "LLEA" means local law enforcement agencies: city, county; and state.

(f) "Offender"means the person to be arrested.

(g) "Protective Force Officer" means any person authorized by DOE to carry firearms under section 161.k. of the Atomic Energy Act of 1954.

(h) "Special Nuclear Material" (SNM) means: (1) Plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which DOE, pursuant to the provisions of Section 51 of the Atomic Energy Act of 1954, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

§ 1047.4 Arrest authority.

(a) Under the Act, the authority of a DOE protective force officer to arrest without warrant is limited to the performance of official duties and should be exercised only in the enforcement of:

(1) The following laws only if property of the United States which is in the custody of the DOE or its contractors is involved:

(i) *Felonies:* (A) Arson—18 U.S.C. 81—(only applicable to "special maritime and territorial jurisdiction of the United States" as defined by 18 U.S.C. 7).

(B) Building or property within special maritime and territorial jurisdiction—18 U.S.C. 1363—(only applicable to "special maritime and territorial jurisdiction of United States" as defined by 18 U.S.C. 7).

(C) Civil disorder—18 U.S.C. 231.

(D) Communication lines, stations or systems—18 U.S.C. 1362.

(E) Concealment, removal or mutilation generally—18 U.S.C. 2071.

(F) Conspiracy—18 U.S.C. 371—(violation of this section is a felony if the offense which is the object of the conspiracy is a felony).

(G) Destruction of motor vehicles or motor vehicle facilities—18 U.S.C. 33.

(H) Explosives—18 U.S.C. 844(f).

(I) Government property or contracts—18 U.S.C. 1361—(violation of section is a felony if property damage exceeds $100).

(J) Military, naval or official passes—18 U.S.C. 499—(pertains to forging or altering official passes).

(K) Personal property of the United States—18 U.S.C. 2112.

(L) Public money, property, or records—18 U.S.C. 641—(violation of section is a felony if the property value exceeds $100).

(M) Sabotage—18 U.S.C. 2151, 2153-2156.

(N) Violation under Physical Security Convention—18 U.S.C. 831.

(ii) *Misdemeanors:* (A) Conspiracy—18 U.S.C. 371—(violation of section is a misdemeanor if the offense which is the object of the conspiracy is a misdemeanor).

(B) Explosives—18 U.S.C. 844(g).

(C) Government property or contracts—18 U.S.C. 1361—(violation of section is a misdemeanor if the property damage does not exceed $100).

(D) Official badges, identification cards, other insignia—18 U.S.C. 701—(pertains to the manufacture, sale, and possession of official insignia).

(E) Public money, property or records—18 U.S.C. 641—(violation of section is a misdemeanor if the property value does not exceed $100).

(2) The following criminal provisions of the Atomic Energy Act:

(i) *Felonies:* (A) Section 222. Violation of Specific Sections—42 U.S.C. 2272.

(B) Section 223. Violation of Sections Generally. 42 U.S.C. 2273.

(C) Section 224. Communication of Restricted Data—42 U.S.C. 2274.

(D) Section 225. Receipt of Restricted Data—42 U.S.C. 2275.

(E) Section 226. Tampering with Restricted Data—42 U.S.C. 2276.

(ii) *Misdemeanors:* (A) Section 227. Disclosure of Restricted Data—42 U.S.C. 2277.

(B) Section 229. Trespass Upon Commission (DOE) Installations—42 U.S.C. 2278.

(C) Section 230. Photographing, etc., of Commission (DOE) Installations—42 U.S.C. 2278.b.

(b) *Felony Arrests.* A protective force officer is authorized to make an arrest for any felony listed in paragraph (a)(1)(i) or (a)(2)(i) of this section if the offense is committed *in the presence* of the protective force officer or if he or she has *reasonable grounds to believe* that the individual to be arrested has committed or is committing the felony.

(1) "*In the presence of*" means that the criminal act must have taken place in the physical presence of (under the observation of) the protective force officer. Knowledge of the existence of a criminal violation obtained in any other way (e.g., information from other persons) is not sufficient to permit an arrest under this part of the Act.

(2) "*Reasonable grounds to believe*" means that, at the moment of arrest, either the facts and circumstances within the knowledge of the protective force officer, or of which the protective force officer had reasonably trustworthy information, were sufficient to cause a prudent person to believe that the suspect had committed or was committing the offense.

(c) *Misdemeanor Arrest*. A protective force officer is authorized to make an arrest for any misdemeanor listed in paragraph (a)(1)(ii) or (a)(2)(ii) of this section if the offense is committed in the presence of the protective force officer.

(d) *Other Authority*. The Act does not provide authority to arrest for violations of state criminal statutes or for violations of federal criminal statutes other than those listed in paragraph (a) of this section. Therefore, arrests for violations of such other criminal statutes shall be made by other peace officers (e.g., U.S. Marshals or Federal Bureau of Investigation (FBI) agents for federal offenses; LLEA officers for state or local offenses) unless:

(1) The protective force officer can make a citizen's arrest for the criminal offense under the law of the state,

(2) The protective force officer is an authorized state peace officer or otherwise deputized by the particular state to make arrests for state criminal offenses, or

(3) The protective force officer has been deputized by the U.S. Marshals Service or other federal law enforcement agency to make arrests for the criminal offense.

(e) In those locations which are within the "special maritime and territorial jurisdiction of the United States," as defined in 18 U.S.C. 7, the Assimilative Crimes Act (18 U.S.C. 13) adopts the law of the state for any crime under state law not specifically prohibited by Federal statute and provides for federal enforcement of that state law. The local DOE Office of Chief Counsel, in coordination with contractor legal counsel, as appropriate, shall provide guidance in this matter.

§ 1047.5 Exercise of arrest authority—general guidelines.

(a) In making an arrest, the protective force officer should announce his or her authority (e.g., "Security Officer") and that the person is under arrest prior to taking the person into custody. If the circumstances are such that making such announcements would be useless or dangerous to the officer or others, the protective force officer may dispense with these announcements.

(b) The protective force officer at the time and place of arrest may search any arrested person for weapons and criminal evidence and the area into which the arrested person might reach for a weapon or to destroy evidence. Guidance on the proper conduct and limitations in scope of search and seizure of evidence shall be obtained from the local DOE Office of Chief Counsel, in coordination with contractor legal counsel, as appropriate.

(c) After the arrest is effected, the arrested person shall be advised of his or her constitutional right against self-incrimination (Miranda warnings). If the circumstances are such that making such advisement is dangerous to the officer or others, this requirement may be postponed until the immediate danger has passed.

(d) Custody of the person arrested should be transferred to other federal law enforcement personnel (i.e., U.S. Marshals or FBI agents) or to LLEA personnel, as appropriate, as soon as practicable. The arrested person should not be questioned or required to sign written statements unless:

(1) Questioning is necessary for security or safety reasons (e.g., questioning to locate a bomb), or

(2) Questioning is authorized by other federal law enforcement personnel or LLEA officers responsible for investigating the crime.

§ 1047.6 Use of physical force when making an arrest.

(a) When a protective force officer has the right to make an arrest as discussed above, the protective force officer may use only that physical force which is reasonable and necessary to apprehend and arrest the offender; to prevent the escape of the offender; or to defend himself or herself or a third person from what the protective force officer believes to be the use or threat of imminent use of physical force by the offender. It should be noted that verbal abuse alone by the offender cannot be the basis under any circumstances for use of physical force by a protective force officer.

(b) Protective force officers shall consult the local DOE Office of Chief Counsel and contractor legal counsel, as appropriate, for additional guidance on use of physical force in making arrests.

§ 1047.7 Use of deadly force.

(a) Deadly force means that force which a reasonable person would consider likely to cause death or serious bodily harm. Its use may be justified only under conditions of extreme necessity, when all lesser means have failed or cannot reasonably be employed. A protective force officer is authorized to use deadly force only when one or more of the following circumstances exists:

(1) *Self-Defense.* When deadly force reasonably appears to be necessary to protect a protective force officer who reasonably believes himself or herself to be in imminent danger of death or serious bodily harm.

(2) *Serious offenses against persons.* When deadly force reasonably appears to be necessary to prevent the commission of a serious offense against a person(s) in circumstances presenting an imminent danger of death or serious bodily harm (e.g. sabotage of an occupied facility by explosives).

(3) *Nuclear weapons or nuclear explosive devices.* When deadly force reasonably appears to be necessary to prevent the theft, sabotage, or unauthorized control of a nuclear weapon or nuclear explosive device.

(4) *Special nuclear material.* When deadly force reasonably appears to be necessary to prevent the theft, sabotage, or unauthorized control of special nuclear material from an area of a fixed site or from a shipment where Category II or greater quantities are known or reasonably believed to be present.

(5) *Apprehension.* When deadly force reasonably appears to be necessary to apprehend or prevent the escape of a person reasonably believed to: (i) have committed an offense of the nature specified in paragraphs (a)(1) through (a)(4)[1] of this section; or (ii) be escaping by use of a weapon or explosive or who otherwise indicates that he or she poses a significant threat of death or serious bodily harm to the protective force officer or others unless apprehended without delay.

(b) *Additional Considerations Involving Firearms.* If it becomes necessary to use a firearm, the following precautions shall be observed:

(1) A warning, e.g. an order to halt, shall be given, if feasible, before a shot is fired.

(2) Warning shots shall not be fired.

PART 1050—FOREIGN GIFTS AND DECORATIONS

Subpart A—General

Sec.

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APPENDIX I—DOE FORM 3735.2—FOREIGN GIFTS STATEMENT
APPENDIX II—DOE FORM 3735.3—FOREIGN TRAVEL STATEMENT

AUTHORITY: The Constitution of the United States, Article I, Section 9; 5 U.S.C. 7342; Pub. L. 95-91, secs. 644 and 652, 91 Stat. 599 (42 U.S.C. 7254 and 7262).

SOURCE: 45 FR 53972, Aug. 13, 1980, unless otherwise noted.

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[1] These offenses are considered by the Department of Energy to pose a significant threat of death or serious bodily harm.

Subpart A—General

§ 1050.101 Purpose and scope.

These regulations implement the provisions of the Foreign Gifts and Decorations Act (5 U.S.C. 7342), which establishes policies and procedures pertaining to the acceptance, use, and disposition of gifts or decorations from foreign governments. If an employee of Department of Energy (DOE) meets the requirements of these regulations, he or she is deemed to be in compliance with the DOE Conduct of Employees regulations, 10 CFR Part 1010.

§ 1050.102 Applicability.

These regulations apply to all DOE employees, including special Government employees, and civilian and military personnel of other Government agencies regularly detailed to DOE, and to spouses and dependents of such personnel. These regulations apply to all employees of the Federal Energy Regulatory Commission (FERC) to the extent the Commission by rule makes these regulations applicable to FERC employees. These regulations do not apply to gifts and bequests accepted by the Department as authorized by section 652 of the Department of Energy Organization Act (42 U.S.C. 7262), except as set forth in § 1050.202(d) of this part. These regulations do not apply to assistance from a foreign government for participation by DOE employees in foreign cultural exchange programs pursuant to the Mutual Educational and Cultural Exchange Act (22 U.S.C. 2458a).

§ 1050.103 Definitions.

(a) "Employee" means—

(1) An employee of DOE or FERC as defined by 5 U.S.C. 2105 (employees of DOE contractors are specifically excluded);

(2) A special Government employee as defined in 18 U.S.C. 202(a), and an expert or consultant who is under contract to the DOE pursuant to 5 U.S.C. 3109, including, in the case of an organization performing services under such section, any individual involved in the performance of such services;

(3) A member of a Uniformed Service or an employee of another Government agency assigned or detailed to the DOE or FERC;

(4) The spouse of an individual described in paragraphs (a)(1) through (a)(3) of this section (unless such individual and his or her spouse are legally separated) or a dependent (within the meaning ot section 152 of the Internal Revenue Code of 1954) of such an individual, other than a spouse or dependent who is an employee under paragraphs (a)(1) through (a)(3).

(b) "Foreign government" means:

(1) Any unit of foreign governmental authority, including any foreign national, State, local, or municipal government;

(2) Any international or multinational organization whose membership is composed of any unit of foreign government described in paragraph (b)(1); and

(3) Any agent or representative of any such unit or such organization, while acting as such.

(c) "Gift" means a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government.

(d) "Decoration" means an order, device, medal, badge, insignia, emblem, or award tendered by, or received from, a foreign government.

(e) "Minimal value" means a retail value in the United States at the time of acceptance of $100 or less.

(f) "The Act" means the Foreign Gifts and Decorations Act, 5 U.S.C. 7342.

(g) "Appropriate General Counsel" means either the DOE General Counsel when the employee involved is an employee of that portion of the DOE which excludes FERC, or the FERC General Counsel when the employee involved is an employee of FERC.

§ 1050.104 Responsibilities and authorities.

(a) The Director of Administration shall:

(1) Assure that all employees are given access to or a copy of the Act and these regulations;

(2) Maintain liaison with the Department of State and prepare Departmental reports to the Department of

State consistent with the Act and these regulations;

(3) Provide advice and assistance on implementation of the act and these regulations, in coordination with the Assistant Secretary for International Affairs (IA) and the appropriate General Counsel;

(4) Collect and maintain for public inspection all employee statements submitted pursuant to these regulations;

(5) Arrange for independent appraisal of the value of gifts or decorations, upon the request of the General Services Administration or the Inspector General (or other appropriate DOE official); and

(6) Accept and maintain custody and make all determinations regarding the use and disposition of all gifts and decorations accepted by employees on behalf of the United States, in coordination with IA, the appropriate General Counsel, and, for gifts to the Secretary, Deputy Secretary or Under Secretary, the appropriate official in the Office of the Secretary.

(b) The Assistant Secretary for International Affairs (IA) shall assist the Directorate of Administration, where appropriate, in making determinations concerning the effects of the proposed acceptance, use, or disposition of a foreign gift or decoration on the foreign relations of the United States.

(c) The appropriate General Counsel shall assist the Directorate of Administration in matters relating to the interpretation and application of the Act, and these and any related regulations, and shall provide counseling and interpretation regarding the Act, and these and any related regulations, to employees.

(d) The Inspector General shall investigate suspected violations of these regulations pursuant to § 1050.303 below.

Subpart B—Guidelines for Acceptance of Foreign Gifts or Decorations

§ 1050.201 Policy against accepting foreign gifts or decorations.

(a) The Constitution of the United States, Article I, section 9, clause 8, provides that "* * * no Person holding any Office of Profit or Trust under * * * [the United States], shall, without the consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any * * * foreign State." In the Foreign Gifts and Decorations Act the Congress consented to the acceptance by Federal employees of gifts and decorations with certain constraints and under certain procedures. Acceptance of any gift or decoration not consistent with this Act, the Department of Energy Organization Act, or the regulations in this part is prohibited.

(b) No employee shall request or otherwise encourage the tender of a gift or decoration from a foreign government. No employee shall accept a gift or decoration from a foreign government except as provided in §§ 1050.202 or 1050.203 of this part and in accordance with the additional procedures set forth in §§ 1050.204 and 1050.301 of this part.

§ 1050.202 Allowable acceptance of gifts.

(a) An employee may accept and retain gifts from foreign governments where the gift is tendered or received as a souvenir or mark of courtesy, and is of minimal value. Initial responsibility for determining the value of a gift lies with the employee.

(b) Subject to the prior approval requirements described in § 1050.204(a) of this part, an employee may accept gifts of more than minimal value, tendered as a souvenir or mark of courtesy, where it appears that refusal of the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States. Otherwise, an employee, when offered a gift of more than minimal value from a foreign government, other than a gift designated in paragraph (c) of this section, should advise the donor that acceptance of such gifts by the employee is contrary to the policy of the United States. If a gift described in this paragraph is accepted by an employee and not immediately returned thereby, it shall be deemed to have been accepted on behalf of the United States. Upon acceptance it becomes the property of the United States. Within 60 days after acceptance by the employee, the gift shall be deposited with the Directorate of Administration for disposal or official Departmental use as determined by the Directorate of Administration, in accordance with § 1050.302 of this part, and an appropriate statement shall be filed by the employee in accordance with § 1050.301(a) of this part.

(c) Subject to the prior approval requirements described in § 1050.204(a) of this part, an employee may accept and retain gifts of more than minimal value:

(1) Where the gift is in the nature of an educational scholarship.

(2) Where the gift is in the form of medical treatment.

An employee accepting a gift pursuant to this paragraph shall file an appropriate statement in accordance with § 1050.301(a) of this part.

(d) An employee may accept gifts (whether or not of minimal value) of travel or expenses for travel (such as transportation, food, lodging, or entertainment) taking place entirely outside of the United States where the provision of such travel or expenses is in accordance with diplomatic custom or treaty and where the Head of the employee's Office grants prior written approval. A spouse or dependent may accept gifts of travel or travel expenses when accompanying the employee, provided this is done with the prior written approval of the Head of the employee's Office. The Head of the employee's Office shall consult with the appropriate General Counsel in connection with granting approval under this paragraph. Travel or expenses for travel may not be accepted merely for the personal benefit, pleasure, enjoyment, or financial enrichment of the individual involved. An appropriate statement shall be filed in accordance with § 1050.301(b) of this part. When *any portion* of the travel (such as the origination or termination of a flight) is within the United States, it may not be paid for by a foreign government, except as set forth in paragraph (e) of this section.

(e) Pursuant to section 652 of the DOE Organization Act, an employee may accept gifts from the International Atomic Energy Agency or other energy-related international organizations (e.g., the Nuclear Energy Agency and the International Energy Agency) covering transportation expenses to or from a foreign country in connection with scientific or technical assistance projects of such agencies for which the Department of Energy has lead U.S. Government agency responsibility. Such gifts may be accepted only with the prior written approval of the Head of the employee's Office, who is hereby delegated authority to accept such gifts in accordance with section 652.

§ 1050.203 Acceptance of decorations.

(a) An employee may accept, retain and wear a decoration tendered by a foreign government in recognition of active field service in time of combat operations or awarded for other outstanding or unusually meritorious performance.

(b) Acceptance of a decoration in accordance with paragraph (a) of this section shall be reviewed and approved by the Directorate of Administration in accordance with § 1050.204 of this part. Otherwise, it will be deemed to have been accepted on behalf of the United States, shall become the property of the United States, and shall be deposited, within 60 days of acceptance, with the Directorate of Administration for disposal or official Departmental use as determined by the Directorate of Administration in accordance with § 1050.302 of this part.

§ 1050.204 Advance approval for acceptance of gifts or decorations.

(a) If an employee is advised that a gift of more than minimal value as described in § 1050.202 (b) or (c) is to be tendered to him or her, the employee shall, if time permits, request the written advice of the Directorate of Administration regarding the appropriateness of accepting or refusing the gift. A request for approval shall be submitted to the Directorate of Administration in writing, stating the nature of the gift and the reasons for which it is being tendered. The Directorate of Administration shall consult with Assistant Secretary for International Affairs and the appropriate General Counsel in connection with advising the employee. If such advice cannot be obtained and refusal of the gift would likely cause offense or embarrassment or otherwise adversely effect the foreign relations of the United States, the gift may be accepted, but the Directorate of Administration shall be informed as soon as possible. In either event, the employee shall proceed as provided in §§ 1050.202 and 1050.301 of this part.

(b) Where an employee is notified of the intent of a foreign government to award him a decoration for outstanding or unusually meritorious service, approval required under § 1050.203 should be obtained prior to acceptance of the award. A request for approval shall be submitted to the Directorate of Administration in writing, stating the nature of the decoration and the reasons for which it is being awarded. The Directorate of Administration shall consult with the Assistant Secretary for International Affairs and the appropriate General Counsel. If time does not permit the employee to obtain approval for the award of the decoration before its receipt, the employee may accept it, but shall seek such approval immediately thereafter.

Subpart C—Procedures and Enforcement

§ 1050.301 Reports.

(a) Within 60 days of accepting a gift of more than minimal value, other than gifts of travel or travel expenses, which are covered in paragraph (b) of this section, an employee shall, in addition to depositing a tangible gift (e.g. wearing apparel, liquor, etc.) with the Directorate of Administration in accordance with § 1050.202 of this part, file with the Directorate of Administration a statement concerning the gift containing the information identified on the sample form set forth in Appendix I. The form set forth in Appendix I must also be filed if the aggregate value of gifts accepted by the recipient from all sources over any period of one year exceeds $250.

(b) Within 30 days after accepting travel or travel expenses in accordance with § 1050.202 of this part, an employee shall file with the Directorate of Administration a statement concerning the travel containing the information identified on the sample form set forth in Appendix II. Such a statement need not be filed, however, if the travel is in accordance with specific travel arrangements made by the Department in cooperation with the foreign government.

(c) The Directorate of Administration shall:

(1) Maintain the statements filed pursuant to these regulations and make them available for public inspection and copying during regular business hours; and

(2) Not later than January 31 of each year compile and transmit to the Department of State for publication by the Department of State in the FEDERAL REGISTER a list of all statements filed pursuant to these regulations during the preceding calendar year.

§ 1050.302 Use or disposal of gifts and decorations accepted on behalf of the United States.

(a) The Directorate of Administration shall accept and maintain custody of all tangible gifts and decorations accepted by employees on behalf of the United States pending their final disposition.

(b) Whenever possible, the gift or decoration shall be returned to the original donor. The Directorate of Administration shall examine the circumstances surrounding its donation, and, in consultation with the Assistant Secretary for International Affairs, assess whether any adverse effect upon the United States foreign relations might result from return of the gift or decoration to the donor. The appropriate officials of the Department of State shall be consulted if the question of an adverse effect arises.

(c) The Directorate of Administration may determine that the gift or decoration may be retained for the official use of the Department, if it can be properly displayed in an area at Headquarters or at a field facility accessible to employees or members of the public or if it is otherwise usable in carrying out the mission of the Department. The Assistant Secretary for International Affairs shall be consulted to determine whether failure to accept the gift or decoration for the official use of the Department will have an adverse effect on the foreign relations of the United States. In no case shall a gift or decoration be accepted for the official use of the Department when the enjoyment and beneficial use of the gift will accrue primarily to the benefit of the donee or any other individual employee. Gifts or decorations that are retained for the official use of the Department shall be handled in accordance with the provisions of paragraph (d) of this section when their official use is ended.

(d) If a gift or decoration is not retained for official use of the Department, or if its official use has ended, the Directorate of Administration shall, within 30 days after its deposit or after its official use has ended—

(1) Report the gift or decoration to the General Services Administration (GSA) for transfer, donation, or other disposal in accordance with the provisions of the Federal Property and Administrative Services Act of 1949 and the Federal Property Management Regulations at 41 CFR Part 101-49, or

(2) If the gift or decoration is in cash, currency, or monies (except those with possible historic or numismatic value), or is a noncash monetary gift such as a check, money order, bonds, shares of stock, or other negotiable instrument, forward it to the Finance and Accounting Office for deposit with the Department of the Treasury.

(e) The Directorate of Administration shall retain custody of gifts and decorations not returned to the donor or retained for the official use of the Department until GSA directs it concerning their disposition. At the request of GSA, the Directorate of Administration shall arrange for appraisal of specific gifts and decorations.

§ 1050.303 Enforcement.

(a) An employee who violates the provisions of the Act or these regulations may be subject to disciplinary action or civil penalty action as set forth in paragraphs (c) and (d) of this section.

(b) Suspected violations of the Act or these regulations shall be reported promptly to the appropriate General Counsel and the Inspector General.

(c) The Inspector General will be responsible for taking the following actions:

(1) If the results of an investigation by the Inspector General do not provide any support for a determination that a violation of the Act or these regulations has occurred, then no further action shall be taken.

(2) If it is determined that the employee knowingly and through actions within his own control has done any of the following, the matter shall be referred to the Attorney General for appropriate action:

(i) Solicited or accepted a gift from a foreign government in a manner inconsistent with the provisions of the Act and these regulations;

(ii) As the approved recipient of travel expenses failed to follow the procedures set forth in the Act and these regulations; or

(iii) Failed to deposit or report a gift as required by the Act and these regulations.

(3) If it is determined that the employee failed to deposit a tangible gift with the Directorate of Administration within 60 days, or to account properly for acceptance of travel expenses, or to comply with the requirements of these regulations relating to the disposal of gifts and decorations retained for official use, but that the criteria of knowledge and control specified in paragraph (c)(2) of this section for referral to the Attorney General have not been met, then the matter shall be referred by the Inspector General to appropriate Departmental officials for administrative action.

(d) As set forth in section 7342(h) of title 5, United States Code, the Attorney General may bring a civil action in any district court of the United States against any employee who knowingly solicits or accepts a gift from a foreign government not consented to by the Act, or who fails to deposit or report such gift as required by the Act. The court in which such action is brought may assess a civil penalty against such employee in any amount not to exceed the retail value of the gift improperly solicited or received plus $5,000.

Subpart D—Gifts to Foreign Individuals

§ 1050.401 Prohibition against use of appropriated funds.

No appropriated funds other than funds from the "Emergencies in the Diplomatic and Consular Service" account of the Department of State may be used to purchase any tangible gift of more than $100 value for any foreign individual unless such gift has been approved by the Congress.

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APPEND

U.S. DEPARTMENT OF ENERGY
FOREIGN GIFTS STATEMENT
(Statement Concerning Gifts
Received from a Foreign Government)

1. Name of Employee	2. Date
3. Division	4. Position
5. Name of Recipient	6. Relationship to Employee
7. Description of Gift	
8. Date of Acceptance	9. Value of Gift
10. Circumstances Justifying Acceptance of the Gift	
11. Foreign Government Donor	
12a. Name of Individual Presenting Gift	12b. Position of Individual Presenting Gift
13. Do you wish to participate in the sale of this item if it is sold by GSA? ☐ Yes ☐ No	
Signature of Recipient	Date

STATEMENT CONCERNING GIFTS RECEIVED FROM A FOREIGN GOVERNMENT

Item 1. This statement is to be filed pursuant to the provisions of the Foreign Gifts and Decorations Act (5 U.S.C. 7342, as amended by Pub. L. 95-105, August 17, 1977) and DOE implementing regulations at 10 CFR Part 1050. These provisions apply to foreign gifts tendered to or accepted by Federal employees *and* their spouses and dependents. The name of the employee should always be indicated in item 1; if the employee is the recipient of the gift then items 5 and 6 should be marked N/A-not applicable; if the recipient is a spouse or dependent, then the appropriate information should be included in items 5 and 6.

Item 2. Self explanatory.

Items 3 and 4. The Office or Division and the position of the employee should be indicated here regardless of whether the recipient is the employee or a spouse or dependent.

Items 5 and 6. See above, Item 1.

Item 7. Self explanatory.

Item 8. Self explanatory.

Item 9. Indicate the retail value in the United States at the time of acceptance. If there is any uncertainty as to the value of the gift, it is the recipient's responsibility to make a reasonable effort to determine value. If the value is $100 or under, and if the aggregate value of the gifts accepted by the recipient from all sources over any period of one year does not exceed $250, then the gift may be retained by the recipient and this Statement need not be submitted.

Item 10. Identify in this item whether or not approval to accept the gift was sought or given in advance in accordance with Section 1050.204 of the DOE regulations. Also identify those circumstances supporting a determination that refusal of the gift would likely cause offense or embarrassment or otherwise adversely affect the foriegn relations of the United States.

Items 11 and 12. Self explanatory.

Item 13. Though there is no assurance that the item will be sold or if it is sold that it will be feasible for the recipient to participate in the sale, GSA regulations provide for participation by the recipient where feasible.

DOE F [illegible]
([illegible])

APPENDIX II

U.S. DEPARTMENT OF ENERGY

FOREIGN TRAVEL STATEMENT

(Statement Concerning Acceptance of Travel or Travel Expenses from a Foreign Government)

1. Name of Employee	2. Date
3. Division	4. Position
5. Name of Recipient	6. Relationship to Employee
7a. Description of Transportation Provided: Approximate Value $ ☐	7b. Description of Other Travel Expenses Provided Approximate Value $ ☐
8. Date of Acceptance	9. Total Value of Transportation and Expenses Provided $ ☐
10. Nature of Employee's Official Business Related to Travel:	
11. Circumstances Justifying Acceptance:	
12. Foreign Government Donor	
13a. Name of Individual Responsible for Payment of Travel or Travel Expenses	13b. Position of Individual Responsible
Signature of Recipient	Date

STATEMENT CONCERNING ACCEPTANCE OF TRAVEL OR TRAVEL EXPENSES FROM A FOREIGN GOVERNMENT

Item 1. This statement is to be filed pursuant to the provisions of the Foreign Gifts and Decorations Act (5 U.S.C. 7342, as amended by Pub. L. 95-105, August 17, 1977) and DOE implementing regulations at 10 CFR Part 1050. These provisions apply to travel or travel expenses for travel *entirely outside* of the United States[1] tendered to or accepted by Federal employees and their spouses and dependents. The name of the employee should always be indicated in item 1; if the employee is the recipient of the travel or travel expenses, then items 5 and 6 should be marked N/A-not applicable; if the recipient is a spouse or dependent, then the appropriate information should be included in items 5 and 6.

Item 2. Self explanatory.

Items 3 and 4. The Office or Division of the employee should be indicated here regardless of whether the recipient is the employee or a spouse or dependent.

Items 5 and 6. See above, Item 1.

Item 7a. Indicate the location and mode of transportation and approximate value in U.S. dollars, if possible. Attach itinerary if available.

Item 7b. Indicate nature and location of travel expenses provided and approximate value in U.S. dollars, if possible. Attach itinerary if available.

Item 8. Indicate dates of travel.

Item 9. Self explanatory.

Item 10. Travel and travel expenses may be accepted in accordance with DOE regulations where the travel is official agency business. Spouses and dependents may accept such travel and expenses only when accompanying the employee. Item 10 therefore should be completed to identify the *employee's* official business whether the recipient is an employee or a spouse or dependent.

Item 11. Identify in this item any treaty or diplomatic custom that related to acceptance of the travel or expenses, and any circumstances indicating that acceptance would be consistent with the interests of the U.S. Also provide information regarding any prior approval of the acceptance.

Items 12, 13a, and 13b. Self explanatory.

[1] The Congress has consented in Pub. L. 95-105 only to acceptance of travel or travel expenses that is *entirely outside* of the United States. Travel, *any portion* of which (such as the origination or termination of a flight) is within the United States, may not be paid for by a foreign government. All such travel must be handled within applicable DOE Travel Regulations and Standards of Conduct Regulations.

PART 1060—PAYMENT OF TRAVEL EXPENSES OF PERSONS WHO ARE NOT GOVERNMENT EMPLOYEES

Sec.
1060.101 Persons who may be paid.
1060.201 Relatives, contractors, and assistance award recipients.
1060.301 Government employees.
1060.401 Applicability of internal DOE rules.
1060.501 Definitions.

AUTHORITY: Sec. 644, Pub. L. 95-91, 91 Stat. 599 (42 U.S.C. 7254).

SOURCE: 46 FR 35631, July 10, 1981, unless otherwise noted.

§ 1060.101 Persons who may be paid.

(a) Payment may not be authorized or approved for transportation, lodging, subsistence, or other travel expenses from DOE funds to, or on behalf of, a person who is not a Government employee unless such payment is made—

(1) Pursuant to an invitation received by that person from the Department to confer with a DOE employee on matters essential to the advancement of DOE programs or objectives and (i) in the case of a person invited to confer at the post of duty of the conferring DOE employee, a designated official has approved and stated the reasons for the invitation in writing, or (ii) in the case of a person invited to confer at a place other than the post duty of the conferring DOE employee, a principal departmental official has approved and stated the reasons for the invitation in writing;

(2) Pursuant to an invitation for an interview to a prospective employee of the Department who is an applicant for (i) a position in the Department classified at GS-16 or above of the General Schedule or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate equal to or greater than the minimum rate of basic pay fixed for GS-16, (ii) a position for which a determination has been made that there is a manpower shortage pursuant to 5 U.S.C. 5723, or (iii) a DOE position for which the Department has the exclusive duties of recruitment and selection;

(3) In accordance with 28 U.S.C. 1821 or other applicable law, to a person who is subpoenaed by the Department to appear and testify or to appear and to produce documents at a designated place;

(4) To a person who serves as a travel attendant for a handicapped individual who is authorized to travel at DOE expense and who cannot travel alone because of the handicap; or

(5) Pursuant to a written determination of a principal departmental officer that it is in the interest of the Government to provide such payment, where the Counselor has determined in writing that the payment is authorized under 5 U.S.C. ch. 57 or other statutory authority.

(b) The authority of a designated official or a principal departmental officer, as the case may be, to provide approval of an invitation to travel under paragraph (a)(1) and of a principal departmental officer to determine that payment of travel expenses is in the interest of the Government under paragraph (a)(5) of this section may not be delegated.

(c) Within 30 days of providing written approval of an invitation under paragraph (a)(1)(i) of this section, a designated official who is an Administrator of a power administration or the head of a Field Organization shall transmit a copy of the written approval to the principal departmental officer to whom the official or the official's organization reports.

(d) Payment of travel expenses may not be made pursuant to an invitation to travel under paragraphs (a)(1) or (a)(5) unless the written approval and statement of reasons required by paragraph (a)(1), or the written determinations required by paragraph (a)(5) of this section, are made before the travel to be authorized by the invitation takes place.

(e) Nothing in this section shall be interpreted to prohibit payment for travel expenses that are reimbursable or allowable by the Department under the terms of a DOE contract or assistance award.

§ 1060.201 Relatives, contractors, and assistance award recipients.

Notwithstanding any other provision in this part, a DOE employee may not authorize or approve, require another person to authorize or approve, or advocate the authorization or approval of, payment from DOE funds of travel expenses of a person who is not a Government employee and who is (a) the DOE employee's relative (except in the case of payment under § 1060.101(a)(4)), or (b) in the case of payment under § 1060.101(a)(1), a DOE contractor or a DOE assistance award recipient or the employee of a DOE contractor or a DOE assistance award recipient unless the travel expenses are incurred with respect to matters outside the scope of the contract or assistance award, as the case may be. (See also § 1060.101(e).)

§ 1060.301 Government employees.

Nothing in this part shall be interpreted as being applicable to authorization or approval of payment of travel expenses of Government employees, including DOE employees.

§ 1060.401 Applicability of internal DOE rules.

Payment of travel expenses under § 1060.101(a) (1) through (5) shall be subject to other Department rules relating to authorization of travel.

§ 1060.501 Definitions.

For purposes of this part—

(a) "Counselor" means the General Counsel of the Department or the General Counsel of the Federal Energy Regulatory Commission or their delegates, as appropriate.

(b) "Designated official" means (1) a principal departmental officer, (2) an individual who is appointed to a position in the Department by the President of the United States with the advice and consent of the Senate, (3) the Administrator of a power administration, or (4) the head of a Field Organization.

(c) "DOE" or "Department" means the Department of Energy established by the Department of Energy Organization Act, section 201, Pub. L. 95-91 (42 U.S.C. 7131).

(d) "Employee" means—

(1) An employee as defined by 5 U.S.C. 2105;

(2) A special Government employee as defined in 18 U.S.C. 202(a);

(3) A member of a Uniformed Service.

(e) "Handicapped individual" means a person who has a physical or mental disability or health impairment, and includes an individual who is temporarily incapacitated because of illness or injury.

(f) "Principal departmental officer" means the Secretary, Deputy Secretary, or Under Secretary, or, in the case of the Federal Energy Regulatory Commission, the Chairman or Executive Director of the Commission.

(g) "Relative" means, with respect to a DOE employee, an individual who is related to the employee, by blood, marriage, or operation of law, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandchild, grandparent, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, and shall also include the grandparent of an employee's spouse, an employee's fiance or fiancee, or any person residing in the employee's household.

CHAPTER XV—OFFICE OF THE FEDERAL INSPECTOR FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

SUBCHAPTER A—GENERAL PROVISIONS

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SUBCHAPTER A—GENERAL PROVISIONS

PART 1500—FUNCTIONS, POWERS AND DUTIES

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AUTHORITY: Alaska Natural Gas Transportation Act, 15 U.S.C. 719; *Decision and Report to Congress on the Alaska Natural Gas Transportation System*, Executive Office of the President, Energy Policy and Planning, issued September 22, 1977; Reorganization Plan No. 1 of 1979, 44 FR 33663 (June 12, 1979); Executive Order 12142 of June 21, 1979, 44 FR 36927 (June 25, 1979); and 5 U.S.C. 552(a)(1).

SOURCE: 46 FR 22328, Apr. 16, 1981, unless otherwise noted.

Subpart A—General Provisions

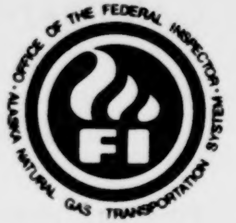
§ 1500.101 Purpose.

This part is intended to provide a general description of the functions, powers, and duties of the Office of the Federal Inspector for the Alaska Natural Gas Transportation System (OFI).

§ 1500.102 Seal.

(a) The OFI has adopted an official seal of which judicial notice shall be taken. Its description is as follows: A blue circle encircled by a blue band with the words "Office of the Federal Inspector, Alaska Natural Gas Transportation System" encircling the blue band. Inside the circle, in white, are the letters "FI". Above the letters are three white symbols representing natural gas flames. The symbols get progressively smaller from left to right.

(b) The Official Seal of the OFI is illustrated as follows:



Subpart B—Creation and Authority

§ 1500.201 Summary.

(a)(1) Congress, in its 1976 legislation clearing the way for the Alaska Natural Gas Transportation System (ANGTS), included the requirement that a Federal Inspector be appointed to assure that the project be built as timely as possible, without excessive cost overruns, and with minimal harm to the enviromnent.

(2) OFI was established pursuant to the Alaska Natural Gas Transportation Act of 1976 (ANGTA), 15 U.S.C. 719; Reorganization Plan No. 1 of 1979, 44 FR 33663 (June 12, 1979); and Executive Order No. 12142, 44 FR 36927 (June 25, 1979).

(b) The Alaska Natural Gas Transportation System (ANGTS) is the statutory designation for the system chosen by the President pursuant to his statutory authority to designate a system for the delivery of Alaska natural gas to the contiguous states. Section 7(a)(4) of ANGTA. The President designated an overland pipeline system beginning at Prudhoe Bay in Northern Alaska, continuing through Alaska into Canada. The system will split in Southern Alberta into eastern and western legs terminating in Dwight, Illinois, and Antioch, California, respectively. The ANGTS will be designed optimally to carry 2.0 to 2.5 billion cubic feet of gas per day, with greater volumes possible. It is more fully described in Section 2 of the *Decision and Report to Congress on the Alaska Natural Gas Transportation System (Decision)* Executive Office of the President, Energy Policy and Planning, issued September 22, 1977.

§ 1500.202 Statutory background.

(a) *The Alaska Natural Gas Transportation Act of 1976 (ANGTA).*

(1) In 1976 ANGTS was given priority status, and thus removed from the standard regulatory process, by ANGTA. The Congressional purpose of ANGTA was twofold: to provide for a sound system-selection decision, involving the President, Congress, and many Federal agencies; and to expedite construction—once a system was selected—through a number of administrative and judicial innovations. One such innovation was the Federal Inspector.

(2) The President was authorized and directed by Section 7(a)(5) of ANGTA, 15 U.S.C. 719(e), to appoint either a single officer or a board as Federal Inspector, following issuance of his decision selecting a transportation system. The authorities first envisioned by Congress for the Federal Inspector entail monitoring, as contrasted to actual enforcement. In addition to the authority to establish a joint monitoring agreement with Alaska, to monitor compliance with all Federal laws, to compel submission of information, and to report to the President and Congress, the Federal Inspector was authorized to monitor closely the technical aspects of project planning and execution.

(b) *President's Decision.* (1) In 1977 the President selected the Alcan (since changed to Alaskan Northwest Natural Gas Transportation Company) project, as he issued his *Decision and Report to Congress on the Alaska Natural Gas Transportation System (Decision)*, Executive Office of the President, Energy Policy and Planning, issued September 22, 1977. In Section 5 thereof, the President determined that, in order to ensure coordinated government oversight, the Federal Inspector must, in addition to the ANGTA authorities (described in paragraph (a) of this section) have "field-level supervisory authority over enforcement of terms and conditions from those Federal agencies having statutory responsibilities over various aspects of (ANGTS)" (*Id.*, at a 41-42). He concluded, however, that the necessary transfer of authorities would have to await a reorganization plan, which in turn necessitated compliance with the substantive and parliamentary requirements of the Reorganization Act of 1977, 5 U.S.C. 901, *et seq.*

(2) In deferring appointment of the Federal Inspector until after transmitting a reorganization plan to Congress, the President substantially expanded the Federal Inspector concept, from Congress' watchdog to the focus of all enforcement of Federal laws related to ANGTS. Also as part of Section 5 of the *Decision*, the President further expanded the Federal Inspector's authority to include pre-approval of the many important planning decisions to be made by the ANGTS sponsors. This took the form of numerous terms and conditions governing construction costs and schedule, safety and design, and environmental protection.

(3) These myriad terms and conditions have the force of law. The President was authorized, by Section 7(a)(6) of ANGTA, to include them in his *Decision*. And because the *Decision* in its entirety was given full legal effect, under Section 8 of ANGTA by joint resolution, H.J. Res. 621, Pub. L. 95-158, 95th Cong. 1st Sess., these terms and conditions have in essence become statutory in nature.

(c) *Reorganization Plan and Executive Order.* (1) In 1979 the OFI was actually established, and the necessary transfer of authorities accomplished through, Reorganization Plan No. 1 of 1979. First, the OFI was transferred "exclusive responsibility for enforcement of all Federal statutes relevant in any manner to preconstruction, construction, and initial operation" of ANGTS. Section 102 of the Reorganization Plan. The OFI is to enforce the legal requirements of many Federal agencies. The Environmental Protection Agency (EPA), the Army Corps of Engineers (COE), Department of

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Transportation (DOT), Department of Energy (DOE), Federal Energy Regulatory Commission (FERC), Department of the Interior (DOI), Department of Agriculture (USDA), and Department of the Treasury (Treasury), and their respective legal authorities, are specifically enumerated as the most likely to be enforced by the OFI relative to ANGTS. The OFI was also charged with enforcing the terms and conditions found in Section 5 of the *Decision*, as well as fulfilling the monitoring duties set for the Federal Inspector in Section 7(a)(5) of ANGTA and the supplemental enforcement duties found in Section 11 of ANGTA.

(2) Enforcement and monitoring constitute only part of the OFI's authority under the Reorganization Plan. Under Section 202(b), for example, the OFI is to coordinate and expedite the permitting activities of the Federal agencies. This is a permit-scheduling function.

(3) Under Section 202(a) final enforcement actions of the OFI are subject to judicial review only under Section 10 of ANGTA. Thus, complaints must be filed with the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of the challenged final OFI action. Review is then expedited (90 days) and of limited scope.

(4) The Reorganization Plan became effective as of July 1, 1979, as per Executive Order 12142. And with the Executive Order, the OFI officially came into existence.

Subpart C—Function and Duties

§ 1500.301 Summary.

Through the combination of authorities described in § 1500.202, the OFI oversees every aspect of ANGTS planning and execution. For ease of understanding, these functions (and the underlying legal authorities) are enumerated under five major groupings: general monitoring and oversight (§ 1500.302); scheduling of permits and other governmental authorizations (§ 1500.303); review and approval of systems, plans, and design during planning (§ 1500.304); cost control (§ 1500.305); and enforcement of Federal statutes and related terms and conditions (§ 1500.306).

§ 1500.302 General monitoring and oversight.

Monitoring and oversight entails the following OFI functions:

(a) *Coordinating enforcement with Alaska.* The OFI is to establish a "joint surveillance and monitoring agreement" with the State of Alaska (section 7(a)(5)(A) of ANGTA). In this way Federal and State enforcement efforts can be coordinated, to avoid conflicts and to enhance efficiency. The OFI may also work jointly on compliance with the Lower 48 states traversed by ANGTS.

(b) *Monitoring compliance with Federal laws.* The OFI is to monitor compliance with applicable Federal laws and terms and conditions of the many Federal permits and other authorizations issued for ANGTS (section 7(a)(5)(B) of ANGTA). This includes compliance with the terms and conditions attached to the authorizations.

(c) *Monitoring for effective planning.* The OFI is to "monitor actions taken to assure timely completion of construction schedules and the achievement of quality of construction, cost control, safety, and environmental protection * * *" (section 7(a)(5)(C) of ANGTA). The breadth of this monitoring function requires that the OFI follow the various aspects of project planning and execution.

(d) *Reporting to Congress and the President.* One purpose of the monitoring function is to provide the information for the OFI's current and periodic reports to Congress and the President on the status of ANGTS progress (section 7(a)(5)(E) of ANGTA). In this regard, the OFI publishes a quarterly report on the status of ANGTS (section 7(a)(5)(E) of ANGTA). This is available to the public upon request.

§ 1500.303 Permit scheduling and coordination.

(a) The Reorganization Plan differentiates between permitting (so-called "nonenforcement") and enforcement, only the latter function being transferred to the OFI. Nevertheless, the OFI is responsible for coordinating and expediting the issuance of permits and other authorizations by the Federal agencies. Section 9(a) and (b) of ANGTA, and Section 202(b) of the Reorganization Plan. OFI coordination can, for example, take the form of "requiring submission of scheduling plans for all permits;" and "serving as the 'one window' point for filing for and issuance of all necessary permits" and data requests. Section 202(b) of the Reorganization Plan.

(b) This coordination function goes beyond mere permit scheduling. It also involves the OFI, pursuant to Section 202(b) of the Reorganization Plan, in evaluating the many discretionary terms and conditions which each Federal agency may impose on ANGTS, to assure that they do not impair project expedition, as per Section 9(c) of ANGTA.

§ 1500.304 Approval of systems, plans, and design.

All significant systems, plans, and design are subject to OFI scrutiny, as a precondition to commencement of construction (Section 5 of the *Decision* and Section 102(h)(3) of the Reorganization Plan). Without listing every approval requirement, the following are the most significant:

(a) *Management plans.* Prior to final certification, the ANGTS applicants must provide a "detailed overall management plan" for OFI approval (Section 5 of the *Decision*, Condition I.1.). Thus, at the outset the applicant's overall strategy for executing the project will be scrutinized.

(b) *Execution contracts.* Several aspects of the contracts with execution contractors (the prime contractor for any given pipeline spread) must be approved by the OFI (Section 5 of the *Decision*, Conditions I.2, I.3, I.7, and I.8). These include contract form (if other than fixed-price), bonding and other prequalification requirements, labor relations procedure, and dispute procedures.

(c) *Cost and schedule control.* The applicants must provide the OFI with detailed "cost and schedule control techniques" (*Id.*, Condition I.4.). This entails, for example, manpower, material, logistical, and equipment planning.

(d) *Operating strategies.* The OFI must approve the applicants' operating strategies. Equipment supply, repair facilities, and spare-part inventories are among the items to be reviewed (*Id.*, Condition I.6.).

(e) *Design review.* The OFI's technical oversight is manifested most in approving the "final design, design-cost estimate, and construction schedule" for the ANGTS applicants (*Id.*, Condition I.5.). Because construction may not start until final design is approved, this review is perhaps the OFI's primary means for assuring proper design and planning, as well as assuring the reasonableness of the design-cost estimate.

(f) *Quality control and assurance.* The OFI must approve the procedures proposed for quality control and quality assurance during construction (*Id.*, Condition I.9.). Apart from these procedures, the OFI must approve technical construction specifications and seismic monitoring systems, to assure pipeline safety and integrity of design, as well as approve plans to assure environmental protection (*Id.*, Safety and Design Conditions II.2 and II.6; Environmental Condition III.2.).

(g) *Procurement review.* As part of the bilateral agreement with Canada relative to ANGTS, the OFI, along with the Northern Pipeline Agency in Canada, is charged with endeavoring "to ensure that the supply of goods and services to (ANGTS) will be on generally competitive terms" (*Decision*, Section 7, paragraph 7(a)). Because sanctions for violation include reopening bids, procurement review occurs during the planning process, not after-the-fact. This review is accomplished through detailed reciprocal procedures, which were established by a "diplomatic exchange of notes" and subsequently given regulatory approval by the FERC.

§ 1500.305 Cost control.

In addition to the cost-control purpose and effect of monitoring (§ 1500.302) and systems approval (§ 1500.304), the OFI has additional and more direct cost-control functions.

(a) The Incentive Rate of Return, developed by the Federal Energy Regulatory Commission (FERC), is to be administered by the OFI during planning and construction, *Determination of Incentive Rate of Return,* Order No. 31, Docket No. RM78-12, issued June 8, 1979. The OFI will rule on design changes prior to its approval of the final design during planning and construction (*Determination of Incentive Rate of Return.* Order No. 31, Docket No. RM78-12, issued June 8, 1979. The OFI cost estimate and on scope changes during construction).

(b) both by transfer of enforcement functions under Section 102(d) of the Reorganization Plan, and also by delegation from the FERC pursuant to Section 202(b) of the Reorganization Plan, 45 FR 85511 (December 29, 1980), the OFI will audit expenditures for rate base formation and accounting compliance. This audit must be performed on a timely basis during construction (Section 5 of the *Decision,* Finance Condition IV.2.).

§ 1500.306 Enforcement of Federal laws.

(a) The OFI's enforcement function extends to "all Federal statutes relevant in any manner to pre-construction, construction, and initial operation" of ANGTS. Section 102 of the Reorganization Plan. This transfer includes, but is not limited to, the enforcement functions of the following agencies:

(1) *The Environmental Protection Agency.* Such enforcement functions of the Administrator and others related to compliance with:

(i) National Pollutant Discharge Elimination System permits (Section 402 of the Clean Water Act of 1977 (CWA)). These permits are required for the discharge of pollutants into waters of the U.S.

(ii) Spill prevention, containment, and countermeasure plans (Section 311 of CWA). These plans are required for major nontransportation oil storage at camps and other facilities.

(iii) Review of permits issued by the Corps of Engineers for dredged and fill materials (Section 404 of CWA). These permits are required for the discharge of dredged or fill material into waters of the U.S.

(iv) New Source Performance Standards (Section 111 of the Clean Air Act). Enforcement of standards of performance for new stationary sources of air pollution such as stationary gas turbines and incinerators.

(v) Prevention of Significant Deterioration review and approval (Sections 160-169 of the Clean Air Act). Review of construction or modification of most stationary air emission sources which emit over 100 tons per day of any air pollutant.

(vi) Resource Conservation and Recovery permits (Resource Conservation and Recovery Act of 1976). Enforcement of permits for disposal or chemical destruction of hazardous wastes.

(2) *The U.S. Army Corps of Engineers.* Such enforcement functions of the Secretary of the Army and others related to compliance with:

(i) Dredged and fill material permits (Section 404 of CWA). Enforcement of permits regulating the discharge in waters of the U.S. of dredged materials and pollutants that comprise fill material.

(ii) Permits for structures in navigable waters (Section 10 of Rivers and Harbors Appropriation Act of 1899). Enforcement for permits for structures, including piers, break waters, bulkheads, revetments, power transmission lines, and aids to navigation, as well as for certain work performed in navigable waters.

(3) *The Department of Transportation.* Such enforcement functions of the Secretary of Transportation and others related to compliance with:

(i) The Natural Gas Pipeline Safety Act of 1968 and related regulations. This entails a comprehensive oversight program to assure quality of construction and pipeline integrity.

(ii) The Federal Aviation Act and related authorizations and regulations, such as, proposed private airport facilities, air traffic limitations, and height requirements for structures like microwave transmitter towers.

(iii) Permits for bridges across navigable waters (Section 9 of Rivers & Harbors Appropriation Act of 1899).

(4) *The Department of Energy and the Federal Energy Regulatory Commission.* Such enforcement functions of the Secretary of Energy, the Com-

mission and others related to compliance with:

(i) Certificates of public convenience and necessity (Section 7 of the Natural Gas Act).

(ii) Authorizations for importation of natural gas, including gas imported from Alberta as predeliveries of Alaska gas (Section 3 of the Natural Gas Act). Enforcement of requirements for facilities necessary to transport this gas.

(5) *The Department of the Interior.* Such enforcement functions of the Secretary of the Interior and others related to compliance with:

(i) Grants of rights-of-way and temporary use permits for Federal lands (Section 28 of Mineral Leasing Act). These grants and permits include those for gas pipelines and related facilities on Federal lands, as well as those for related temporary uses, such as campsites, roads, communications and monitoring sites.

(ii) Land use permits for temporary use of public lands and other associated land uses (Section 302, 501, and 503-511 of the Federal Land Policy and Management Act of 1976). These permits provide authority for temporary use of Federal lands in addition to the authority under the Mineral Leasing Act and include permits for field work preparatory to applying for grants of right-of-way and other associated uses.

(iii) Materials sales contracts (the Materials Act of 1947). These permits concern the removal of mineral or vegetative material from public lands.

(iv) Rights-of-way across Indian lands (Rights of Way Through Indian Lands Act). Grants of rights-of-way issued by the Secretary after tribal consent.

(v) Removal permits (the Materials Act of 1947). These permits also concern removal of mineral or vegetative material from public lands.

(vi) Approval to cross national wildlife refuges (National Wildlife Refuge System Administration Act of 1966 and Upper Mississippi River Wildlife and Fish Refuge Act). Issuances of permits or rights-of-way or permits on wildlife refuges must have Interior approval as being compatible with the purpose for establishing the refuge.

(vii) Wildlife consultation (Fish and Wildlife Coordination Act). Requirement for consultation with Fish and Wildlife Service as to the effects of rights-of-way or permits on wildlife resources.

(viii) Protection of certain birds (Migratory Bird Treaty Act and Bald and Golden Eagles Protection Act). Interior is responsible for protecting migratory birds and eagles, their nests and eggs. Special use permits or waivers are available except in the case of eagles.

(ix) Review of Corps of Engineers' dredged and fill material permits (Section 404 of CWA). *See* similar discussion under paragraph (a) of this section, EPA, and paragraph (b) of this section, the Corps.

(x) Rights-of-way across recreation lands (Land and Water Conservation Fund Act of 1965). Compliance with restrictions for land acquired or developed with the assistance of the Fund.

(xi) Historic preservation (National Historic Preservation Act of 1966). Principally consultation on the effect of system activities on locations covered by the Act.

(xii) Permits issued under the Antiquities Act of 1906. Such permits allow certain institutions to examine ruins, to excavate archeological sites and to gather objects of antiquity on or from Federal lands.

(xiii) System activities requiring coordination and approval under the general authorities of:

(A) The National Trails System Act,

(B) The Wilderness Act,

(C) The Wild and Scenic Rivers Act,

(D) The National Environmental Policy Act of 1969,

(E) The Act of April 27, 1935, dealing with the prevention of soil erosion, and

(F) An Act to provide for the Preservation of Historical and Archeological Data.

The enforcement functions under these Acts generally concern requirements that the purposes and protection set forth in the Act be observed, or, depending on the specific statute, at least be taken into account, in the performance of system activities.

(xiv) Equal opportunity regulations published by the Department. 43 CFR

Part 34. These regulations require affirmative action to assure against discrimination in employment and contracting on ANGTS. Section 17 of ANGTA.

(6) *The Department of Agriculture.* Such enforcement functions of the Secretary of Agriculture or other related to compliance with:

(i) Associated land use permits under grants of rights-of-way across Federal lands (Section 28 of the Mineral Leasing Act of 1920). Similar permits to those of Interior above except for lands administered by USDA.

(ii) Land use permits for associated land uses (Section 501 and 503-511 of Federal Land Policy and Management Act of 1976). Similar permits to those of Interior above except for lands administered by USDA.

(iii) Land use permits under the Organic Administration Act of June 4, 1897 and Title III of Bankhead-Jones Farm Tenant Act of 1937. Permits for land use of a non right-of-way nature for National Forest System lands (under the first Act) and National Grasslands (under the second Act).

(iv) Removal of materials under the Materials Act of 1947. Similar permits to those of Interior above except for lands administered by USDA.

(v) Removal of objects of antiquity (Antiquities Act of 1906). Similar permits to those of Interior above except for lands administered by USDA.

(vi) Construction and utilization of national forest roads (Roads and Trails System Act of 1964). Permanent or temporary easements issued for such roads.

(vii) System activities requiring coordination and approval under the general authorities of:

(A) The National Forest Management Act of 1976;

(B) The Multiple Use Sustained-Yield Act of 1960;

(C) The Forest and Rangelands Renewable Resources Planning Act of 1974;

(D) The National Trails System Act;

(E) The Wilderness Act;

(F) The Wild and Scenic Rivers Act;

(G) The Land and Water Conservation Fund Act of 1965;

(H) The Clean Water Act of 1977;

(I) The Fish and Wildlife Coordination Act;

(J) The Fish and Game Sanctuaries Act;

(K) The National Historic Preservation Act of 1966;

(L) An Act to provide for the preservation of Historical and Archeological Data;

(M) The National Environmental Policy Act of 1969;

(N) The Watershed Protection and Flood Prevention Act;

(O) The Soil and Water Conservation Act of 1977; and

(P) The Act of April 27, 1935, dealing with prevention of soil erosion.

The enforcement functions under these acts generally concern requirements that the purposes and protections set forth in the acts be observed, or, depending on the specific statute, at least be taken into account, in the performance of system activities.

(7) *The Department of the Treasury.* Such enforcement functions of the Secretary of the Treasury and others related to compliance with permits and regulations for interstate transport or storage of explosives.

(8) *The Department of Labor.* Pursuant to memorandum of understanding, coordination of functions to assure compliance with:

(i) The Federal Mine Safety and Health Act of 1977, and

(ii) The Occupational Safety and Health Act of 1970.

Regulations promulgated pursuant to these acts are intended to reduce lost work time resulting from workplace injuries and illnesses.

(b) The specific statutes and regulations listed above span the full spectrum of Federal regulatory law. Be they concerned with environmental protection, pipeline integrity, public convenience and necessity, or public land use, these statutes, and the resulting regulations, permits, and terms and conditions, require the OFI to oversee every aspect of ANGTS construction.

PART 1502—ORGANIZATION

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1502.2 Status.

1502.3 Federal Inspector.

1502.4 Executive policy board.

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1502.6 Citizens' Environmental Advisory Committee.

1502.7 Internal organization.

1502.8 Offices and hours.

AUTHORITY: Alaska Natural Gas Transportation Act, 15 U.S.C. 719; *Decision and Report to Congress on the Alaska Natural Gas Transportation System*, Executive Office of the President, Energy Policy and Planning, issued September 22, 1977; Reorganization Plan No. 1 of 1979, 44 FR 33663 (June 12, 1979); Executive Order 12142 of June 21, 1979, 44 FR 36927 (June 25, 1979); and 5 U.S.C. 552(a)(1).

SOURCE: 46 FR 22332, Apr. 17, 1981, unless otherwise noted.

§ 1502.1 Purpose.

This part is intended to provide a general description of the organization of the Office of the Federal Inspector (OFI). More detailed information can be obtained from the OFI Public Information Officer.

§ 1502.2 Status.

Pursuant to Section 101(a) of Reorganization Plan No. 1 of 1979, the OFI was created as an independent establishment in the Executive Branch. It is not a component of any department or other agency. The Federal Inspector reports to the Executive Office of the President.

§ 1502.3 Federal Inspector.

Pursuant to Section 101(b) of Reorganization Plan No. 1 of 1979, the OFI is headed by a Federal Inspector. Pursuant to Section 7(a)(5) of ANGTA, the Federal Inspector was appointed by the President with the advice and consent of the Senate.

§ 1502.4 Executive policy board.

Established by Executive Order No. 12142, the Executive Policy Board (EPB) is composed of high-level representatives of the Departments of Labor, Agriculture, Energy, Interior, Transportation, the U.S. Army Corps of Engineers, the Federal Energy Regulatory Commission, and the Environmental Protection Agency. The EPB advises the Federal Inspector on policy issues and the exercise of OFI authorities relating to enforcement actions (Section 201 of the Reorganization Plan). But the other functions proposed for the EPB in the *Decision* were transferred to the Federal Inspector (*Id.*).

§ 1502.5 Agency authorized officers.

Each Federal agency which has approval authority for some aspect of the project must appoint an Agency Authorized Officer (AAO) to represent that agency in the Federal Inspector's Office (Section 101(c) of the Reorganization Plan). The AAOs work closely with their agencies and are responsible to the Federal Inspector for assuring timely completion of all necessary actions during this project. In addition, depending on the degree of delegation from the Federal Inspector, they may participate in major enforcement actions related to their agency's responsibilities (Section 202(a) of the Reorganization Plan).

§ 1502.6 Citizens' Environmental Advisory Committee.

The Federal Inspector has established a Citizens' Environmental Advisory Committee to advise him regarding environmental issues associated with the Alaskan segment of the System. (45 FR 41741, June 20, 1980). The Committee provides a formal, direct channel through which views of the environmental community can be made known to the Federal Inspector.

§ 1502.7 Internal organization.

The OFI is headed by the Federal Inspector. There are two Deputy Federal Inspectors, one responsible for operations in Alaska and the Irvine Office and the other responsible for Lower 48 operations and the headquarters offices. An Executive Director coordinates the technical and administrative functions of the OFI. The following organizational components are under the Federal Inspector's supervision:

(a) *The Office of the General Counsel.* The Office of the General Counsel provides all legal services to the Federal Inspector on matters related to environmental, technical, public utility, contract, administrative, and all other laws related to the ANGTS.

(b) *The Office of Equal Employment Opportunity/Minority Business Enterprise/Labor.* The Office of Equal Employment Opportunity/Minority Business Enterprise/Labor (Office of EEO/MBE/Labor) monitors all external EEO and MBE matters including the development and implementation of the affirmative actions plans and regulations required by Section 17 of ANGTA and Title VII of the Civil Rights Act of 1964. This office also administers the OFI EEO program. In addition, the Office of EEO/MBE/Labor works with organized labor and the sponsors on EEO and other labor-related issues.

(c) *The Office of External Affairs.* The Office of External Affairs is responsible for Congressional and Canadian liaison, public affairs, and intergovernmental affairs.

(d) *The Office of Administration.* The Office of Administration is responsible for all normal personnel and financial management functions, including operation of the OFI management information system. In addition, this office provides contract management, procurement, internal audit, and security functions.

(e) *The Office of Policy Analysis.* The Office of Policy Analysis analyzes major policy and economic issues as they arise and provides program evaluations and special organization studies for the Federal Inspector. It also provides policy oversight and program assistance on socioeconomic impact issues.

(f) *The Office of Engineering Review.* The Office of Engineering Review reviews pipeline design and construction plans, quality assurance and control programs, change orders and requests, cost estimates, and provides both compliance guidance and technical advice and assistance for field inspections.

(g) *The Office of Environmental Review.* The Office of Environmental Review has functions which are similar to those of the Office of Engineering Review, except that this office focuses its attention on solving environmental problems. Although structurally separate, these two units work closely to ensure that both engineering and environmental considerations are addressed in a coordinated manner.

(h) *The Office of Audit and Cost Analysis.* The Office of Audit and Cost Analysis implements the incentive rate of return mechanism and conducts audits of the sponsors' records for purposes of rate base formation. It is also responsible for assuring that the project sponsors establish and maintain effective cost-control and other management systems. These activities enable the Federal Inspector to quickly determine the impact of major decisions on cost and scheduling and to anticipate any potential significant cost or schedule deviations on the part of the project sponsors.

(i) *The Office of Permits, Scheduling, and Compliance.* The Office of Permits, Scheduling, and Compliance tracks, expedites, and coordinates Federal permit issuance. It also monitors resource requirements, generally oversees the regulatory process by working with and advising the field staff, provides guidance and criteria on the enforcement of terms and conditions, laws, and regulations and administers the joint surveillance and monitoring agreement.

(j) *Field Offices in Alaska, San Francisco, and Omaha.* Field Offices in Alaska, San Francisco, and Omaha are responsible for monitoring any preconstruction activities, serve as the "one window" for processing permit applications, and monitor all construction and initial operation activities for the Alaska, Western and Eastern legs of the project. The field offices also enforce laws, regulations, and the terms and conditions of all permits, grants, certificates, and notices-to-proceed.

§ 1502.8 Offices and hours.

(a) Offices of the OFI are in the following locations:

(1) *Headquarters.* Room 2407, Post Office Building, 1200 Pennsylvania Avenue, N.W. Washington, D.C. 20044;

(2) *San Francisco.* Room 767, Matson Building, 215 Market Street, San Francisco, California 94105;

(3) *Irvine.* 1st Floor, 2302 Martin Drive, Irvine, California 92715;

(4) *Anchorage.* 605 West Fourth Avenue, Pouch 6619, Anchorage, Alaska 99502;

(5) *Fairbanks.* Suite 400, Central Office Building, 1001 Noble Street, Fairbanks, Alaska 99701; and

(6) *Omaha.* Suite 350, 11414 West Center Road, Omaha, Nebraska 68144.

(b) Business hours are from 8:30 a.m. to 5:00 p.m. in Washington, from 8:00 a.m. to 5 p.m. in Irvine, and from 7:30 a.m. to 4:00 p.m. in all other locations. Offices are open Monday through Friday, except for Federal holidays.

PART 1504—GATHERING, HANDLING, AND DISCLOSING INFORMATION

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AUTHORITY: 5 U.S.C. 552; secs. 7(a) (5) and 9 of ANGTA, 15 U.S.C. 719; and secs. 102 and 202 of Reorganization Plan No. 1 of 1979.

SOURCE: 46 FR 61228, Dec. 15, 1981, unless otherwise noted.

Subpart A—Procedures Governing OFI Information Requests, Subpoena Process, Judicial Enforcement, and Administrative Sanctions

§ 1504.101 Scope.

(a) The Federal Inspector has expansive authority to collect information which "he deems necessary to carry out his responsibilities." Section 7(a)(5)(D) of the Alaska Natural Gas Transportation Act (ANGTA), 15 U.S.C. 719e(a)(5)(D). Absent voluntary submission, the Office of the Federal Inspector (OFI) may issue an administrative subpoena and, if necessary, pursue judicial enforcement of unsatisfied subpoenas.

(b) This subpart describes the procedures which will be used when voluntary OFI requests for information relevant to the general oversight functions of the OFI are not fulfilled. It also provides the procedures to be used during any formal OFI proceeding for issuing and enforcing administrative subpoenas.

§ 1504.102 General oversight—OFI requests for information.

(a) The OFI will exercise its jurisdiction mainly through general project oversight, not through *ad hoc* adjudication. As a result, most of the OFI's requests for information should occur outside the confines of litigation.

(b) The OFI will make requests for information in writing, except when a written communication would result in an unacceptable delay, in which case any oral request will be confirmed in writing. Requests will provide an adequate description of the information requested and state a reasonable period of time, consistent with the mandate of ANGTA to expedite the regulatory process, within which the information should be submitted.

(c) When the request for information has not been satisfied, the OFI may take further action under either or both §§ 1504.103 and 1504.104.

§ 1504.103 General oversight—informal sanctions.

(a) If the request for needed information is not satisfied, as per § 1504.102(c), the OFI may—as an alternative to or in addition to issuing an administrative subpoena—withhold any regulatory approval or monitoring action to which the needed information relates.

(b) The director of the OFI office responsible for the specific regulatory approval or monitoring action and in need of the information withheld or the Deputy Federal Inspector where appropriate may, after consultation with the General Counsel, withhold such approval or action, as per § 1504.103(a).

(c) Delays associated with the OFI withholding approval or action, as per paragraph (a) of this section, will be attributed to the recalcitrant entity, to which the unsatisfied but valid information request had been made.

§ 1504.104 General oversight—subpoenas.

(a) *Justification.* If the request for needed information is not satisfied, as per § 1504.102(c), the OFI may issue a subpoena compelling production under this section.

(b) *Issuance.* Subpoenas for the production of information deemed necessary for the OFI to carry out its general oversight and monitoring responsibilities may be issued either by the Federal Inspector or by the OFI General Counsel or designee.

(c) *Contents.* Subpoenas will bear the OFI name and seal and the name and position of the issuing officer. Subpoenas will command the production of reasonably described information at a designated place and time, not to exceed 10 calendar days from date of service. The subpoena will contain the statutory basis for the request of the information and how the requested information is relevant to the execution of OFI's authority.

(d) *Service.* (1) A subpoena will be served upon the person(s) named in the subpoena by delivering a copy of the subpoena to the person(s) named.

(2) Delivery of the subpoena may be made by:

(i) Any legally-accepted method, or

(ii) Any other method that provides the person with actual notice prior to the return date of the subpoena.

(e) *Motion to quash.* A motion to quash a subpoena may be made no more than 5 calendar days from the date of service. Such motion shall be filed with the issuing officer and shall set forth specific reasons why the information requested is clearly not necessary for the OFI to carry out its duties. The issuing officer may deny or grant the motion in whole or part; stay or extend the time for compliance; or modify the subpoena as appropriate.

§ 1504.105 General oversight—compliance orders.

(a) When a subpoena issued pursuant to § 1504.104 has been neither quashed nor satisfied, the OFI may issue a compliance order, as per section 11(a)(1) of ANGTA, 15 U.S.C. 719i(a)(1). Either the Federal Inspector or the OFI General Counsel may issue such an order.

(b) Such compliance order will specify: (1) The subpoena violated; and (2) a time of compliance, not to exceed 10 calendar days.

§ 1504.106 General oversight—judicial enforcement.

In addition to pursuing remedies available under other applicable provisions of law, the OFI may, after the issuance and violation of a compliance order:

(a) Seek judicial enforcement of the unsatisfied subpoena;

(b) Commence a civil action pursuant to section 11(a)(2) of ANGTA, 15 U.S.C. 719i(a)(2), in the district court of the United States having venue for appropriate relief, including an injunction against or civil penalties (not to exceed $25,000 per day) for, violating the compliance order; and/or

(c) Where appropriate, seek an order from the district court holding the defendant in contempt of court.

§ 1504.107 Formal OFI proceedings—discovery.

(a) To the extent that it undertakes an enforcement or other regulatory action which requires an agency hearing on the record or which otherwise could result in the imposition of serious sanctions against the responding person, the OFI will gather the necessary information through interrogatories, document production, depositions, and other forms of discovery.

(b) The rules governing such discovery will appear as part of the OFI's rules of practice and procedure, 10 CFR Part 1508.

(c) Unjustified refusal to comply with discovery requests may result in the OFI issuing a subpoena compelling compliance, as per § 1504.108.

§ 1504.108 Formal OFI proceedings—subpoenas.

(a) *Justification.* If the discovery request for information is refused, as per § 1504.107(c), if a requested witness refuses to appear, or if a party refuses to produce evidence, the OFI may issue a subpoena compelling discovery, attendance, or production under this section.

(b) *Issuance.* Subpoenas justified under § 1504.108(a) may be issued by the OFI presiding officer on his or her own motion or on a motion filed with the presiding officer by any party to the OFI proceeding. Subpoenas will be issued if the presiding officer finds that the information requested is necessary to the duties of the OFI and should not otherwise be withheld.

(c) *Contents.* Subpoenas will bear the OFI name and seal, the name and position of the issuing officer, and the title of the proceeding. Subpoenas will command a named person to testify or produce reasonably described evidence or information at a designated time and place. The subpoena will contain the statutory basis for the request of the information and how the requested information is relevant to the execution of OFI's authority.

(d) *Service.* Service will be accomplished in accordance with § 1504.104(d).

(e) *Motion to quash.* A motion to quash a subpoena may be made no more than 5 calendar days from the date of service. Such motion shall be filed with the OFI presiding officer who issued the subpoena (and where appropriate served on the party applying for the subpoena) and shall set forth specific reasons why the information requested is clearly not necessary for the OFI to carry out its duties, or should otherwise be withheld. The OFI presiding officer may deny or grant the motion in whole or part; stay or extend the time for compliance; or modify the subpoena as appropriate.

§ 1504.109 Formal OFI proceedings—compliance orders.

When a subpoena issued pursuant to § 1504.108 has been neither quashed nor satisfied, the OFI may issue a compliance order in accordance with the procedures set forth in § 1504.105.

§ 1504.110 Formal OFI proceedings—judicial enforcement.

Judicial enforcement of a compliance order, issued under § 1504.109, may be sought in accordance with § 1504.106.

Subpart B—Treatment of "Sensitive" and "Business" Information

§ 1504.201 General policy.

(a) The OFI agrees in advance to resist disclosure of "sensitive" information, a narrow category including national security, trade secret, critical procurement, and secrecy agreement information.

(b) For "business" information, however, the OFI only agrees to the following: (1) To give to the submitter notice and opportunity to object; and (2) to balance the competing interests as to disclosure.

§ 1504.202 Document categories.

(a) The "sensitive" category is very narrow, only including documents which, except under court order, should in no case be distributed outside the government (and in most cases retained just within the OFI). The following types of information are "sensitive":

(1) Documents classified for national security reasons are "sensitive", the only contemplated examples of which relate to the reciprocal procurement review with the Northern Pipeline Agency in Canada.

(2) Trade secrets, as explained and defined in § 1504.203(b) for this particular context, also come within the "sensitive" category.

(3) Critical procurement information, particularly tentative bids, price and vendor conditions, come within the "sensitive" designation.

(4) The "sensitive" category also includes information originally received by the submitter under a *bona fide* secrecy agreement from the third party originator of the information.

(5) There could possibly be other documents received under circumstances warranting limited or no distribution. Privileged information developed during non-ANGTS litigation, for example, might warrant an OFI agreement to resist disclosure. Privacy considerations might also be relevant here. Because "sensitive" designation of this type of information is presently only hypothetical, it will receive n elaboration in § 1504.203.

(b) The "business" category entail information either developed at a cos and possessing demonstrable marke value or the release of which may substantially impair the competitive position of the person who supplied it, whether an ANGTS sponsor or another. This is basically proprietary information, disclosure of which would reduce or eliminate its value to the submitter. Unlike "sensitive" information, "business" information may, under certain circumstances, be disclosed to the public. The OFI will balance the economic impact of disclosure against the public interest in access.

§ 1504.203 Factors governing designatio of information as "sensitive".

(a) *National Security.* While relatively rare, the first type of "sensitive" information to be protected by the OFI is "classified" information. Through a formal U.S.-Canadian exchange of diplomatic notes establishing reciprocal procedures to administer procurement oversight, the OFI is required to maintain the "confidentiality" of certain information disclosed by the Northern Pipeline Agency. Such information would constitute "foreign government information" and as such would be classified as "confidential" under Executive Order 12065. During the limited period of the procurement process, while this information continues to be "confidential," the OFI will deny public access under FOIA exemption (b)(1), that is, information properly classified under Executive Order as "in the interest of national defense or foreign policy." (See § 1504.317(a)(1) of Subpart C of this part).

(b) *Trade Secrets.* Trade secrets are the core of the "sensitive" category:

(1) The ANGTS sponsors might have to contract for some highly specialized, technical, and secret process or mechanism instrumental to the design or construction effort.

(2) Public disclosure of the process itself—as contrasted to what was produced by use of the process—would cause the contractor severe economic

and competitive loss. Disclosure of such trade secrets is not in the public interest, for it could both hamper project expedition and also escalate construction costs.

(3) The OFI will resist any FOIA request for such information, as well as discourage requests from other agencies or Congressional committees, unless adequate protections are provided. FOIA exemption b(4)—while broader than just trade secrets—will be employed. (See § 1504.317(a)(4) of Subpart C of this part). So too, the Trade Secrets Act prohibition against unauthorized disclosure applies primarily to information like these trade secrets.

(4) While the term "trade secret" has varying connotations depending on the legal context, the OFI will use the following criteria to discern if information is a trade secret, solely for the purpose of bringing it within the "sensitive" category:

(i) The cost of developing the information;

(ii) The value of the information to the owner and competitor, *i.e.*, the extent of the competitive advantage it provides;

(iii) The extent to which the information is not independently known or available to others; and

(iv) The extent to which the owner has maintained its confidentiality.

(c) *Secrecy agreements.* The OFI will scrutinize information under secrecy agreements from a narrow perspective similar to that employed for trade secrets. These secrecy agreements could well be insisted upon by the trade secret owner contracting with the ANGTS sponsor. The OFI will closely review such secrecy agreements to assure that they are:

(1) Necessary, in terms of the sponsor being able to gain possession of the information on reasonable conditions;

(2) Enforceable against the submitter, *i.e.*, through civil damages; and

(3) Not formed to circumvent the OFI's regulations limiting special treatment for "sensitive" information.

(d) *Critical Procurement.* Critical procurement information will be protected through the FOIA (b)(4) exemption, and includes primarily tentative bids (price vendor, and conditions), disclosure of which before completion of the process could skew the procurement, leading to delay and/or cost escalation. Critical procurement information of the ANGTS sponsors will also retain the "sensitive" designation subsequent to the award of a contract.

§ 1504.204 Factors governing designation of information as "business".

(a) *Proprietary nature.* "Business" information is proprietary, commercial or financial information, the release of which may substantially impair the competitive position of the person who supplied it, whether an ANGTS sponsor or another. In the majority of cases, the ANGTS sponsor will incur substantial costs to develop or purchase numerous studies, plans, designs, methods, systems, etc., associated with project completion. While not "sensitive" information, these documents nonetheless possess some value; that is, the sponsors might at some time find a willing buyer for the information.

(b) *Treatment.* "Business" information generally comes within FOIA exemption b(4), but the OFI is not committed necessarily to resisting its public disclosure. Instead, the OFI will balance the economic harm of disclosure against the public interest supporting the access request. In so doing, the OFI will first notify the submitter of "business" information that a request for access has been made or that the OFI on its own initiative intends to disclose it, as detailed in § 1504.208. The submitter will then have the burden of proving to the OFI that the requested information is truly valuable and that disclosure will reduce or eliminate that value.

(c) *Factors against disclosure.* While OFI disclosure of such information would not, strictly speaking, impair competitive position, it might reduce or eliminate the potential for revenues from a future sale. Beside this general economic impact, the OFI will consider the following ANGTS-specific factors militating against disclosure:

(1) For "business" information merely held by an ANGTS sponsor but owned by a third party, such as pro-

curement-related information of a prospective vendor or contractor, public disclosure might be shown to impair the sponsor's ability to procure future goods and services at a reasonable price.

(2) To the extent that "business" information is utilized by the sponsors for ANGTS construction, the associated costs will be capitalized for rate base inclusion. As such, the consumers of Alaskan gas will pay for such "business" information. The revenues from any subsequent sale of this "business" information should be used as a credit to rate base, thereby benefitting the gas consumer, who has been paying for such information. Therefore, when ruling on requests for public disclosure of the sponsors' "business" information, the OFI will consider, on the one hand, the likelihood and magnitude of future gas consumer rate reduction if access is denied and, on the other hand, the purpose to be served if access is granted.

(3) While the OFI's authority to gather information is expansive (see Subpart A of this part), public disclosure of certain types of "business" information might increase submitter resistance and thereby increase the OFI's need to use compulsory rather than voluntary process for subsequent information gathering. This eventuality could impair the OFI's ability to expedite ANGTS construction, something which the OFI would try to avoid.

(d) *Factors favoring disclosure.* (1) Disclosure is the statutory preference under FOIA.

(2) For "business" information related to its overall role of administering the equal opportunity program for ANGTS preconstuction and construction (see 43 CFR Part 34 and 10 CFR Part 1534), the OFI will accord the maximum public access permitted within relevant legal parameters, as described in this subpart.

§ 1504.205 Procedures to designate information as "sensitive".

(a) Any person, who has been requested by the OFI to provide information, including computerized data, which that person believes to be "sensitive," must so designate the information on its face and also submit, simultaneously with the information, a petition justifying that "sensitive" designation.

(b) A petition for "sensitive" designation must contain the following:

(1) A thorough statement (including documentary support and sworn affidavits if appropriate) explaining why the information is "sensitive," pursuant to the criteria set forth in §§ 1504.202 and 1504.203;

(2) When appropriate, the length of time and the circumstances under which the information should remain designated "sensitive"; and

(3) The name and address by which the petitioner can promptly be reached by the OFI (through letter or telegram) concerning the petitioned-for designation.

(c) Upon receipt of the petition, the OFI General Counsel or designee will determine whether the information will be designated as "sensitive."

(1) The General Counsel or designee will make this determination as soon after receipt of the petition as is practicable, but in the interim the petitioner may not assume that the petition has been approved.

(2) The General Counsel or designee will notify the petitioner of one of the three following determinations:

(i) The information is designated as "sensitive" and thus will be protected from public disclosure under all circumstances, as per § 1504.206;

(ii) The information is not designated as "sensitive," in which case the petitioner may, where appropriate, consider petitioning the OFI for a "business" designation, as per § 1504.207; or

(iii) The petition is inadequate for making a final determination, in which case the petitioner will have five calendar days from receipt of the determination in which to cure the petition.

§ 1504.206 Treatment of "sensitive" information.

(a) For information designated by the OFI as "sensitive," under § 1504.205(c)(2)(A), the OFI will take the following internal steps:

(1) The designated information will be officially stamped on its face as

"sensitive," with the notations that public disclosure is prohibited; that the OFI General Counsel must first approve disclosure within the Government; and that internal distribution and copying is also prohibited unless approved by the OFI Security Officer. The "sensitive" designation will remain unless the General Counsel determines that changed circumstances make it necessary to remove such a designation, in which case the submitter will be so notified immediately.

(2) The OFI will impose stringent internal control procedures for the designated information, including special locked storage facilities, an assigned custodian, and a system of written logs to assure limitation on distribution and copying.

(b) When a request for public disclosure of the designated information is received, the OFI Freedom of Information Officer will so notify the original submitter of the "sensitive" information.

(c) Any information designated "sensitive," which is released pursuant to either a joint federal/state agreement or any other arrangement, shall not be released to the public by the State or any other entity receiving it.

(d) To the extent that a state agency or any other respective entity does not agree in advance to § 1504.206(c), the OFI will not release such information to it.

(e) If the OFI subsequently encounters difficulties in resisting public disclosure of "sensitive" information, the OFI General Counsel or designee will so notify the original submitter, affording an opportunity for the submitter to take whatever supplemental legal action it deems appropriate to assist the OFI in resisting disclosure.

§ 1504.207 Procedures to designate information as "business".

(a) Any person, who has been requested by the OFI to provide information, including computerized data, which that person believes to be "business," must so designate the information on its face and also submit, simultaneously with the information, a petition justifying that "business" designation.

(b) A petition for "business" designation must contain the following:

(1) A concise statement explaining why the information is "business," pursuant to the criteria set forth in § 1504.204 of this part, including particular analysis of the factors for and against disclosure;

(2) When appropriate, the length of time and the circumstances under which the information should remain designated "business"; and

(3) The name and address of a responsible person, who can speak for the petitioner and who can promptly be reached by the OFI (through letter or telegram) concerning the petitioned-for designation.

(c) Upon receipt of the petition, the OFI General Counsel will briefly review the matter and reject petitions which are patently inadequate. This brief review, however, does not constitute final action on the petition. Until the petition is formally considered (see § 1504.208 of this part) by the OFI, the petitioner may not assume that the petition has been approved.

§ 1504.208 Treatment of "business" information.

(a) For information petitioned to be designated as "business," for which the petition has not been rejected as patently inadequate under § 1504.207(c), the OFI will stamp "'business' petition pending," with the notation that public disclosure is not allowed without prior official OFI approval pursuant to this section, whether in the case of FOIA requests or disclosure at the OFI employee's own initiative. Otherwise, the OFI will impose no special procedures for internal control.

(b) When a request for public disclosure of the information stamped "business" is received or when the OFI on its own initiative intends to make pubic disclosure, the OFI Freedom of Information Officer will so notify the original submitter of the information, giving the submitter up to five days to supplement the original petition for "business" designation, first filed pursuant to § 1504.207(a). This supplementation may be accompanied by a sworn affidavit if appropriate and should include the following:

(1) Statement of any change in facts since the petition was first filed (including whether the petition has become unnecessary);

(2) Detailed explanation of the market value of the information at issue and why disclosure would reduce or eliminate that value; and

(3) Suggested ways to minimize economic harm from disclosure while still affording public access, such as isolating the specific portions of documents warranting special treatment.

(c) As part of the OFI initial determination on any FOIA request for stamped information (under §§ 1504.309 and 1504.312 of Subpart C) or as part of an independent OFI decision to disclose that stamped information to the public, the OFI General Counsel or designee will make one of the following decisions on the pending petition for "business" designation:

(1) The information is not "business" within the meaning of § 1504.204(a), and the petition is therefore denied. If there is no other reason to withhold public disclosure, the OFI Freedom of Information Office will then grant the FOIA request.

(2) The information is "business" within the meaning of § 1504.204(a). The petition is therefore granted and the information is designated as "business." However, when balancing the competing factors as to disclosure under § 1504.204(b) through (d), the public interest favors disclosure. Thus, the OFI Freedom of Information Office will then grant the FOIA request.

(3) The information is "business" within the meaning of § 1504.204(a). The petition is therefore granted, and the information is designated as "business." When balancing the competing factors as to disclosure under § 1504.204(b) through (d) the public interest is against disclosure. Thus, the OFI Freedom of Information Officer will then deny the FOIA request as per § 1504.312 of Subpart C, subject to the petitioner's ongoing assistance to the OFI in defense of any proceeding that might thereafter be brought to compel the OFI to disclose the "business" information.

(d) Any information designated "'business' petition pending," which is released pursuant to a joint federal/state agreement or any other arrangement, shall not be released to the public by the State or any other entity receiving it unless the OFI General Counsel has made a determination otherwise.

(e) To the extent that a state agency or any other entity does not agree in advance to § 1504.208(d), the OFI will not release such information to it.

(f) The OFI Freedom of Information Officer will immediately advise the petitioner (submitter of the information at issue) of:

(1) The determinations made pursuant to either § 1504.208(c)(1) or (c)(2); and

(2) The fact that the information at issue will be publicly disclosed ten calendar days after the determination.

Subpart C—Public Requests for Information

§ 1504.301 Purpose and scope.

(a) This subpart describes the procedures by which records may be obtained from the Office of the Federal Inspector for the Alaska Natural Gas Transportation System (OFI), in accord with the Freedom of Information Act, 5 U.S.C. 552. That provision of law requires that this agency, "upon any request (other than that made by another Federal agency) for records which (1) reasonably describes such records, and (2) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."

(b) The procedures in this subpart do not apply to requests for records published in the FEDERAL REGISTER, for materials which are legally owned by OFI employees in their personal capacity, and for materials which are readily available to the public, such as books, journals, perodicals and other copyrighted materials available through reference libraries, even if such materials are in OFI's possession.

§ 1504.302 Policy on disclosure of OFI records.

(a) The OFI will make records available to the public, to the greatest extent possible in keeping with:

(1) The spirit of the Freedom of Information Act;

(2) The rights of individuals to privacy;

(3) The designation of any document as "sensitive" and "business" information which the OFI will give special treatment (pursuant to Subpart B of this part); and

(4) The need to promote frank internal policy deliberations and to pursue official activities without undue disruption.

(b) All OFI records shall be available to the public upon request, unless disclosure is prohibited by court order, Executive Order, statute, provision of this subsection, or an exemption under the Freedom of Information Act.

§ 1504.303 Partial disclosure of records.

If a requested record contains both exempt and nonexempt material, the nonexempt material shall be disclosed after the exempt material has been deleted.

§ 1504.304 Existing records.

(a) The Freedom of Information Act does not require the creation of new records in response to a request, nor does it require the OFI to place a requestor's name on a distribution list for automatic receipt of certain kinds of records as they come into existence. Instead, it establishes requirements for disclosure of existing records.

(b) All existing OFI records are subject to routine destruction according to standard record retention schedules.

§ 1504.305 Where and to whom requests for OFI records should be sent.

(a) Although OFI records may be located in one or more of the OFI's branch offices, all requests for OFI records should be sent to OFI Headquarters, addressed to: Office of the Federal Inspector, Alaska Natural Gas Transportation System Freedom of Information Officer Room 3413, Post Office Building 12th and Pennsylvania Avenue, N.W. Washington, D.C. 20044

(b) To the extent that a request is received by a branch office of the OFI, the request will not be deemed received by the OFI until received at OFI headquarters, following transmission by the branch office.

§ 1504.306 Form of request.

A request shall be made in writing and shall reasonably describe the records sought in a way that will permit their identification and location. If such information is available, the request should identify the subject matter of the records, the date when it was made, the person(s) or the office which made the records, the present custodian of the records, and any other information which will assist in the location of the requested records.

§ 1504.307 Requests which do not reasonably describe records sought.

(a) If the description of the records sought in the request is not sufficient to allow the OFI to identify and locate the requested records, the OFI will notify the requestor that the request cannot be processed further until additional information is furnished.

(b) The OFI will make reasonable effort to assist in the identification and description of records sought and to assist the requestor in formulating his request.

(c) If a request is described in general terms (e.g., all records having to do with a certain area), the OFI may communicate with the requestor with a view towards reducing the administrative burden of processing a broad request and minimizing the fees payable by the requestor.

§ 1504.308 Responsibilities of Freedom of Information Officer.

(a) Upon receipt of a written request, the Freedom of Information Officer shall mark the request with the date of receipt, indicate the date by which a response is due, and note any other pertinent administrative information. The Freedom of Information Officer shall monitor the handling of the initial request and any appeals to ensure a timely response.

(b) The Freedom of Information Officer shall maintain a file concerning each initial request and any appeals received. This file shall contain a copy of the request, initial and appeal determinations, and other pertinent correspondence and records.

(c) The Freedom of Information Officer shall collect and maintain the information necessary to compile the reports required by 5 U.S.C. 552(d).

§ 1504.309 Time allowed for issuance of initial determination.

(a) Except as otherwise provided in this section, the Freedom of Information Officer shall not later than the tenth working day after the date of receipt of a request for records, issue a written determination to the requestor, stating:

(1) Which of the requested records will, and which will not, be released; and

(2) The reason for any denial of a request.

(b) The period of 10 working days shall be measured from the date the request is first received, pursuant to § 1504.305 of this part.

(c) There shall be excluded from the period of 10 working days (or any extension thereof) any time which elapses between the date when a requestor is notified by the OFI that his request does not reasonably identify the records sought and the date when the requestor furnishes a reasonable identification.

(d) There shall also be excluded from the period of 10 working days (or any extension thereof) any time which elapses between the date when a requestor is notified by the OFI that prepayment of fees is required and the date when the requestor pays, or makes suitable arrangements to pay such charges. See § 1504.318(c).

(e) The OFI may extend the basic 10-day period established under § 1504.309(a) by a period not to exceed 10 additional working days by furnishing written notice to the requestor, within the basic 10-day period, stating the reasons for such extension and the date by which the OFI expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following circumstances require the extension:

(1) There is a need to search for and collect the requested records from field facilities;

(2) There is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) There is a need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request (or among two or more components of the OFI).

(f) Failure of the OFI to issue a determination within the 10-day period (together with any authorized extensions) shall constitute final agency action, which authorizes the requestor to commence an action in an appropriate Federal District Court to obtain the records.

§ 1504.310 Records of other Federal agencies.

(a) If the release of a record would be of concern to both the OFI and another Federal agency, the record will be made available by the OFI only if the interest of OFI is the primary interest. The OFI has the primary interest in a record if it was developed pursuant to OFI regulations, directives, or request, even though the record originated outside the OFI.

(b) If the OFI does not have primary interest in the records, the request shall be referred in writing to the agency having the primary interest and the requestor will be so notified.

§ 1504.311 Records obtained from the public; notice to the donor.

(a) If a requested record was obtained by the OFI from a person or entity outside the Government, the OFI official responsible for processing the request shall, before making a decision on the request and when it is administratively feasible to do so, seek the views of that person or entity in writing on whether the record should be released.

(b) For "sensitive" or "business" information, notice to the entity providing the information is required and governed by Subpart B of this part.

§ 1504.312 Initial denial of a request.

(a) An initial denial of a request may be issued only for one or more of the following reasons:

(1) The record requested is not known to exist;

(2) The record is not in the OFI's possession;

(3) A statutory provision, a provision of this Part, a court order, or an Executive Order requires that the information not be disclosed;

(4) The record is exempt from mandatory disclosure under 5 U.S.C. 552(b), and the OFI has decided that the public interest would not be served by disclosure; or

(5) The record is believed to exist in OFI's possession but has not yet been located (see § 1504.312(e)).

(b) Each initial determination to deny a request shall be written, signed, and dated, and it shall state the basis for denial of a record or any part of a record.

(c) The written denial of a request shall include the name and title of the person(s) participating in a decision to deny that request.

(d) The denial shall state the administrative procedure for appealing a determination against releasing any record or part of a record.

(e) When a request must be denied because the record has not yet been located (although it is believed to exist in OFI's possession), the OFI office responsible for maintaining the record shall both continue to search diligently (until it is located or it appears that the record does not exist or is not in OFI's possession), and also periodically inform the requestor of the office's progress.

§ 1504.313 Appeal from an initial denial.

(a) Any person whose request has been denied in whole or in part by an initial determination may appeal that denial by addressing a written appeal to the address shown in § 1504.305.

(b) An appeal should be mailed no later than 30 calendar days after the date the requestor received the initial determination denying the request. An untimely appeal may be treated either as a timely appeal or as a new request, at the option of the Freedom of Information Officer.

(c) The appeal letter shall contain the date of the initial determination, and the name and address of the person who issued the initial denial. The appeal letter shall also indicate which of the records, to which access was denied, are the subject of the appeal.

§ 1504.314 Appeal determination.

(a) The Federal Inspector will make one of the following legal determinations in connection with every appeal from the initial denial of a request for an existing, located record:

(1) The record must be disclosed;

(2) The record must not be disclosed, because a statute or a provision of this Part so requires; or

(3) The record is exempt from mandatory disclosure but legally may be disclosed as a matter of OFI discretion.

(b) The Federal Inspector may decide to delegate his authority over the appeal process.

§ 1504.315 Contents of determination denying appeal.

A determination denying an appeal from an initial denial shall contain the following:

(a) It shall be in writing;

(b) It shall state which of the exemptions in 5 U.S.C. 552(b) apply to each requested existing record;

(c) It shall state the reason(s) for denial of the appeal;

(d) It shall also state the name and position of the OFI officer or employee who made the decision that the appeal be denied; and

(e) It shall further state that the person whose request was denied may obtain judicial review of the denial by complaint filed with the District Court of the United States in the District in which the complainant resides, in which the OFI records are situated, or in the District of Columbia, pursuant to 5 U.S.C. 552(a)(4).

§ 1504.316 Time allowed for issuance of appeal determination.

(a) Except as otherwise provided in this section, the Federal Inspector shall—no later than the twentieth working day after the date of receipt by the Freedom of Information Officer at OFI Headquarters of an appeal from an initial denial of a request for records—issue a written determination stating which of the requested records (as to which an appeal was made) shall be disclosed and which shall not be disclosed.

(b) The period of 20 working days shall be measured from the date when an appeal is first received by the Freedom of Information Officer at OFI Headquarters.

(c) The Federal Inspector may extend the basic 20-day period established under § 1504.316(a) by a period not to exceed 10 additional working days, by furnishing written notice to the requestor within the basic 20-day period, stating the reasons for such extension and the date by which the Federal Inspector expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following circumstances require the extension:

(1) There is a need to search for and collect the records from field facilities or other establishments that are separate from the office processing the appeal;

(2) There is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) There is a need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the OFI.

§ 1504.317 Exemption categories.

(a) 5 U.S.C. 552(b) establishes nine exclusive categories of matters which are exempt from the mandatory disclosure requirements of 5 U.S.C. 552(a). No request under 5 U.S.C. 552 for an existing, located record in the OFI's possession shall be denied by any OFI office or employee, unless the record contains (or its disclosure would reveal) matters which are:

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order (See Subpart B or this part);

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute, other than 5 U.S.C. 552(b): *Provided*, that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential (See Subpart B of this part);

(5) Interagency or intra-agency memoranda or letters which would not be available by law to a party, other than an agency, in litigation with the agency;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would:

(i) Interfere with enforcement proceedings,

(ii) Deprive a person of a right to a fair trial or an impartial adjudication,

(iii) Constitute an unwarranted invasion of personal privacy,

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) The fact that the applicability of an exemption permits the withholding of a requested record (or portion thereof) does not necessarily mean that the record must or should be withheld.

§1504.318 Fees; payment; waiver.

(a) *Fee schedule.* Fees will be charged requestors for searching for and reproducing requested records, in accordance with the following schedule: Record search time (OFI employees), $5.00 per half hour; computer programming time (OFI employees), $16.00 per half hour; reproduction of documents (paper copy of original), $0.20 per page; and other costs of searching for or duplicating records (including such items as: computer system time; contractor computer programming time; reproduction of photographs, microforms, or magnetic tape; computer printouts; and transportation of records), actual direct cost to the OFI.

(b) *Method of payment.* All fee payments shall be in the form of a check or money order payable to the order of the "U.S. Treasury" and shall be addressed to: Office of the Federal Inspector, Alaska Natural Gas Transportation System, Division of Financial Management, Room 1409, Post Office Building, 12th & Pennsylvania Ave. NW., Washington, D.C. 20044.

(c) *Prepayment or assurance of payment.* If the OFI determines or estimates that the unpaid fees attributable to one or more requests by the same requestor exceed or will exceed $25.00, OFI need not search for, duplicate, or disclose records in response to any request by that requestor until the requestor pays, or makes acceptable arrangements to pay, the total amount of fees due (or estimated to become due) under this section. (See §1504.309(d)). In such a case, the OFI office shall promptly inform the requestor (by telephone, if practicable) of the need to make payment or arrangements to pay.

(d) *Reduction or waiver of fee.* The fee chargeable under this section may be reduced or waived by the OFI, if the public interest would be served. A request for reduction or waiver of fees should be addressed to the OFI Freedom of Information Officer.

(e) The OFI Freedom of Information Officer shall maintain a record of all fees charged requestors for searching for and reproducing requested records under this section. If, after the end of 60 calendar days from the date on which request for payment was made, the requestor has not submitted payment to the OFI Freedom of Information Officer, the Freedom of Information Officer shall place the requestor's name on a delinquent list. If a requestor whose name appears on the delinquent list makes another request under this part, the OFI Freedom of Information Officer shall inform the requestor that the OFI will not process the request until the requestor submits payment of the overdue fee from the earlier request and prepayment of the fee for the current request may be required.

PART 1506—EMPLOYEE STANDARDS OF CONDUCT

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AUTHORITY: E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306; E.O. 12142, 44 FR 36927; 5 CFR 735.104; Pub. L. 95-521, as amended by Pub. L. 96-19 (2 U.S.C. 701, 5 U.S.C. Appendix 201, 28 U.S.C. Appendix 301).

SOURCE: 45 FR 60371, Sept. 11, 1980, unless otherwise noted.

Subpart A—General Provisions; Notice to Employees; Advisory Service

§ 1506.101 Purpose.

It is the purpose of these regulations to set high ethical standards of conduct for employees of the Office of the Federal Inspector (OFI). The OFI is a unique agency in a number of conduct-related ways, stemming mainly from its character as a project-specific agency. The OFI is charged with expediting the regulatory processes involved in the construction of a single pipeline system designed to transport Alaska Natural Gas to the contiguous states. Thus, OFI employees deal closely with the sponsors of, and governmental bodies involved in, just one project. On the first anniversary of the completion of the project, the OFI will cease to exist. These regulations reflect the unique charter of this project-specific agency.

§ 1506.102 Authority.

These regulations are promulgated pursuant to Executive Orders 11222, 11590 and 12142, to section 7(a)(5) of the Alaska Natural Gas Transportation Act, to the Ethics in Government Act of 1978, and to implementing regulations of the Office of Government Ethics (OGE).

§ 1506.103 Definitions.

In these regulations:

(a) "Employee" means an officer or employee of the Office of the Federal Inspector for the Alaska Natural Gas Transportation System.

(b) "Honorarium" means a payment of money or anything of value received by an officer or employee of the Federal Government, if accepted as consideration or as a fee for an appearance, speech, or article.

(c) "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other group, organization or institution.

(d) "Special Government employee" means an officer or employee of the OFI who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days, temporary duties either on a full-time or intermittent basis.

(e) "Project sponsor" means one of the persons designated to construct and operate a portion of the Alaska Natural Gas Transportation system.

(f) "Logistics agreement" means an agreement negotiated with a project sponsor governing the provision to OFI field employees of food, lodging, transportation, and medical and office facilities by the project sponsor. Logistics agreements are entered into because of the scarcity of such facilities in remote areas along the project route.

§ 1506.104 Coverage.

(a) The provisions of Subpart A of this part apply to all regular employees and all special Government employees.

(b) The provisions of Subpart B of this part apply to all regular employees.

(c) The provisions of Subpart C of this part apply to all senior Executive Service employees, both special and regular, and to the Federal Inspector.

(d) The provisions of Subpart D of this part apply to those regular employees who meet the criteria set forth in the first section of that subpart, § 1506.401.

(e) The provisions of Subpart E of this part apply to all special Government employees.

(f) The provisions of Subpart F of this part apply to special Government employees who are paid at a rate equivalent to GS-16 or above.

(g) The provisions of Subpart G of this part apply to those special Government employees who meet the criteria set forth in the first section of that subpart, § 1506.701.

§ 1506.105 Notice to employees.

(a) Each employee and special Government employee shall be furnished a copy of these regulations within 90 days of their effective date.

(b) Each new employee and special Government employee shall be furnished a copy of these regulations at the time of his or her entrance on duty.

(c) Thereafter, each employee and special Government employee shall be reminded of these regulations once a year and shall be informed on a timely basis of any changes in these regulations.

(d) The agency ethics officers shall have copies of all pertinent laws, executive orders, OFI regulations and OGE regulations available for review by employees and special Government employees.

§ 1506.106 Interpretation and advisory service.

(a) There shall be an advisory service which will furnish interpretations and advice to employees and to special

Government employees on questions which they may have concerning these regulations.

(b) The General Counsel of the OFI shall be the Designated Agency Ethics Officer (ethics officer). The ethics officer shall coordinate the agency's counseling and interpretation services and serve as the OFI designee to the OGE on appropriate matters.

(c) The Federal Inspector and the General Counsel shall appoint such deputy ethics officers as they deem necessary.

(d) Each employee and special Government employee shall be informed of the availability of the advisory service within 90 days after these regulations become effective. New employees, both special and regular, shall be informed about this service upon entrance on duty.

(e) Any employee or special Government employee who has a question about the application of these regulations has a duty to consult the ethics officer or deputy officer concerning the question.

Subpart B—Rules of Conduct for Employees

§ 1506.201 Generally prohibited conduct.

An employee shall avoid any action which might result in or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

§ 1506.202 Acceptance and solicitation of gifts, entertainment, and favors.

(a) Apart from the exceptions listed in paragraph (b) of this section, an employee shall neither solicit nor accept any gift, gratuity, favor, entertainment, loan, or any thing of monetary value from a person who:

(1) Has, or is seeking to obtain, contractual business or financial relations with the OFI;

(2) Is regulated by the OFI; or

(3) Has interests that may be substantially affected by the performance of the employee's official duty.

(b) Exceptions to the prohibitions of paragraph (a) of this section are:

(1) An employee may accept food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting when, and only when, it is impracticable to pay for the food or refreshments, and

(2) An employee may accept unsolicited promotional materials, such as pens, pencils, note pads, and calendars which are of nominal value.

(c) An employee shall not solicit a contribution from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself. However, this paragraph does not prohibit a voluntary gift of nominal value on a special occasion such as marriage, illness, or retirement.

(d) An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress, as provided in 5 U.S.C. 7342. A copy of 5 U.S.C. 7342 may be obtained from the ethics officer or his deputy. Employees who are contemplating acceptance of a gift from a foreign government should familiarize themselves with this provision of law.

§ 1506.203 Acceptance of reimbursement for official travel.

(a) Subject to the exceptions listed in paragraph (b) of this section, an employee may be reimbursed for his official travel expenses only by the OFI.

(b) There are the following statutory exceptions to paragraph (a) of this section:

(1) Contributions and awards incident to training in non-Government facilities, and payment of travel, subsistence, and other expenses incident to attendance at meetings, may be made to and accepted by an employee.

without regard to section 209 of title 18, if the contributions, awards, and payments are made by an organization determined by the Secretary of the Treasury to be an organization described by section 501(c)(3) of title 26 which is exempt from taxation under section 501(a) of title 26. (5 U.S.C. 4111).

(2) An employee may accept reimbursement of expenses related to being detailed to State and local governments or to universities (5 U.S.C. 3371).

(3) If and when the Secretary of State assigns an employee to a foreign government, the employee may accept, with the approval of the OFI, reimbursement for his or her pay and allowances (22 U.S.C. 1451).

(4) If and when an employee is detailed to a public international organization in which the United States participates, the OFI may accept reimbursement for the detailed employee's pay, travel expenses, and allowances (5 U.S.C. 3343).

§ 1506.204 OFI's reimbursement of project sponsors for logistical support.

(a) Because of the limited travel, lodging, medical, and office facilities along the route of the project in Alaska, employees in the field will be relying upon the logistical support of the project sponsor. Normally, all logistical support provided by the project sponsor will be provided in accordance with the "logistics support agreement" between the sponsor and the OFI. Under the terms of this agreement, OFI will reimburse the sponsor for this support.

(b) If it is necessary for an employee to rely upon logistic support of the sponsor or other person which is not within the scope of the "logistics support agreement," the employee shall notify the ethics officer or the Federal Inspector as soon as practicable.

(c) The employee may accept the logistics support which is beyond the scope of the "logistics support agreement" only if the Federal Inspector determines that such acceptance facilitates the conduct of official business and is in the best interest of the Government.

§ 1506.205 Outside employment.

(a) An employee shall not engage in outside employment or other outside activity which is incompatible with the full and proper discharge of the duties and responsibilities of his or her Government employment. Incompatible activities include but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest; or

(2) Outside employment which tends to impair his or her mental or physical capacity to perform Government duties and responsibilities in an acceptable manner.

(b) An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U.S.C. 209).

(c) Employees are encouraged to engage in teaching, lecturing, and writing which is not prohibited by law, Executive Order, OGE regulations, or this part. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing which depends on information obtained as a result of his or her Government employment, except when that information has been made available to the general public or will be made available on request. An employee also shall not accept an honorarium for any consultation, writing, speech, lecture, or appearance, the subject matter of which draws substantially on official data or ideas which have not become part of the body of public information.

(d) The Federal Inspector may not have, in any calendar year, outside earned income which is in excess of fifteen percent of his Government compensation (Pub. L. 95-521, as amended, section 210).

(e) Any employee engaged in outside paid employment on a substantially regular basis shall notify his or her supervisor, who in turn will evaluate the continuation of such outside employment relative to paragraph (a) of this section.

§ 1506.206 Acceptance of honoraria.

(a) No employee shall accept an honorarium for any consultation, writing, speech, lecture, or appearance, the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the OFI.

(b) No employee shall accept an honorarium for any consultation, writing, speech, lecture, or appearance which he performs while on duty.

(c) No employee shall accept an honorarium of more than $2,000 for any appearance, speech, or article, or accept honoraria aggregating more than $25,000 in any calendar year (2 U.S.C. 441i).

(d) No employee shall accept an honorarium from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the OFI;

(2) Conducts operations or activities which are regulated by the OFI; or

(3) Has interests which may be substantially affected by the performance or nonperformance of his official duty.

§ 1506.207 Prohibited financial interests.

(a) No employee shall have a financial interest that conflicts substantially, or appears to conflict substantially, with his or her Government duties and responsibilities.

(b) As applied, paragraph (a) of this section requires that no employee shall own securities of any company (or its parent or affiliate):

(1) Which initially owns and produces gas to be transported through the Alaska Natural Gas Transportation System (the system);

(2) Which "first purchases" gas to be transported through the system;

(3) Which is involved in the ownership of the system; or

(4) Which is very substantially involved by contract in the construction or design of the system.

(c) A list of the companies whose securities are prohibited under the criteria of paragraph (b) of this section shall be issued to each employee upon entrance on duty. A list of these companies shall be distributed to all employees annually and whenever change in circumstances requires modification of the list.

(d) In addition to the specific companies (meeting the criteria in paragraph (b) of this section and listed according to paragraph (c) of this section), there are other categories of companies to which the prohibition in paragraph (a) of this section may or may not apply. Employees should consider the following factors:

(1) Ownership of the securities of other oil and gas companies is not at present prohibited. Employees are advised, however, that, if such other companies become involved in either the system or ownership of gas to be transported through the system, ownership of the securities of those companies will, at that time, become prohibited.

(2) As a general rule, the securities of those companies supplying goods or services for the planning or construction of the system are not prohibited from ownership by employees. Nevertheless, certain of those companies could supply such a large share of goods or services for the system that employees also may not own their securities.

(3) Employees shall not own the securities of companies described in this paragraph *only if and when* a specific company is included in the prohibited securities list provided in accordance with paragraph (c) of this section.

(e) If employees have any questions or doubts regarding the ownership of securities, they should contact the ethics officer for advice.

(f) An employee may seek a waiver of the prohibitions imposed by paragraphs (a) and (b) of this section for a particular financial interest. In order to obtain such a waiver, an employee must fully disclose his financial interest to the ethics officer and to the Federal Inspector. If the ethics officer and the Federal Inspector determine that the disclosed financial interest is not so substantial as to be likely to affect the integrity of the employee's Government services, they may grant a waiver.

(g) The prohibitions of paragraphs (a) and (b) of this section do not apply to mutual funds (unless investing primarily in oil and gas securities) and investments in mutual savings banks. Further, if an employee has continued to participate in a bona fide pension, retirement, group life, health, or accident insurance plan or other employee welfare or benefit plan that is maintained by a business or nonprofit organization or which he is a former employee, that financial interest is exempted from the prohibitions of paragraphs (a) and (b) of this section, except when the welfare or benefit plan is a profit-sharing or stock-bonus plan.

§ 1506.208 Use of Government property.

No employee shall use, or allow the use of, government property for any activity which is not officially approved. An employee has a positive duty to protect and conserve Government property which has been issued or entrusted to him.

§ 1506.209 Misuse of information.

No employee shall use, or allow the use of, official information obtained through his Government employment which has not been made available to the general public or would not be made available to the public on request.

§ 1506.210 Indebtedness.

An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law, such as Federal, State or local taxes. For the purpose of this section, a "just financial obligation" means one acknowledged by the employee or reduced to judgment by a court or one imposed by law, and "in a proper and timely manner" means in a manner which the agency determines does not, under the circumstances, reflect adversely on the Government as the employee's employer. In the event of dispute between an employee and an alleged creditor, this section does not require the OFI to determine the validity or amount of the disputed debt.

§ 1506.211 Gambling, betting, and lotteries.

No employee shall participate in any gambling activity while on Government property or while on duty for the Government. However, organizations composed of Federal employees may conduct fund-raising activities in accordance with procedures approved by the Federal Inspector (Executive Order 10927).

§ 1506.212 General conduct prejudicial to the Government.

No employee shall engage in criminal, infamous, dishonest or disgraceful conduct, or other conduct prejudicial to the government.

§ 1506.213 Miscellaneous statutory provisions.

Each employee shall acquaint himself with the following statutory provisions which relate to Federal employee conduct. Copies, explanations, and interpretations of these provisions may be obtained from the ethics officer or his deputy.

(a) House Concurrent Resolution 175, 85th Congress, 2d session, 72 Stat. B12, the "Code of Ethics for Government Service."

(b) Chapter 11 of Title 18, United States Code, relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.

(c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(d) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibitions against (1) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) the disclosure of confidential information (18 U.S.C. 1905).

(f) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(g) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(h) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(i) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(j) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(k) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(l) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(m) The prohibition against (1) embezzlement of Government money or property (18 U.S.C. 641); (2) failure to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(n) The prohibition against unauthorized use of documents to claims from or by the Government (18 U.S.C. 285).

(o) The prohibitions against certain political activities in the "Hatch Act" (5 U.S.C. 7324-7327 and 18 U.S.C. 602, 603, 607, and 608).

(p) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

Subpart C—Public Financial Disclosure Requirements for Employees

§ 1506.301 Employees subject to public financial disclosure requirements.

(a) Every employee whose position is classified as GS-16 or above or who is paid at an equivalent rate in the Senior Executive Service shall annually file an "Executive Personnel Financial Disclosure Report" (referred to as a "278 form") for public financial disclosure.

(b) Every schedule C employee who is paid at a rate below GS-16 shall file a 278 form annually, unless specifically excepted from the requirement, in accordance with OGE procedure, as having no role in advising or making policy determinations concerning agency programs or policies.

(c) The OFI ethics officer shall file a 278 form annually.

§ 1506.302 When to file 278 form.

(a) Except as described in paragraph (b) of this section, all employees who are required by virtue of their position to file a 278 form shall file the form within thirty days of their entrance into that position.

(b) A new entrant to a 278 position does not need to file a 278 form within 30 days of entrance upon duty:

(1) If the entrant has just left a position for which he was required to file a 278 form; or

(2) If the entrant has already filed a 278 form as a nominee or candidate for the position.

(c) Thereafter, every employee who performs the duties of a 278 position for more than 60 days of any calendar year shall file a 278 form for that year by May 15 of the succeeding year.

(d) Within thirty days after the termination of employment in a 278 position, a terminated employee shall file a 278 form for the year of termination. However, if an employee terminates one 278 position but assumes another 278 position (either at OFI or in other Federal employment) within 30 days of termination, no report is required by this subsection.

(e) The ethics officer may, for good cause shown, grant to any employee or class of employees an extension of up to 45 days. The OGE may, for good cause shown, grant an additional extension of up to 45 days. The employee shall set forth specific reasons for the additional extension request and shall submit these reasons to the ethics officer. The ethics officer will forward the request and comments on it to the OGE.

§ 1506.303 Where to file 278 form.

(a) Employees who are required to file 278 forms shall file them with the ethics officer.

(b) The ethics officer shall transmit the 278 form of the Federal Inspector and the ethics officer's 278 form to the Director of the OGE. Prior to transmitting these forms, the ethics officer shall review the 278 form of the Federal Inspector and shall ensure that ethics officer's 278 form is reviewed by the Federal Inspector.

§ 1506.304 Procedure for completing 278 forms.

Each 278 form shall be filled out entirely and in accordance with its instructions. If questions arise while filling out his or her form, an employee should consult the ethics officer. The ethics officer shall in turn make available the OGE regulations implementing Title II of the Ethics in Government Act.

§ 1506.305 Special rules for completing 278 forms.

Employees who are required to submit 278 forms should acquaint themselves with the special rules set forth in the regulations of the Office of Government Ethics at 5 CFR 734.303. Copies and interpretations of these provisions may be obtained from the ethics officer. Employees should note that they may request a waiver of the reporting requirement for certain personal gifts.

§ 1506.306 Special rules for reporting trust interests and assets.

(a) Subject to the exceptions of paragraph (b) of this section, employees required to submit 278 forms shall report trust interests and assets which have a value in excess of $1,000.

(b) The reporting requirement of paragraph (a) of this section does not apply when an employee is the beneficiary of:

(1) A "qualified blind trust,"

(2) A "qualified diversified trust," or

(3) An "excepted trust."

(c) The trusts provided in paragraph (b) of this section are approved in the following manner:

(1) A "qualified blind trust" is a trust certified as approved by the Director of the Office of Government Ethics as meeting the requirements of section 202(f)(3) of the Ethics in Government Act and implementing regulations.

(2) A "qualified diversified trust" is a trust certified as approved by the Director of the Office of Government Ethics, in concurrence with the Attorney General, as meeting the requirements of section 202(f)(4)(B) of the Ethics in Government Act and implementing regulations.

(3) An "excepted trust" is one which was not created directly by the employee, his spouse, or his dependent child, and the holdings or sources of income of which are not known to the employee, his spouse, or his dependent child. An excepted trust requires no certification or approval.

(d) An employee who wishes to create a qualified blind trust or (in the case of the Federal Inspector) a qualified diversified trust should consult with the ethics officer, who shall refer the employee to the OGE.

(e) Employees who create, maintain, or dissolve either a qualified blind trust or a qualified diversified trust shall familiarize themselves with the special filing requirements for those actions. Employees may obtain copies and interpretations of those requirements (5 CFR 734.407) from the ethics officer.

(f) Assets in all types of trusts, except a qualified diversified trust of the Federal Inspector, shall be considered financial interests until the employee is notified by the trustee that the assets have been disposed of or have a value of less than $1,000. As such, all trust assets, except those in qualified diversified trusts, shall be subject to the financial interest restrictions of § 1506.207 of section 208 of Title 18 of the United States Code, and of any other Federal conflict of interest statutes or regulations.

§ 1506.307 Custody of completed 278 forms.

(a) Any completed 278 form filed with the ethics officer or transmitted to the Director, Office of Government Ethics, pursuant to this subpart, shall be retained by the OFI or the Office of Government Ethics, or both, as the case may be. Such completed forms shall be made available to the public for a period of six years after receipt of the report. After this six-year period, the form shall be destroyed, unless needed in an ongoing investigation. In the case of an individual who filed a 278 form as a nominee to a position requiring Senate confirmation and who was not subsequently confirmed by the Senate, his or her form shall be destroyed one year after he or she is no longer under consideration by the Senate, unless it is needed in an ongoing investigation.

(b) Copies of all qualified trust agreements, the list of assets initially placed in such trusts, and all other publicly available documents relating to such trusts shall be retained until the periods for retention of all other forms have lapsed.

§ 1506.308 Public access to completed 278 forms.

Within fifteen days after any completed form is actually received by the ethics officer, the ethics officer shall permit inspection of such report by, or furnish a copy to, any person who makes a written application which:

(a) States the applicant's name, occupation, and address,

(b) States the name and address of any other person or organization on whose behalf the request is made, and

(c) States that the applicant is aware of the restrictions on the obtaining and the use of the report.

§ 1506.309 Review of completed 278 forms and remedial action.

(a) The reviewing official (the ethics officer, except for the ethics officer's form, which the Federal Inspector shall review) shall review each 278 form to determine that it complies with all applicable law.

(b) Upon determining that the employee is in compliance with all applicable law, the reviewing official shall sign and date the completed form.

(c) If the reviewing official believes that additional information is necessary, such information shall be requested. The employee of whom this request is made shall be afforded a reasonable opportunity to respond.

§ 1506.310 Procedure after review of additional information.

(a) If, after reviewing the additional information, the reviewing official concludes that the employee is in compliance with applicable law, the reviewing official shall sign and date the completed form and so notify the employee.

(b) If, after reviewing the additional information, the reviewing official concludes that the employee is not in compliance with applicable law, the reviewing official shall:

(1) Notify the employee of that opinion;

(2) Afford the employee an opportunity for personal consulation, if practicable;

(3) Determine what remedial action should be taken to bring the employee into compliance; and

(4) Notify the employee in writing of the remedial action required, indicating a date by which such action should be taken.

(c) Remedial steps may include:

(1) Divestiture of a conflicting interest;

(2) Restitution;

(3) Establishment of a qualified blind trust; or

(4) Request for an exemption under 18 U.S.C. 208(b).

(d) If the employee complies with the suggested remedial steps, the reviewing official shall so indicate in the "comments" section of the form, and shall sign and date it.

§ 1506.311 Procedure upon employee's refusal to comply.

(a) If the employee does not comply with the remedial steps suggested pursuant to § 1506.310, the reviewing official shall notify the OGE and refer the matter for approporiate action to:

(1) The President, if the non-complying employee is the Federal Inspector, or

(2) The Federal Inspector, concerning all other employees.

(b) Appropriate action may include:

(1) Any of the remedial steps listed in paragraph (c) of § 1506.310;

(2) Removal;

(3) Suspension;

(4) Reduction in grade; or

(5) Reduction in pay.

§ 1506.312 Advisory opinions and situation lists.

Employees may consult the ethics officer to inquire:

(a) About advisory opinions rendered by the Director of the OGE, and

(b) About lists of circumstances and situations which have resulted in noncompliance with ethics laws. These lists, as they are published, will be furnished to all employees who are required to file 278 forms.

§ 1506.313 Penalities for failure to file or falsifying 278 forms.

(a) *Referral of cases.* The Federal Inspector or the Director, Office of Government Ethics, as the case may be, shall refer to the Attorney General the name of any individual who, the appropriate officer has reasonable cause to believe, has willfully failed to file a report, or has willfully falsified or willfully, failed to file information required to be reported.

(b) *Civil action.* The Attorney General may bring a civil action in any appropriate United States District Court against any individual who knowingly and willfully falsifies or who knowingly or willfully fails to file or report any information which such individual is required to report pursuant to this subpart. The court in which such action is brought may assess against such individual a civil penalty in any amount, not to exceed $5,000.

(c) *Administrative remedies.* The President, the Director, Office of Government Ethics, or the Federal Inspector, may take any appropriate personnel or other action in accordance with applicable law or regulation against any individual failing to file a report or falsifying or failing to file information required to be reported. Such action includes adverse action under 5 CFR Part 752.

§ 1506.314 Penalties for non-compliance with the special filing requirements for qualified trusts.

(a) The Attorney General may bring a civil action in any appropriate United States District Court against any individual who knowingly and willfully violates the provisions of 5 CFR 734.407 (a) or (b). The court in which such action is brought may assess against such individual a civil penalty in any amount, not to exceed $5,000.

(b) The Attorney General may bring a civil action in any appropriate United States District Court against any individual who negligently violates those provisions. The court in which such action is brought may assess against such individual a civil penalty in any amount, not to exceed $1,000.

Subpart D—Confidential Disclosure Requirements for Employees

§ 1506.401 Employees required to submit confidential statements of employment and financial interests.

(a) Unless subject to the public financial disclosure requirements of Subpart C of this part or unless exempted under paragraph (b) of this section, those employees required to file confidential statements are:

(1) Employees classified as GS-13 or above, or at an equivalent pay level, who the ethics officer or the FI determines are in positions which require them to make a Government decision or take a Government action in regard to:

(i) Contracting or procurement;

(ii) Regulating or aduiting private or other non-Federal enterprise; or

(iii) Other activities where the decision or action has an economic impact on the interests of any non-Federal enterprise;

(2) Employees classified as GS-13 or above, or at an equivalent level of pay, who are in positions which entail duties and responsibilities which require them to report employment and financial interests in order to avoid involvement in a possible conflicts-of-interest situation; and

(3) Employees classified below GS-13, or at an equivalent rate of pay, who are in positions which otherwise meet the criteria in paragraph (a) (1) or (2) of this section, when the requirement that they file has been specifically justified and for which approval has been given by the OGE.

(b) An employee in a position that meets the criteria in paragraph (a) of this section may be excluded from the reporting requirement when the ethics officer determines that:

(1) The duties of his or her position are such that the likelihood of involvement in a conflicts-of-interest situation is remote;

(2) The duties of his or her position are at such a level of responsibility that the submission of a statement of employment and financial interests is not necessary because of the degree of supervision and review over him or her; or

(3) The use of an existing or alternative procedure is adequate to prevent possible conflicts-of-interest.

(c) The ethics officer shall maintain a list of positions for which a confidential statement is required and shall notify the employees in those positions of the reporting requirement

§ 1506.402 Time and place for submission of confidential statements.

An employee required to submit a confidential statement shall submit it to the ethics officer:

(a) Within ninety days of the date on which these regulations become effective, or

(b) Within thirty days after his or her entrance on duty, but not earlier than ninety days after these regulations become effective.

§ 1506.403 Supplementary statements.

Changes in, or additions to, the information contained in an employee's confidential statement of employment and financial interests shall be reported in a supplementary statement as of June 30 each year, except when the OGE authorizes a different date. If no changes or additions occur, a negative report is required.

§ 1506.404 Interests of employee's relatives.

The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, "member of an employee's immediate household" means those blood relations who are residents of the employee's household.

§ 1506.405 Information not known by employees.

If any information required to be included in a statement of employment and financial interest or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his behalf.

§ 1506.406 Information not required.

This subpart does not require an employee to submit on a statement of employment and financial interests or supplementary statement any information relating to the employee's connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement of employment and financial interests.

§ 1506.407 Confidential custody of reports.

The ethics officer shall hold each statement of employment and financial interests, and each supplementary statement, in confidence. To insure this confidentiality, he shall designate which employees are authorized to review and retain the statements. Employees so designated are responsible for maintaining the statements in confidence and shall not allow access to, or allow information to be disclosed from, a statement, except to carry out the purposes of these regulations. The OFI will not disclose information from a statement, except as the Office of Government Ethics or the Federal Inspector may determine for good cause shown.

§ 1506.408 Employee's complaint on filing.

Any employee who feels that he or she has been unjustly required to file a confidential statement shall be afforded an opportunity for review of that requirement through the OFI's grievance procedure. Any employee who wishes to be afforded that opportunity shall consult the ethics officer concerning the proper procedure.

§ 1506.409 Review of reports and remedial action.

(a) The ethics officer shall review each confidential statement of employment and financial interests.

Upon determining that the employee is in compliance with applicable laws and regulations, the ethics officer shall sign and date the report.

(b) If the ethics officer believes that additional information is necessary, such information shall be requested. The employee of whom this request is made shall be afforded a reasonable opportunity to respond.

§ 1506.410 Procedure after review of additional information.

(a) If, after reviewing the additional information, the ethics officer concludes that the employee is in compliance with applicable law, the ethics officer shall sign and date the report and so notify the employee.

(b) If, after reviewing the additional information, the ethics officer concludes that the employee is not in compliance with applicable law, the ethics officer shall:

(1) Notify the employee of that opinion,

(2) Afford the employee an opportunity for personal consultation, if practicable,

(3) Determine what remedial action should be taken to bring the employee into compliance, and

(4) Notify the employee in writing of the remedial action required, indicating a date by which such action should be taken.

(c) Remedial steps may include:

(1) Divestiture of a conflicting interest;

(2) Restitution;

(3) Establishment of a qualified blind trust; or

(4) Request for an exemption under 18 U.S.C. 208(b).

(d) If the employee complies with the suggested remedial steps, the ethics officer shall sign and date the report.

§ 1506.411 Procedure upon employee's refusal to comply.

(a) If the employee does not comply with the suggested remedial steps, the ethics officer shall refer the matter for appropriate action to the Federal Inspector.

(b) Appropriate action may include:

(1) Any of the remedial steps listed in paragraph (c) of § 1506.410;

(2) Removal;

(3) Suspension;

(4) Reduction in grade; or

(5) Reduction in pay.

(c) Remedial action, whether disciplinary or otherwise, shall be effected in accordance with applicable law.

Subpart E—Rules of Conduct for Special Government Employees

§ 1506.501 Applicability.

The provisions of this subpart apply to all special Government employees, as defined in § 1506.103 of these regulations.

§ 1506.502 Use of Government employment.

No special Government employee shall use his Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for him or herself or another person, particularly one with whom he or she has family, business, or financial ties.

§ 1506.503 Use of inside information.

(a) No special Government employee shall, either by direct action on his or her part or by counsel, recommendation, or suggestion to another person, use inside information, obtained as a result of his or her Government employment, for private gain for him or herself or another person, particularly one with whom he or she has family, business, or financial ties. For the purpose of this section, "inside information" means information, obtained under Government authority, which has not become part of the body of public information.

(b) No special Government employee shall, either for or without compensation, engage in teaching, lecturing, or writing that depends on information obtained as a result of his or her OFI employment, except when that information has been made available to the general public or will be made available on request, or when the agency head gives written authorization for use of nonpublic information on the basis that the use is in the public interest.

§ 1506.504 Coercion.

No special Government employee shall use his or her Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to him or herself or another person, particularly one with whom he or she has family, business, or financial ties.

§ 1506.505 Acceptance and solicitation of gifts, entertainment, and favors.

(a) Apart from the exceptions listed in paragraph (b) of this section, no special Government employee shall solicit or accept for him or herself or anyone else any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value from a person who:

(1) Has, or is seeking to obtain, contractual business or financial relations with OFI;

(2) Is regulated by OFI; or

(3) Has interests that may be substantially affected by the special Government employee's performance of his Government duty.

(b) Exceptions to the prohibitions of paragraph (a) of this section are:

(1) A special Government employee may accept food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting when, and only when, it is impracticable to pay for the food or refreshments (that is, when the special Government employee is unable to ascertain either the price of the food or refreshments or an appropriate person to pay for the food or refreshments); and

(2) A special Government employee may accept unsolicited promotional materials, such as pens, pencils, note pads, and calendars which are of nominal value.

§ 1506.506 Prohibited financial interests.

(a) No special Government employee shall have a financial interest that conflicts substantially with his or her Government duties and responsibilities.

(b) As applied, paragraph (a) of this section requires that no special Government employee shall own securities of any company (or its parent or affiliate):

(1) Which initially owns and produces gas to be transported through the Alaska Natural Gas Transportation System (the system);

(2) Which first purchases gas to be transported through the system;

(3) Which is involved in the ownership of the system; or

(4) Which is very substantially involved by contract in the construction or the design of the system.

(c) A list of the companies whose securities are prohibited under the criteria of paragraph (b) of this section shall be issued to each special Government employee upon entrance on duty. A list of these companies shall be distributed to all special Government employees annually and whenever change in circumstances requires modification of the list.

(d) In addition to the specific companies (meeting the criteria in paragraph (b) of this section and listed according to paragraph (c) of this section), there are other categories of companies to which the prohibition in paragraph (a) of this section may or may not apply. Special Government employees should consider the following factors:

(1) Ownership of the securities of other oil and gas companies is not at present prohibited. Special Government employees are advised, however, that if such other companies become involved in either the system or ownership of gas to be transported through the system, ownership of the securities of those companies will, at that time, become prohibited.

(2) As a general rule, the securities of those companies supplying goods or services for the planning or construction of the system are not prohibited from ownership by special Government employees. Nevertheless, certain of these companies could supply such a large share of goods or services for the system that special Government employees also may not own their securities.

(3) Special Government employees shall not own the securities of companies described in this paragraph *only if and when* a specific company is included in the prohibited securities list provided in accordance with paragraph (c) of this section.

(e) If special Government employees have any questions or doubts regarding the ownership of securities, they should contact the ethics officer for advice.

(f) A special Government employee may obtain a waiver of the prohibitions, imposed by paragraphs (a) and (b) of this section, for a particular financial interest. In order to obtain a waiver, a special Government employee must fully disclose his financial interest to the ethics officer and to the Federal Inspector. If the ethics officer and the Federal Inspector determine that the disclosed financial interest is not so substantial as to be likely to affect the integrity of the special Government employee's services, they may grant a waiver.

(g) The prohibitions of paragraphs (a) and (b) of this section do not apply to mutual funds and investments in mutual savings banks. Further, if a special Government employee has continued to participate in a bona fide pension, retirement, group life, health, or accident insurance plan or other employee welfare or benefit plan that is maintained by a business or nonprofit organization of which he is a former employee, that financial interest is exempted from the prohibitions of paragraphs (a) and (b) of this section, except when the welfare or benefit plan is a profit-sharing or stock-bonus plan.

§ 1506.507 Miscellaneous statutory provisions.

Each special Government employee shall acquaint him or herself with the following statutory provisions which relate to Federal employee conduct. Copies, explanations, and interpretations of these provisions may be obtained from the ethics officer or his deputy.

(a) House Concurrent Resolution 175, 85th Congress, 2d session, 72 Stat. B12, the "Code of Ethics for Government Service".

(b) Chapter 11 of Title 18, United States Code, relating to bribery, graft, and conflicts of interest, as appropriate to the special Government employee concerned.

(c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(d) The prohibition against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibitions against (1) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) the disclosure of confidential information (18 U.S.C. 1905).

(f) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(g) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(h) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(i) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(j) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(k) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(l) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(m) The prohibition against (1) embezzlement of Government money or property (18 U.S.C. 641); (2) failure to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(n) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(o) The prohibitions against certain political activities in the "Hatch Act" (5 U.S.C. 7324-7327 and 18 U.S.C. 602, 603, 607, and 608).

(p) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

Subpart F—Public Financial Disclosure Requirements for Special Government Employees

§ 1506.601 Special Government employees subject to public financial disclosure requirements.

Every special Government employee whose position is classified at GS-16 or above or who is paid at an equivalent rate shall annually file a 278 form, the public financial disclosure form.

§ 1506.602 Applicability of Subpart C to special Government employees.

All of the provisions in Subpart C, concerning public financial disclosure by regular employees, shall apply equally to special Government employees. Therefore, every special Government employee who must file a public financial disclosure statement should familiarize him or herself with that subpart and look to it for guidance in meeting his or her public financial disclosure obligations.

§ 1506.603 Exception for special Government employees who are employed for less than sixty days.

(a) A special Government employee who must otherwise file a 278 form may be excepted from this obligation if, as determined by the ethics officer, the special Government employee is not reasonably expected to perform the duties of his or her office or position for more than sixty days in a calendar year.

(b) Notwithstanding paragraph (a) of this section, a special Government employee who is subject to public financial disclosure requirements and actually performs the duties of his or her position for more than sixty days in a calendar year shall file a 278 form within fifteen days after the sixty-first day of such employment, unless excepted under § 1506.604.

§ 1506.604 Special waiver of public disclosure requirement for special Government employees.

(a) In unusual circumstances, the Director, Office of Government Ethics, may grant a request for a waiver of any reporting requirement otherwise applicable for an individual who is reasonably expected to perform, or has performed, the duties of his or her office or position for less than one hundred and thirty days in a calendar year, but only if the Director determines that:

(1) Such individual is a special Government employee,

(2) Such individual is able to provide services specially needed by the Government,

(3) It is unlikely that the individual's outside employment or financial interests will create a conflict of interests, and

(4) Public financial disclosure by such individual is not necessary under the circumstances.

(b) In requesting a waiver pursuant to paragraph (a) of this section, the procedures of the OGE (5 CFR 734.205) shall be followed.

Subpart G—Confidential Disclosure By Special Government Employees

§ 1506.701 Special Government employees required to submit confidential statements of employment and financial interests.

(a) Unless subject to the public financial disclosure requirements of Subpart E of this part or unless exempted under paragraph (b) of this section, every special Government employee shall submit a confidential statement of employment and financial interests.

(b) The requirement of paragraph (a) of this section may be waived for a special Government employee who is neither a consultant nor an expert and whose duties are such that disclosure of interests is not necessary to protect Government integrity. For the purpose of this subsection, "consultant" and "expert" have the meanings given those terms by Chapter 304 of the Federal Personnel Manual.

§ 1506.702 Time and place for submission of confidential statements.

Confidential statements of employment and financial interests shall be submitted to the OFI ethics officer not later than the commencement of employment of the special Government employee. Special Government employees shall keep their statements current throughout their employment with the agency by the submission of supplementary statements.

§ 1506.703 Custody and review of confidential statements; remedial action.

The confidential statements of employment and financial interests filed by special Government employees shall be kept in custody and reviewed in the same manner as are the confidential statements of regular employees. Special Government employees shall be afforded the same procedural safeguards as are regular employees in any remedial action taken against them.

PART 1530—REIMBURSEMENT OF COSTS

Sec.

1530.1 Coverage.
1530.2 Reimbursable activities.
1530.3 Costs to be reimbursed.
1530.4 Billing procedures.
1530.5 Payment procedures.
1530.6 Protest procedures.

AUTHORITY: Sec. 9 of the Alaska Natural Gas Transportation Act, 15 U.S.C. 719g, secs. 102 and 202 of Reorganization Plan No. 1 of 1979, 44 FR 33663 (made effective by Executive Order 12142 of June 21, 1979, 44 FR 36927), sec. 28(l) of Title I of the Mineral Leasing Act, 30 U.S.C. 185; and 31 U.S.C. 483a.

SOURCE: 46 FR 28397, May 27, 1981, unless otherwise noted.

§ 1530.1 Coverage.

(a) This part applies to the companies (or their agents) sponsoring the segments of the Alaska Natural Gas Transportation System (ANGTS) in the United States, as listed in the President's *Decision and Report to Congress on the Alaska Natural Gas Transportation System* and as subsequently restructured, renamed, or otherwise changed, to the extent that they are also holders of rights-of-way or permits for use of federal land.

(b) This part also applies to companies sponsoring facilities which have been determined to be "necessary or related to" ANGTS, within the meaning of Section 9 of ANGTA, and thereby come within the OFI's enforcement authority, to the extent that they are also holders of rights-of-way or permits for use of federal land.

(c) This part governs how the OFI will obtain reimbursement from the sponsoring companies described above in paragraphs (a) and (b) of this section for the costs incurred in certain of its ANGTS-related enforcement activities. It does not govern how any other federal agency might seek similar reimbursement from the sponsoring companies for ANGTS-related nonenforcement activities.

§ 1530.2 Reimbursable activities.

(a) The sponsoring companies shall reimburse the United States for the OFI's costs incurred in enforcing ANGTS right-of-way and permit requirements on federal lands, as directly required by Section 28 of the Mineral Leasing Act.

(b) Enforcement, the costs of which are reimbursable under paragraph (a) of this section immediately above, entails monitoring and any other compliance or oversight activities reasonably related to the OFI enforcement process, as established by Section 102 of Reorganization Plan No. 1 of 1979.

§ 1530.3 Costs to be reimbursed.

(a) The OFI will require reimbursement for the activities, defined by § 1530.2 as reimbursable, of the following OFI offices:

(1) Engineering Review;
(2) Environmental Review;
(3) Permits and Compliance; and
(4) Field offices located in:
(i) Anchorage, Alaska;
(ii) Fairbanks, Alaska;
(iii) San Francisco, California;
(iv) Irvine, California; and
(v) Omaha, Nebraska.

(b) The specific costs of reimbursable activities are limited to the following:

(1) Employee costs for:
(i) Salaries;
(ii) Cost-of-living allowance (but only in Alaska);
(iii) Benefits;
(iv) Travel;
(v) Training; and
(vi) Household moves;

(2) Outside support costs for:

(i) Contractors;

(ii) Consultants; and

(iii) Interagency arrangements, whether pursuant to a:

(A) Delegation under Section 202(a) of Reorganization Plan No. 1 of 1979; or

(B) Formal cooperative work sharing agreement under the Economy Act;

(3) Office expenses for:

(i) Relocation;

(ii) Supplies;

(iii) Rent;

(iv) Utilities;

(v) Communications; and

(vi) Machine rental;

(4) Material and equipment purchase or rental;

(5) Vehicle and aircraft purchase or rental;

(6) Any of the above or other support services provided by the sponsoring companies in the field on a cost recovery basis under logistical support agreements between the OFI and the sponsoring companies; and

(7) Cost to administer this part equal to a percentage (determined annually by the OFI in the context of § 1530.4(c)(1)) of the total costs under paragraphs (b)(1) through (6) of this section.

§ 1530.4 Billing procedures.

(a) The OFI will present the sponsoring companies with a bill within 30 calendar days of the end of each calendar-year quarter for reimbursable costs incurred over that quarter for that segment of ANGTS or other facilities determined to be related to ANGTS.

(b) The bill will include the following:

(1) Total OFI expenditures incurred for the quarter, broken down by object class per OFI office;

(2) A brief description of reimbursable activities undertaken for the quarter, broken down by OFI office;

(3) The percentage of reimbursable to non-reimbursable activities for that segment of ANGTS, broken down by OFI office; and

(4) A calculation of the reimbursement due for that quarter, computed by multiplying the total OFI expenditures, as per paragraph (b)(1) of this section, by the reimbursable percentage, as per paragraph (b)(3) of this section.

(c) The reimbursable percentage used in paragraph (b)(3) of this section is determined as follows:

(1) Prior to the commencement of each calendar year, the OFI will consult with the sponsoring companies to ascertain their project activities for the coming year, with special identification of activities requiring reimbursable OFI enforcement activities.

(2) The OFI will then determine the reimbursable percentage for each OFI office by project segment.

(i) That percentage will apply for the entire upcoming calendar year. It will not be adjusted unless extraordinary and unanticipated events materially and dramatically alter the OFI's reimbursable enforcement activities.

(ii) The OFI will determine that percentage based upon the following factors:

(A) Amount of federal land to be crossed;

(B) Types of pre-construction or construction activities to be undertaken during that year;

(C) Proportionate amount of time each OFI office will need to monitor those activities; and

(D) Level of intensity for monitoring on federal lands as opposed to non-federal lands.

(3) If a sponsor company intends to contest any of the reimbursable percentages, it may not do so until, but must do so when, it receives its first quarterly bill for the calendar year at issue. It must then follow the procedures set out in §§ 1530.5 and 1530.6 of this part.

§ 1530.5 Payment procedures.

(a) Payment of reimbursable costs should be made, as billed, to the OFI specifically identified for U.S. Treasury Account Number 2469.

(b) Payment should be made within 30 calendar days of receipt of billing.

(c) The sponsoring company making payment under this Section should simultaneously notify the OFI Director of Financial Management of that payment.

(d) If the sponsoring company contests any part of the bill, rendered pursuant to § 1530.4, it must nonetheless pay the uncontested balance, and then proceed under § 1530.6 immediately below.

§ 1530.6 Protest procedures.

(a) If and when a sponsoring company contests any part of an OFI bill, as per § 1530.5(d) of this part, it shall act pursuant to this section.

(b) The contesting company must append to its partial payment a petition fully justifying its action, including the following items:

(1) A clear description of the contested amount, with detailed reference, by cost category and office, to the OFI bill;

(2) A full explanation of the legal basis for contesting payment; and

(3) Where relevant, a counterstatement of the facts at issue.

(c) In its sole discretion the OFI may orally or in writing request further support for the petition contesting reimbursement, including convening an informal conference to explore the matter further.

(d) After reviewing the petition, along with any further information, the OFI, through its Director of Administration, will rule on the petition within thirty calendar days, notifying the petitioner in writing of the decision.

(1) If the Director accepts the contesting company's position and thus grants the petition, the partial payment previously rendered under § 1530.5(d) will be deemed to satisfy fully the quarterly bill rendered under § 1530.4.

(2) If the Director rejects the contesting company's position and thus rejects the petition, the petitioner:

(i) Shall make payment of the contested and previously withheld amount within thirty calendar days, and

(ii) May within thirty calendar days after payment appeal the Director's adverse finding to the Federal Inspector, pursuant to paragraph (e) of this section.

(e) The Federal Inspector or designee will render a final decision on any appeal of the Director's adverse finding within sixty calendar days of receipt, unless the appellant has failed to make full payment to the OFI, as per paragraph (d)(2)(i) of this section.

(1) If the Federal Inspector or designee grants the appeal, the OFI will either return to the appellant the contested payment within thirty calender days or credit the appellant's next quarterly bill.

(2) If the Federal Inspector denies the appeal, the appellant may institute appropriate judicial action to recover the contested payment.

(f) If and when a contesting company refuses to make full payment following the Director's adverse finding on its petition (in contravention of paragraph (d)(2)(i) of this section), the OFI may stop work on any applications for regulatory approval submitted by the company and pending before the OFI under Reorganization Plan No. 1 of 1979. The schedule and cost consequences will be attributed to the noncompliant company.

(g) Notwithstanding paragraphs (a) through (f) of this section the company making full payment of reimbursable costs may undertake the following:

(1) Within seventy-five calendar days of receipt of the OFI quarterly bill, as per § 1530.4, the company may request to conduct an audit of the bill.

(2) The company will complete that audit within ninety calendar days of the request and at its own expense.

(3) If, based on that audit, the company contests any part of the bill, it may petition for the return of the contested payments pursuant to the procedures set forth in paragraphs (b) through (e) of this section where appropriate.

SUBCHAPTER C—ENFORCEMENT PROCEDURES

PART 1534—ENFORCEMENT PROCEDURES FOR REGULATIONS REQUIRING EQUAL OPPORTUNITY DURING PLANNING, CONSTRUCTION, AND INITIAL OPERATION OF THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

Sec.
1534.1 General.
1534.2 Initial stage of compliance review.
1534.3 Initial stage of complaint investigation.
1534.4 Procedures for determination of compliance or noncompliance and for conciliation.
1534.5 Enforcement procedures.

AUTHORITY: Secs. 9 and 17 of the Alaska Natural Gas Transportation Act, 15 U.S.C. 719g and o; 43 CFR 34.10(d); and secs. 102 and 202 of Reorganization Plan No. 1 of 1979.

SOURCE: 46 FR 22337, Apr. 16, 1981, unless otherwise noted.

§ 1534.1 General.

(a) Pursuant to § 34.10(d) of the underlying regulations (43 CFR Part 34) and to Section 9 of the Alaska Natural Gas Transportation Act (ANGTA), the Office of the Federal Inspector (OFI) has established in this part procedures for enforcing Section 17 of ANGTA, Condition 11 of the President's Decision (Decision and Report to Congress on the Alaska Natural Gas Transportation System, approved by H.J. Res. 621, Pub. L. 95-158) and all implementing rules, regulations, orders, and actions taken thereunder (referred to throughout this part collectively as "these regulations").

(1) Section 1534.2 describes how the OFI will conduct the initial stage of compliance review.

(2) Section 1534.3 describes how the OFI will conduct the initial stage of investigating complaints that these regulations have been violated.

(3) Section 1534.4 describes the subsequent procedures for determining compliance or noncompliance, including preliminary findings and final determinations, and for pursuing conciliation and voluntary compliance, which are the same for both compliance review and also complaint investigation.

(4) Section 1534.5 describes how the OFI will enforce these regulations once it has made a final determination that a recipient, contractor, or subcontractor is not in compliance.

(b) The time limitations imposed by this part on the OFI and all parties to enforcement are binding, unless for good cause shown the OFI determines that an extension would be in the public interest.

§ 1534.2 Initial stage of compliance review.

(a) The OFI will conduct initial periodic review (including possible spot on-site review) of selected recipients, contractors, and subcontractors to determine compliance with these regulations.

(b) If, based on the initial periodic review conducted under paragraph (a) of this section, the OFI has reasonable cause to believe that these regulations are not being complied with, it will notify the respective recipient, contractor, or subcontractor by letter of a subsequent and formal on-site review, to be conducted after 15 calendar days of that notice. For formal on-site review just involving a contractor and/or subcontractor, the OFI will also forward a copy of the letter of on-site review to the corresponding recipient.

(c) The contents of such a letter giving notice of the subsequent on-site review, issued under paragraph (b) of this section, as well as the remaining procedures for compliance review, are detailed in § 1534.4 of this part.

(d) After completion of initial periodic compliance review, the OFI will certify when a recipient, contractor, or subcontractor is found to be complying with these regulations. This certification of compliance does not, however, preclude a later determination of noncompliance, but only under the following circumstances:

(1) In light of new or additional information which the OFI should not reasonably be expected to possess, the

full facts were unknown during the compliance review; or

(2) The OFI subsequently finds noncompliance for a later time period, not the subject of the current initial periodic review.

§ 1534.3 Initial stage of complaint investigation.

(a) Complaints alleging violation of these regulations, in the nature of employment discrimination, will be handled by the Equal Employment Opportunity Commission (EEOC) with OFI coordination, pursuant to the Memorandum of Understanding informally agreed to and, after public comment, planned to be signed into effect by the two agencies.

(1) The EEOC will process all complaints alleging employment discrimination within its jurisdiction. All other complaints will be processed, pursuant to paragraph (b) of this section.

(2) Under the MOU the OFI may become involved in two specific aspects of employment discrimination proceedings handled by the EEOC. First, where it appears that the EEOC's efforts at conciliation may fail, the OFI may then attempt such conciliation. Second, when EEOC and OFI efforts at conciliation have failed the OFI, after consultation with the EEOC, may pursue its own enforcement action.

(b) For all other complaints alleging violation of these regulations, the OFI will, within 35 calendar days of receipt, notify the pertinent recipient, contractor, or subcontractor by letter (appended to which will be a copy of the complaint) of the initiation of an investigation. For complaints just against a contractor and/or subcontractor, the OFI will also forward a copy of the complaint and notice to the corresponding recipient. At the same time the OFI will notify the complainant of this action and the procedures to be followed. Complaints to be investigated by the OFI must be in writing and contain the following:

(1) Name, address, and telephone number of the complainant;

(2) Name and address of the recipient, contractor, or subcontractor charged by the complainant;

(3) Description of the acts alleged to violate these regulations; and

(4) Any other pertinent information.

(c) The contents of the letter initiating investigation, issued under paragraph (b) of this section, as well as the remaining procedures for complaint investigation, are detailed in § 1534.4 immediately below.

§ 1534.4 Procedures for determination of compliance or noncompliance and for conciliation.

(a) This Section governs how the OFI will process cases of possible noncompliance, whether generated through compliance review or complaint investigation, initiated under §§ 1534.2 and 1534.3 respectively.

(b) Upon finding reasonable cause to believe that there is noncompliance, during compliance review, or upon initiating investigation, after receipt of a complaint, the OFI will first notify the potentially noncompliant recipient, contractor, or subcontractor of the following:

(1) A request for pertinent information and data;

(2) A statement of the practices to be reviewed, and the programs or activities affected by the compliance review or complaint investigation;

(3) An opportunity to respond in writing:

(i) To explain, support, or otherwise address the practices to be reviewed or

(ii) To rebut or deny the allegations made in the complaint; and

(4) The schedule for review or investigation, including formal on-site review or investigation to commence 15 calendar days after the notice.

(c) Within 30 calendar days of completion of the formal on-site review or investigation (which itself will be conducted expeditiously by the OFI but under no set timetable), conducted as per paragraph (b)(4) of this section, the OFI will notify the pertinent recipient, contractor, or subcontractor in writing of:

(1) Preliminary findings as to compliance or noncompliance; any complainant will receive notice of the preliminary findings;

(2) Where appropriate, recommendations for achieving voluntary compliance;

(3) The opportunity to request that the OFI engage in voluntary compliance negotiations (to be completed within 20 calendar days of this written notice) prior to a final determination of compliance or noncompliance; and

(4) Where a contractor or subcontractor alone appears to be in possible noncompliance, the obligation on the part of the appropriate recipient (after notice of the preliminary finding directed to the contractor or subcontractor) to assist the OFI in achieving voluntary compliance, failure for which may also be processed through these procedures to determine noncompliance with these regulations.

(d) The OFI will render a final determination as to compliance or noncompliance within 45 calendar days of notice given under paragraph (c) of this section.

(1) A final determination of noncompliance will be made in the following situations:

(i) The preliminary recommendation for voluntary compliance is not followed;

(ii) Voluntary compliance is not secured; or

(iii) The preliminary finding of noncompliance is not shown to be false.

(2) A final determination of noncompliance will contain the following provisions:

(i) A statement with specificity of how the recipient, contractor, or subcontractor has violated these regulations;

(ii) A detailed basis for this finding of noncompliance, including how the recipient, contractor, or subcontractor failed to follow the recommendations contained in the OFI's preliminary finding, rendered pursuant to paragraph (c) of this section; and

(iii) Final recommendations on remedial actions to bring the recipient, contractor, or subcontractor into compliance.

(e) Where a final determination of noncompliance has been made under paragraph (d) of this section, the OFI will so advise the pertinent recipient, contractor, subcontractor, and any complainant in writing, giving an additional 10 calendar days in which to comply voluntarily. If the recipient, contractor, or subcontractor has not so complied, the OFI will institute enforcement proceedings under § 1534.5 of this part.

(f) In cases where complaints have been filed against contractors or subcontractors only, the OFI will notify the appropriate recipient pursuant to paragraphs (b), (c) and (e) of this section.

(g) All voluntary compliance agreements, whether formed under paragraphs (c)(3) or (e) of this section, will have the following features:

(1) The agreement shall:

(i) Be in writing;

(ii) Be signed by an authorized official of the recipient, contractor, or subcontractor and by the OFI designated official;

(iii) Contain commitments regarding the precise remedial action to be taken and the dates for completion of those remedial actions, including commitments to eliminate all discriminatory practices and conditions; and

(iv) Include a provision that breach of the agreement may result in further enforcement actions by the OFI.

(2) Upon execution of the agreement, the OFI will certify compliance, conditioned upon:

(i) Performance of the commitments given under paragraph (f)(1)(iii) of this section, and

(ii) The full facts being known at the time the agreement was executed.

(h) In the case of complaints, the OFI will notify the complainant of actions taken, including:

(1) Final determination of noncompliance, and subsequent enforcement efforts;

(2) Finding of compliance;

(3) Achieving voluntary compliance through conciliation; or

(4) Closing the investigation due to complainant's failure to cooperate or provide necessary information.

§ 1534.5 Enforcement procedures.

(a) The OFI will act pursuant to this section when it has rendered a final determination of noncompliance, under § 1534.4(d), and the noncompliant recipient, contractor, or subcontractor has failed to comply voluntarily within 10 days thereafter, under § 1534.4(e). In addition, the OFI will act pursuant to this section when acting against certain employment discrimination, based on determinations of the EEOC, as per § 1534.3(a)(2).

(b) Except as provided in paragraph (c) of this section, the OFI will seek judicial enforcement in the United States District Court having venue, seeking appropriate injunctive and civil fine relief, as provided in 43 CFR 34.11(b) of the 43 CFR Part 34 regulations. Such civil action will be commenced following consultation and coordination between the OFI General Counsel and the Civil Rights Division of the Department of Justice and where appropriate, the EEOC.

(c) In the event that the OFI finds, as part of its final determination made under § 1534.4(d), that a recipient, contractor, or subcontractor has so consistently and substantially failed to meet its approved affirmative action plan that the overall equal opportunity goals of section 17 of ANGTA and the 43 CFR Part 34 regulations are in jeopardy, the OFI may issue a compliance order stopping work on the particular ANGTS activity until compliance is assured. The procedure for issuing such a compliance order entails the following:

(1) Within 10 calendar days of the final determination of noncompliance and related 10-day compliance period (as defined in paragraph (a) of this section), the OFI will issue a show cause order why the noncompliant recipient, contractor, or subcontractor should not immediately be subject to a compliance order and work stoppage. The show cause order will contain the following:

(i) A summary of the final determination of noncompliance;

(ii) A statement of the recipient, contractor, or subcontractor's subsequent failure to achieve voluntary compliance;

(iii) A statement explaining why the violation of the approved affirmative action plan is so serious as to warrant work stoppage; and

(iv) Notice that the OFI will hold an informal conference within 10 calendar days.

(2) The noncompliant recipient, contractor, or subcontractor must present oral argument and documentary support in rebuttal at this informal conference:

(i) If the Director of the OFI Office of Equal Opportunity/Minority Business Enterprise or designee, who will preside over the informal conference, concludes that there are no material facts in issue, he or she will render in writing a recommended decision on the compliance order within 15 calendar days of the close of the informal conference.

(ii) If the Director or designee concludes, however, that there are material facts in issue which cannot be ascertained without a hearing on the record, he or she will set the proceeding for hearing.

(A) The General Counsel of the OFI or designee will preside over and conduct any such hearing on the record, under procedures established by the OFI for similar proceedings (10 CFR Part 1508).

(B) Following the presentation of oral and written evidence, an opportunity for cross-examination, and the filing of briefs, the General Counsel will render in writing a recommended decision on the compliance order within 15 calendar days of the close of the hearing.

(3) The Federal Inspector or delegate will render a final decision on the compliance order. The following process will be employed:

(i) Within 10 calendar days of issuance of a recommended decision, under either paragraph (c)(2)(i) or (c)(2)(ii) of this section, the respondent recipient, contractor, or subcontractor and, in the case of a complaint investigation, the complainant may file a brief agreeing with or contesting the recommended decision.

(ii) Except when the record is unduly voluminous and complex, the Federal Inspector or delegate will issue in writing a final decision within 20 days of receiving the briefs.

(iii) When the final decision is to issue a compliance order and to stop work, the Federal Inspector or delegate will institute the prescribed sanctions, unless the respondent has complied within 10 calendar days of the compliance order.

PART 1535—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY OFFICE OF THE FEDERAL INSPECTOR FOR THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM

Sec.

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1535.149 Program accessibility: Discrimination prohibited.
1535.150 Program accessibility: Existing facilities.
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1535.160 Communications.
1535.161—1535.169 [Reserved]
1535.170 Compliance procedures.
1535.171—1535.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 4579, Feb. 5, 1986, unless otherwise noted.

§ 1535.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 1535.102 Application.

This part applies to all programs or activities conducted by the agency.

§ 1535.103 Definitions.

For purposes of this part, the term—

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Handicapped person" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive;

digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addition and alcholism.

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified handicapped person" means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) "Qualified handicapped person" is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 1535.140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

[51 FR 4579, Feb. 5, 1986; 51 FR 7543, Mar. 3, 1986]

§§ 1535.104—1535.109 [Reserved]

§ 1535.110 Self-evaluation.

(a) The agency shall, by April 9, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspections:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 1535.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 1535.112—1535.129 [Reserved]

§ 1535.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualfied handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 1535.131—1535.139 [Reserved]

§ 1535.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§§ 1535.141—1535.148 [Reserved]

§ 1535.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 1535.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 1535.150 Program accessibility: Existing facilities.

(a) *General*. The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1535.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods*. The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance*. The agency shall comply with the obligations established under this section by June 6, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by April 7, 1989, but in any event as expeditiously as possible.

(d) *Transition plan*. In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by October 7, 1986, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

[51 FR 4579, Feb. 5, 1986; 51 FR 7543, Mar. 3, 1986]

§ 1535.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

§§ 1535.152—1535.159 [Reserved]

§ 1535.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1535.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 1535.161—1535.169 [Reserved]

§ 1535.170 Compliance Procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Legal Counsel, Office of the Federal Inspector of the Alaska Natural Gas Transportation System shall be responsible for coordinating implementation of this section. Complaints may be sent to Legal Counsel, Office of the Federal Inspector of the Alaska Natural Gas, 1000 Independence Avenue, SW., Washington, D.C. 20585.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 1535.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 4579, Feb. 5, 1986, as amended at 51 FR 4574, Feb. 5, 1986]

§§ 1535.171—1535.999 [Reserved]

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